

INTERNATIONAL
NUREMBERG
PRINCIPLES
ACADEMY

Conference Report

Nuremberg Forum 2017

10 Years after the Nuremberg Declaration
on Peace and Justice “The Fight against
Impunity at a Crossroad”



2017



#NueForum

Acknowledgements

The International Nuremberg Principles Academy (Nuremberg Academy) is proud to present this comprehensive publication on the Nuremberg Forum 2017, entitled “10 Years after the Nuremberg Declaration on Peace and Justice ‘The Fight against Impunity at a Crossroad’”, which took place in Courtroom 600 at the Nuremberg Palace of Justice on 20 and 21 October 2017.

The Nuremberg Academy wishes to acknowledge all those who have made the Nuremberg Forum 2017 a success and this publication possible. The success of the conference owes to the executive leadership at the Nuremberg Academy and to the vision and commitment of its Director Klaus Rackwitz. Special thanks go to Ambassador (ret.) Christian Much who acted as Interim Director leading the discussion and direction of the conference during summer 2017 and was key organizer of the “Building Peace and Justice” conference in Nuremberg in 2007 that resulted in the Nuremberg Declaration on Peace and Justice. Moreover, David Tolbert and the International Center for Transitional Justice (ICTJ) were an invaluable source of support in the preparation for this conference over the summer months in 2017 and deserve a special mention here. Furthermore, thank you goes to the Nuremberg Academy staff and their dedication and tireless efforts in organizing the Nuremberg Forum. Finally, the invaluable support of the Foundation Board and the Advisory Council of the Nuremberg Academy is gratefully acknowledged.

Profound gratitude goes to all speakers of the Nuremberg Forum 2017 who demonstrated continuous engagement and generosity in sharing their expertise and profound insights and kindly submitted original written contributions for this compilation. In terms of the publication itself, sincere thanks go to Farah Mahmood, former staff member, for her commitment and professionalism in editing the present report. With regard to final editing, coordinating and ensuring the successful completion of this publication special thanks go in particular to Jolana Makraiová, and to Dr. Viviane Dittrich.



List of Abbreviations

AU	African Union
CAR	Central African Republic
DDR	Disarmament, demobilization and reintegration
DRC	Democratic Republic of Congo
ECCC	Extraordinary Chambers in the Courts of Cambodia
EU	European Union
ICC	International Criminal Court
ICD	International Crimes Division of the High Court (Uganda)
ICTJ	International Center for Transitional Justice
ICTR	International Criminal Tribunal for Rwanda
ICTY	International Criminal Tribunal for the former Yugoslavia
IIM	International, Impartial and Independent Mechanism on international crimes committed in the Syrian Arab Republic
ISIL/ISIS	Islamic State of Iraq and the Levant
KSC	Kosovo Specialist Chambers
MINUSCA	UN Multidimensional Integrated Stabilization Mission in the Central African Republic
NGO	Non-Governmental Organization
OTP	Office of the Prosecutor
RAMSI	Regional Assistance Mission Solomon Islands
SCC	Special Criminal Court (Central African Republic)
SCSL	Special Court for Sierra Leone
SDGs	Sustainable Development Goals
SJP	Special Jurisdiction for Peace (Colombia)
STL	Special Tribunal for Lebanon
TJRC	Truth, Justice and Reconciliation Commission
TRC	Truth and Reconciliation Commission
UN	United Nations
VPRS	Victims' Participation and Reparation Section

Table of Content

	4	List of Abbreviations
	7	Introduction
	8	Welcome Address
	8	Klaus Rackwitz
	8	Viviane Dittrich
	9	Opening Remarks
	9	Guido Hildner
	9	Navi Pillay
	10	Christan Schmidt
	11	Keynote Address
	11	Silvia Fernández de Gurmendi
Panel I	16	The Nuremberg Declaration on Peace and Justice Today
	18	Navi Pillay
	20	David Scheffer
	22	David Tolbert
Panel II	24	Justice, Prevention and Ending Impunity
	26	Chandra Lekha Sriram
	28	Viviane Dittrich
	29	Susanne Buckley-Zistel
Panel III	32	Forgotten Voices – Catering to the Needs of Victims
	34	Anita Ušacka
	36	Sarah Kihika Kasande
	38	Fiona McKay
Panel IV	40	Reconciliation
	42	Betty Murungi
	43	Alison Smith
	45	Velma Šarić
Panel V	48	Development in the Service of Transitional Justice
	50	Marieke Wierda
	52	Chris Mahony
	53	Andras Vamos-Goldman
Panel VI	56	Political Impediments to the Fight against Impunity
	58	Serge Brammertz
	60	Maria Camila Moreno
	62	Athaliah Molokomme
Panel VII	64	Peace and Justice – Lessons Learned
	66	Richard Dicker
	67	Nicola Palmer
	70	Michael E. Hartmann
Panel VIII	74	Peace and Justice – Current Challenges
	76	Nelson Camilo Sánchez León
	77	Patryk Labuda
	78	Radwan Ziadeh
	80	Kelly Case
	82	Closing Remarks
	82	Zeid Ra'ad Al Hussein
	82	Viviane Dittrich
		Annexes
	84	Program of the Nuremberg Forum 2017
	86	Biographies of Contributors
	98	2007 Nuremberg Declaration on Peace and Justice
	102	The International Nuremberg Principles Academy



Introduction

This conference report builds on the high-level discussions during the Nuremberg Forum 2017 and captures key arguments, central debates, various perspectives and lessons learned. The Nuremberg Forum 2017, the third such annual conference of the Nuremberg Academy, was entitled “10 Years after the Nuremberg Declaration on Peace and Justice ‘The Fight against Impunity at a Crossroad’”. The conference elucidated developments since 2007 with a particular focus on analyzing progress and challenges in the application of international criminal law and humanitarian law and related human rights, and in the fight against impunity.

The Nuremberg Declaration on Peace and Justice is a summary document that came out of high-level conference entitled “Building a Future Peace and Justice” held in Nuremberg in June 2007. UN mediators, practitioners and civil society representatives had gathered in Nuremberg to discuss and analyze the synergies and tensions between the goals that need to be tackled in post-conflict situations: peace and security, justice and development. Courtroom 600 of the Nuremberg Palace of Justice provided a congenial setting to critically discuss past, present and future synergies and tensions between peace and justice and the role of international criminal law.

The Nuremberg Forum 2017 represented a unique, timely opportunity to reflect on a decade of practice and actual synergies between peace, justice, security, and development and the high-level “Building a Future Peace and Justice” conference that took place in Nuremberg in 2007. Arising from these conclusions, the 2007 Nuremberg Declaration on Peace and Justice came to light, focusing on transitional justice related questions and more broadly on the peace and justice agenda. This is the link where the Nuremberg Academy is principally invested – ensuring sustainable peace through justice is one of its main goals and it trusts that addressing these synergies and learning from the past lessons can help and advance the future addressing of issues such as development programs, inclusion into peace process, especially when it concerns inclusion of women and all parties that are relevant to the conflict and importance of accountability and adherence to human rights standards.

The Nuremberg Academy welcomed more than 30 leading experts in the field as speakers, including practitioners, policy makers and academics – many of whom had participated in the conference back in 2007. By bringing together distinguished academics and practitioners with a broad wealth of relevant expertise and experience, the Nuremberg Academy provided for a forum for dialogue and critical reflection, and contributed to disseminating knowledge and sharing experiences with a goal of advancing these discussions.

The Nuremberg Forum 2017 provided an invaluable opportunity to critically discuss contemporary issues against the backdrop of current political and legal developments: interlink between peace and justice, the role of victims in international criminal justice, political impediments to the justice agenda, lessons learned and challenges ahead. Several case studies were presented and discussed exemplifying the complex interplay between peace and justice. The publication covers manifold topics and different perspectives from various leading experts, including practitioners, scholars, civil society actors in the field. Subjects covered included the relevance of the Nuremberg Declaration today and the need to start thinking ahead and take lessons learned from the past in order to be effectively able to address newly arising issues. The last two panels zoomed in on comparative lessons learned and challenges ahead offering a more empirical lens to evaluate the often-theorized complementary or conflicting relationship between peace and justice.

This conference publication represents a unique collection of contributions and reflects the presentations and discussions of the Nuremberg Forum. To this end, the Nuremberg Academy invited all speakers of the Nuremberg Forum 2017 to submit a written contribution in response to a specific question raised during the Forum and linked to the overall conference theme, closely reflecting the presentations given during the conference. Each question was carefully tailored to allow a nuanced and comprehensive view of issues arising in relation to the 2007 Nuremberg Declaration on Peace and Justice throughout the two-day conference and the juxtaposition of theory and practice. In addition to the individual contributions, the report includes a short introduction per panel that also incorporates the discussion points raised during the Q&A sessions following each panel, thus ensuring that all essential key points and questions raised are reflected in the report.



The structure of the report mirrors the original conference program (together with the biographies of the speakers) as annexed to the report. The opening and closing remarks are reprinted almost verbatim. The keynote address of the then ICC President Silvia Fernández de Gurmendi is reprinted in full.

The purpose of this report is twofold: to mark the momentum of the Nuremberg Forum 2017 discussions and the 10 years since the drafting of the Nuremberg Declaration and inclusion into the UN General Assembly's agenda, and to encourage future forward-looking discussions on peace and justice by continuing the dialogue on how to address many relevant emerging or well known, yet hitherto unresolved issues. This publication advances the aim of the Nuremberg Academy by making a contribution to ongoing debates in the field and ensures that its activities and results become more widely known and available. By providing a forum for dialogue to discuss and capture lessons learned at the international, regional, national and local level, the Nuremberg Academy continues to support the fight against impunity and promote sustainable peace through justice.

Welcome Address

Klaus Rackwitz, Director of the International Nuremberg Principles Academy

Viviane Dittrich, Deputy Director of the International Nuremberg Principles Academy

On behalf of the International Nuremberg Principles Academy, we would like to personally welcome you to the Nuremberg Forum 2017 entitled “10 Years after the Nuremberg Declaration on Peace and Justice ‘The Fight against Impunity at a Crossroad’”.

In June 2007, high-ranking United Nations mediators, practitioners in the fields of transitional justice, criminal law and development, together with civil society representatives from all parts of the world met in Nuremberg for a ground-breaking conference entitled “Building a Future on Peace and Justice”. The conference was organized by the Governments of Finland, Germany and Jordan as well as civil society organizations, including the International Center for Transitional Justice (ICTJ), and focused on possible synergies and tensions between peace, justice, security and development. Following the conference, a group of international experts working under the auspices of Óscar Arias, then President of Costa Rica, drafted and presented the “Nuremberg Declaration on Peace and Justice” that was brought to the attention of the United Nations General Assembly in 2008 (and included in UN Doc. A/62/885) and later of the ICC Review Conference in 2010.

Ten years later, several trends can be observed: mechanisms that apply international criminal law have multiplied and a considerable wealth of judicial practice has accumulated; at the same time, the global political context has changed, new crises have unfolded, and some fundamental tenets, spelled out in the Nuremberg Principles, are still not generally accepted. Notably this includes the need to promote peace, security, justice and development in tandem, and the need to involve victims in the quest for peace and justice as the fundament for societal efforts to deal with the past and to achieve well-being for all.

The aim of the 2017 Nuremberg Forum is to not only highlight the topical relevance of the Nuremberg Principles and of the 2007 Nuremberg Declaration, but to do so in a comprehensive manner in a series of panels, *inter alia*, focusing on transitional justice, the rights and needs of victims, reconciliation, the development-justice nexus, and political impediments to peace and justice. The final two panels look at the past, present and future and address the interface between peace and justice. It is also planned that a post-conference publication will capture the important discussions highlighted throughout the conference.

To organize a conference of this magnitude requires dedication, commitment and tireless work starting from creating a detailed program, reaching out to experts in the field, coordinating the logistics all the way to managing the post-conference publication. We would like to thank particularly the ICTJ for its strong engagement and contribution in preparing and participating in this conference. We are also honored by the presence of the President of the ICC and grateful that she accepted to deliver a keynote speech marking this crossroad.

Finally, we would also like to thank the speakers and moderators and all guests for your participation in the 2017 Nuremberg Forum in the historic Courtroom 600, the birthplace of international criminal law, and the ideal setting to discuss important questions of justice and peace, evaluate, and renew our commitments in the fight against impunity.

Opening Remarks

Guido Hildner, Chairman of the Foundation Board of the Nuremberg Academy, Director of Public International Law at the Federal Foreign Office

Excellencies, ladies and gentlemen,

Ten years ago, the Nuremberg Declaration on Peace and Justice was adopted. Its message is as relevant today as it was ten years ago. During those ten years the world has not become a better place; to the contrary, almost on a daily basis we hear of atrocious crimes, crimes against humanity, war crimes and genocide being committed. The paramount imperative is that there can be no true, no sustainable peace, without justice. And yet, the cruel facts we are confronted with seem to force us into a different direction. Syria is a telling case. Five years ago, a peace settlement in Syria was unthinkable if it did not include bringing the political leadership that was responsible for those horrific crimes to justice. Today, we hear evermore voices claiming that peace in Syria cannot be reached without addressing the interests of the Assad regime. So, will peace in Syria only be possible without justice?

Allow me to congratulate the International Nuremberg Principles Academy for using the tenth anniversary of the Nuremberg Declaration to dedicate its Annual Forum to this topic. When the Governments of Finland, Jordan and Germany organized the conference on “Building a Future on Peace and Justice” in 2007 in Nuremberg, they consciously referred to Nuremberg as the birthplace of modern international criminal law. The conference can thus be seen as part of the preparations for the creation of the Academy. Ten years ago, in his opening message to the 2007 conference, the then UN Secretary-General Ban Ki-moon said “one of the most fundamental challenges of peacemaking and peace-building is confronting the past whilst building a just foundation for the future”. This sentence captures the spirit of Nuremberg, and it captures the motivation of the Federal Republic of Germany, the Free State of Bavaria and the City of Nuremberg when they decided to create the International Nuremberg Principles Academy in November 2014. On behalf of the Academy’s Foundation Board, it gives me great pleasure to welcome you to the Annual Nuremberg Forum 2017. I am looking forward to two days of discussion and exchange on one of the most pressing topics of international politics today.

Navi Pillay, President of the Advisory Council of the Nuremberg Academy, formerly United Nations High Commissioner for Human Rights, International Criminal Tribunal for Rwanda and International Criminal Court

Distinguished colleagues,

It gives me great pleasure to welcome you to the Nuremberg Forum 2017. The Forum is an annual event and it forms a very important part of the work of the International Nuremberg Principles Academy. The Nuremberg Academy was officially launched here in this courtroom on 6 June 2015 by the Federal Foreign Office, the Free State of Bavaria and the City of Nuremberg. This was a historic occasion marking accountability 70 years after the Nuremberg Trials. The founders were convinced that the Academy will prove to be highly valuable in the fight against impunity for the most serious crimes that affect the international community as a whole. The purpose of the Nuremberg Academy is to implement the Nuremberg Principles and to foster international criminal law through academic expertise, research and education.

To recall the mission statement of the Nuremberg Academy: the Nuremberg Academy is dedicated to the promotion of international criminal justice and human rights, it is located in Nuremberg – the birthplace of modern international criminal law, and conscious of its historic heritage the Nuremberg Academy supports the fight against impunity for universally recognized core crimes – genocide, crimes against humanity, war crimes and the crime of aggression. The Nuremberg Academy promotes sustainable peace through justice, the Nuremberg Principles and the rule of law, by supporting worldwide enforcement of international criminal law, furthering knowledge and building capacities of those involved in the judicial process in relation to these crimes. The Nuremberg Academy also has a Foundation Board and an independent, international Advisory Council currently served by 13 members – and I assumed the chair of the Council after Judge Thomas Buergenthal stepped down earlier this year. The Advisory Council advises and makes recommendations on the program and activities as well as the conceptual work of the Nuremberg Academy.



Following the judgment of 1 October 1946 by the International Military Tribunal, which sentenced 21 Nazi defendants, the United Nations General Assembly by Resolution 95 on 1 December 1946 affirmed the principles of international law recognized by the Charter of the Nuremberg Tribunal. By Resolution 177 on 21 November 1947 it directed the International Law Commission to formulate these principles and to prepare a draft code of offences against the peace and security of mankind. The Law Commission adopted the Nuremberg Principles in 1950 and we currently want to popularize this. The Nuremberg Principles have greatly influenced the development of international criminal law – the principles that have been enshrined in the Statutes of both the International Criminal Tribunals for the former Yugoslavia and for Rwanda (ICTY and ICTR respectively) as well as the Rome Statute were influenced by these Principles. Moreover, at a time when only states had rights and duties – that is, they had legal personality under international law – individual criminal responsibility was not a well-established principle in international criminal law. So, when the United Nations Security Council was for the very first time met with the task of establishing tribunals, it turned to the Nuremberg Principles to pick up the concept of individual criminal responsibility.

In June 2007, a groundbreaking conference on building peace and justice took place and was seen on the agenda of the United Nations General Assembly and the ICC Review Conference. Ten years later, we are gathered here to make use of this unique opportunity to examine the developments that have taken place since 2007 with a particular focus in line with the Academy's mandate on analyzing progress, challenges and above all, seeking solutions in the application of international criminal and humanitarian law, related human rights and in the fight against impunity. Several trends have been noted through the passage of time, mechanisms to apply international criminal law have multiplied, and a wealth of judicial experience has been collected. At the same time, the global political climate has changed; new crises have unfolded and some fundamental tenets spelled out in the Nuremberg Principles in 2007 are still not generally accepted. Notably, the avoidance of impunity, the need to promote peace, justice, security, development and human rights in tandem, and the need to involve victims in the quest for peace and justice as the basis for society's efforts to deal with the past and to achieve sustainable peace.

These are very crucial times; there are grave concerns about the neglect of justice when dealing with post-conflict issues, and disillusionment with international criminal justice, thus adding significance to such a conference. It is indeed an exciting experience to have the presence of so many of you with your rich backgrounds, and I am truly excited by the participation of such a large body of distinguished practitioners here in Courtroom 600.

Thank you for coming and I look forward to your important contributions.

Christian Schmidt, Federal Minister of Food and Agriculture

Ladies and Gentlemen,

I would like to start by thanking the International Nuremberg Principles Academy for bringing the international community to Nuremberg. It has often been practice for some countries to support the tendency of dealing with international challenges alone, which may perhaps be reasonable when creating a state identity. However, it should also be unavoidable that states make the decision to take advantage of cooperation within the international framework. Not predicting when there will be a new Government of the Federal Republic of Germany, I can nevertheless say with great confidence that this Government will contribute to international responsibility and will stick to the understanding that we have to stand together to face all challenges, and the global trends to which we have to answer.

Peace through law; this was the major premise of the Nuremberg Trials that conducted a juridical review of the Holocaust – the unprecedented collapse of civilization, through genocide, war crimes and crimes against humanity. Since then, all Federal Governments have been guided by the principle peace through law, and never again Auschwitz, both in domestic and foreign policies. Conducting such juridical reviews of the injustices committed and drawing on the lessons learned for the common future unites the key values that are so clearly reflected in the 2007 Nuremberg Declaration. One particular aspect of this is the rule of law, which is why I am so pleased that this conference is taking place in this particular venue, steeped in history and providing a sound basis for international criminal law.

The Nuremberg Declaration sets out three recommendations: making peace, dealing with the past and promoting development. Fully respecting the spirit of the Declaration, I understand peace as meaning sustainable peace, therefore necessitating a multi-network approach to future actions in achieving this. Consequently, in addition to the principles encapsulated within the Nuremberg Declaration, in 2015 more than 150 world leaders adopted the Sustainable Development Goals (SDGs) of the UN. Those currently present in Courtroom 600 are representing this much-needed multidisciplinary network to ensure that there is a comprehensive understanding of the many international crises we are witnessing today.

For me personally, this is something that spurs me in my day-to-day policy-making. As Minister of Agriculture, I see that hunger, as a cause for conflict is a very important issue to consider. Many people are unaware that between 2006 and 2010, Syria suffered one of the most severe draughts in recent decades, robbing a great many of their livelihoods. This was one of the factors, which contributed to radicalization, political unrest and ultimately to the outbreak of civil war. If we want to achieve lasting peace in crisis regions, we should as part of our comprehensive approach comprise diplomacy, military capabilities and development cooperation which will also strengthen the element of agriculture and food security – SDG number 2 of 17 reflects this. Sustainable peace is also essential in the fight against hunger, and the fight against hunger is a vital condition for peace.

In line with the core message of the 2007 Nuremberg Declaration on Peace and Justice, our chief concern is to promote both values: peace and justice. I look forward to the fruitful discussions and once again thank the Nuremberg Academy for taking stock at this critical juncture.

Keynote Address

Silvia Fernández de Gurmendi, President of the International Criminal Court

Madam President of the Advisory Council of the Nuremberg Academy and other esteemed members of the Council,

Mr. Minister,

Excellencies,

Dear colleagues and former colleagues, dear friends,

Ladies and gentlemen,

I would like to thank the International Nuremberg Principles Academy for inviting me to give the keynote address today. I am delighted to be here in Nuremberg for several reasons. It was here in the historic Courtroom 600 that we held in 2015 the first retreat of the judges of the ICC to collectively discuss expediting proceedings and improving efficiency; I am grateful to the Academy for hosting that retreat.

And I am indeed very pleased to address you today at the opening of this Forum on the occasion of the tenth anniversary of the Nuremberg Declaration on Peace and Justice. I am happy to see many familiar faces with whom I had the privilege of working during these years, including at the time of the drafting of the Nuremberg Declaration.

Ten years have elapsed since more than three hundred practitioners, academics and policymakers gathered here, in Nuremberg, to tackle one of the most critical questions of our time: how can justice contribute to ensuring peace in the long-term? And how can we reconcile peace and justice in the short-term, when diplomats and mediators are striving to reach an agreement to cease the violence?

The question of how justice impacts on peace was very much at the center of the negotiations for the creation of a permanent international criminal court. However, some of the practical implications of this question could be more clearly discerned only a few years later, when the Court started to make “waves” through actual investigations in situations of ongoing violence. Was the Court’s work really contributing to peace, or was it rather the spoiler in an already complex environment? What was a rather rhetorical question during diplomatic discussions became almost existential when the Court became operational.

The initiators of the Declaration sought to combine the knowledge and expertise of many in order to provide some answers to this fundamental question that continues to be highly relevant today. Ten years after this adoption and after some 30 years of international criminal justice, including 15 years of operations at the Court, it is an appropriate time to take stock of where we stand and contrast the principles of the Declaration against the experience we have gained.



At the outset, it is useful to recall that the Declaration on Peace and Justice helpfully clarifies that “peace” is understood as meaning “sustainable” peace, a concept that needs to be distinguished from ceasing the violence in the short-term. In this regard, while recognizing the imperative to stop the fighting and end the suffering, the Declaration emphasizes that when attempting to make peace, negotiations must build the foundation for both peace and justice. The Declaration explicitly reminds mediators that they bear a responsibility to contribute creatively to the immediate ending of violence and hostilities while promoting sustainable solutions.

These sustainable solutions are, according to the Declaration, based on the following main principles.

Firstly, the “Complementarity of peace and justice”. This brings as a powerful corollary that “the question can never be whether to pursue justice, but rather when and how”.

Secondly, the obligation of ending impunity “for the most serious crimes of concern to the international community, notably genocide, war crimes, and crimes against humanity”. The Declaration, in clear terms affirms that “the emergence of this principle as a norm under international law has changed the parameters for the pursuit of peace”.

Thirdly, there is an emphasis on the need for a “victim-centered approach” and again as a corollary, the need to allow victims an active role in processes related to peace, justice and reconciliation.

Fourthly, the Declaration underlines the need to ensure local ownership and take duly into account local circumstances and expectations in order to ensure the legitimacy of strategies for pursuing peace and justice.

Lastly, reconciliation between formerly antagonistic groups entails, *inter alia*, addressing justice, accountability and, again, the interests of victims.

Now, let’s address these main premises in light of the experience.

As said, the Declaration posits in the first place that peace and justice are complementary and, if properly pursued, promote and sustain one another.

The assumption enshrined in the Declaration is of course not new. The belief that justice is necessary for sustainable peace was indeed the basic rationale for the establishment of international criminal jurisdictions in the last three decades since the establishment of the ad hoc tribunals for Rwanda and the former Yugoslavia in the early nineties.

The development of international criminal justice in these years was based on the premise that certain crimes are a threat to peace and that justice is an effective deterrence against crimes and ultimately a means to achieve sustainable peace and security.

Both ad hoc tribunals were created by the UN Security Council under Chapter VII of the Charter, therefore as an action to deal with a threat to peace and security. In addition, as clearly spelled out in the relevant constituting resolutions, the UN Security Council set up the ICTY and the ICTR based on the belief that an international tribunal could contribute to ensuring that the crimes committed in the former Yugoslavia and in Rwanda would be halted and effectively redressed and thus “contribute to the restoration and maintenance of peace”.

The same underlying objectives guided in 1998 the drafters of the Rome Statute, which gave birth to the ICC. This time, it was not only the UN Security Council but the international community as a whole that endorsed the premise that justice is necessary for sustainable peace. The Rome Statute acknowledges in its preamble that grave crimes such as those, which marked the twentieth century, threaten the peace, security and well-being of the world. Correlatively, justice is regarded therein as a means to contribute to the prevention of such crimes.

A further indication of the assumption that accountability is part of peace can be found in the provisions of the Rome Statute that recognize the powers of the UN Security Council to refer a situation to the Prosecutor under Chapter VII of the UN Charter as well as the more controversial power to defer an investigation or prosecution before the Court.

The two situations referred to the ICC Prosecutor by the Security Council – Darfur in 2005 and Libya in 2011 – were explicitly deemed in the respective resolutions to constitute a threat to international peace and security. The Security Council followed the same rationale when supporting the creation of a Special Court for Sierra Leone (SCSL) by special agreement between Sierra Leone and the UN. In the relevant resolution, the Council reiterated that ending impunity “would contribute to the process of national reconciliation and to the restoration and maintenance of peace”.

And beyond the Security Council, the recent establishment of the Mechanism for Syria by the UN General Assembly was also premised on the correlation between “accountability, reconciliation and sustainable peace”

In sum, the establishment of international criminal jurisdictions clearly evidences a belief on the part of the international community that accountability is an integral part of conflict resolution and prevention. The Nuremberg Declaration spells out this belief.

But, in practice, does justice really contribute to peace? Has justice contributed to peace by deterring crimes? Deterrence of further crimes is empirically difficult to demonstrate, whether it is in a particular situation or at the global level. While some recent case studies seek to assess the impact of international criminal efforts in the prevention of violence, proving the “negative” is always a difficult, often impossible proposition.

The consolidation of international criminal justice, including through the establishment of the ICC may be considered as one of the biggest achievements of the last three decades. However, when looking at the appalling violence against civilians in ongoing conflicts, one may rightly wonder whether international criminal justice efforts have indeed helped to prevent mass crimes.

Unfortunately, it is too early to answer these questions and we must continue to work for justice based on our beliefs that justice is a moral imperative and also a concrete and necessary tool to contribute to sustainable peace.

It is indeed premature to assess the impact of justice on peace efforts. As impressive as three decades of international criminal justice efforts may be, we are far from having achieved a consistent pattern of accountability.

However, what has been achieved for sure is that in the last 30 years the concept of accountability has been put firmly on the global agenda. There is now an expectation that there will be accountability for the most serious crimes and the conviction that this is necessary for sustainable peace. The Declaration indeed got it right when it says that the question is not any more whether to pursue justice, but rather when and how. Impunity for certain crimes is simply not an option any more. Impunity is not an option as a matter of law. It is not an option as a matter of policy.

However, in practice, accountability continues to be the exception rather than the rule. There are huge gaps where impunity continues to flourish. These gaps result from two particular weaknesses in the current system of international criminal justice. One of these is the nature of international crimes, and the other one is the lack of universality of justice efforts.

Firstly, the nature of the crimes. International crimes often involve multiple perpetrators and thousands or hundreds of thousands of victims. It is unavoidable that justice will need to be selective regardless of whether it is applied at the international or national level. That is why, prosecutorial discretion for these type of crimes is typically very broad. At the international level in particular, prosecutorial efforts will normally focus on carefully selected events and perpetrators.

Some international tribunals have been explicitly mandated to focus on those who bear the greatest responsibility. The statute for the SCSL, for example, limited the Court’s jurisdiction to those who bore the greatest responsibility for the crimes committed on the territory of Sierra Leone. As part of their downsizing, the ICTY and the ICTR were specifically requested by the Security Council to focus their efforts on leaders suspected to bear the greatest responsibility.

In addition to the limited number of individuals selected for prosecution, the scope of conduct that is charged is often far narrower than the actual universe of the crimes committed. While the selection may be unavoidable it may result in impunity for many serious crimes and no redress for victims.

In sum, international cases only embrace a handful of the crimes committed in a given area during a given period. Certain crimes, which would also deserve prosecution, are inevitably left aside. There may be different valid reasons for this such as lack of sufficient evidence or the need to expedite both the investigation and the judicial proceedings.

But this narrow selection can cause problems, and we have seen it at the ICC, in particular for the first cases. The Prosecution’s strategy in the Lubanga case – the first case tried before the ICC – attracted criticism from victims for not being adequately comprehensive. Mr. Lubanga was tried exclusively for crimes against child soldiers while there were allegations of other crimes having been committed against the civilian population in eastern Democratic Republic of the Congo (DRC). We see a different approach in the recent Ongwen case,



related to alleged crimes committed by the Lord's Resistance Army in northern Uganda. The Prosecution expanded the earlier selection of charges and brought seventy charges against Mr. Ongwen in relation to a large array of crimes, including murder, torture, rape, sexual enslavement and pillaging.

Notwithstanding these efforts to broaden the approach, we must recognize that international criminal jurisdictions can only deal with a limited portion of acts committed.

The Declaration is thus right in emphasizing that each state has the primary responsibility to prevent, investigate and prosecute such crimes. International and regional jurisdictions can only supplement but never replace the actions of states.

The ICC has been explicitly created as a complementary, last resort mechanism, intended to address only situations in which the relevant states fail to act. As a positive result of this complementary system, an increasing number of states have updated their national legislation to be able to investigate and prosecute international crimes at the domestic level. Others have also established specialized units within their justice system in order to deal with these types of crimes.

All these initiatives are commendable, as only through the combined efforts of all jurisdictions – national, regional and international – can we truly hope to reduce the impunity gap and establish an effective system of global justice. As reaffirmed by the Declaration: “Justice may be delivered by local, national and international actors.”

That is why it is important to deploy all efforts to enhance national capacity to investigate and prosecute massive crimes. This is even more important taking into account that efforts at the international level are not only narrow in scope, they are also not yet universal.

This lack of universality is the second fundamental weakness of international criminal justice. Attention to situations continues to be essentially ad hoc. And agreements for justice mechanisms are not reached for all situations – the example of Syria is a striking illustration.

The Rome Statute of the ICC has a global aspiration, but the Court has no universal jurisdiction and the treaty, with 124 States Parties, has not yet attained universal participation. Promoting universal participation in the Rome Statute is of fundamental importance in order to enhance the effectiveness and the legitimacy of the institution and, ultimately, its capacity to contribute to sustainable peace in the world.

As said, the Declaration emphasizes the importance of having a victim-centered approach to peace and justice and therefore the need to take into account the interests of victims and affected communities in any strategy for peace, justice and reconciliation.

Experience shows that engaging victims fully in criminal proceedings, while being crucial, is in fact particularly difficult for international tribunals. International tribunals are, by definition, detached from national systems and societies and need to proceed, most times, at large distance from them. A particular effort is thus required at the international level to reach out to victims, listen to them and ensure among them sufficient ownership of the justice efforts.

The Rome Statute recognizes this problem and contains, for the first time, some elements intended to engage victims at all stages of the proceedings as participants in their own right, and not merely as witnesses of the crimes. The Rome Statute allows victims to provide information to the Prosecutor and to participate in the judicial proceedings to express their views and concerns. This participation has taken various forms in our proceedings such as making submissions at the critical junctures, examining prosecution and defense witnesses, and presenting evidence.

The possibility for victims to participate can now be said to form an integral part of the international criminal justice system. Since the ICC was established, victims' participation has been incorporated in the legal framework of the Extraordinary Chambers in the Courts of Cambodia (ECCC), that of the Special Tribunal for Lebanon (STL) as well as in that of the Kosovo Specialist Chambers (KSC).

In practice, the participation of sometimes thousands of victims in criminal proceedings raises a number of legal and operational challenges as their participation must be genuine and meaningful without affecting the right of the accused to a fair and expeditious trial.

Almost 13,000 victims are currently participating in the various proceedings before the ICC through legal representatives, including more than 4,000 victims in the latest Ongwen trial. The ever-growing number of victims willing to participate demonstrates both the success of the Court in improving the access of victims

to justice as well as the huge task ahead. As victims participate through legal representations, one particular challenge is to ensure a genuine channeling of victims' voices through legal counsel. Different chambers have so far tried different systems but this is obviously work in progress and more reflection will be needed in this regard.

In order to engage fully with victims, the Court has taken stock of past experiences and is making great efforts to enhance public communication and outreach strategies in situation countries. In the most recent Ongwen case, for instance, proceedings are broadcasted regularly in the affected communities. Questions and answers sessions are also held to help victims understand the way justice works in The Hague.

Due to heightened security risks for all involved, including victims willing to attend the hearings, we have not yet been able to hold proceedings on site, close to where crimes were allegedly committed, but we hope to be able to do so in a near future.

While participation in criminal proceedings is very important, reparations for the harm suffered are also crucial in order to contribute to peace and reconciliation. The Nuremberg Declaration refers to restitution, compensation and rehabilitation as being essential components of justice. The Rome Statute is the first instrument of its kind to provide for the possibility of ordering reparations to victims in case of conviction. Reparations can be individual or collective, or a combination of both.

Reparations are currently being considered in four cases before the ICC, following convictions.

Considering that international criminal justice can only address and repair a handful of cases, it is important that it be complemented by broader assistance to victims in situations investigated by the Court, beyond the confines of a particular case.

As part of the reparations system, States Parties to the Rome Statute have established a Trust Fund for Victims, funded by voluntary donations from states and other donors. The Trust Fund may contribute financially to implementing reparations orders in case the convicted person is indigent, but also may provide broader assistance to victims of crimes in affected communities. In northern Uganda, for instance, the Trust Fund has been active for ten years now, working with local Non-Governmental Organizations on projects aimed at rehabilitating victims of crimes mentally and physically.

Again, the system confronts a number of difficult challenges, including the need to ensure sufficient funds to provide meaningful reparations to victims.

Ladies and gentlemen, to conclude, it can be said that the experience gained in all these years has in no way undermined the validity of the concepts and principles of the Nuremberg Declaration. On the contrary, it is my view that the principles contained in the Declaration continue to provide relevant and accurate guidance on what is required to ensure justice and peace in practice.

Now we understand better the enormous political and practical difficulties of implementing the principles. Peace and justice are not easy to attain.

Unfortunately, in our increasingly troubled world, difficulties of all kind multiply and even some of the underlying essential values and beliefs seem to be put in question. When we look up at the enormous challenges, it is sometimes difficult to maintain optimism and keep our resolve intact. On occasions, we cannot but wonder whether we will manage not even to strengthen but just to maintain the important achievements attained in the area of justice and rule of law after so much effort.

However, I am convinced that notwithstanding the difficulties, we should not lose historical perspective. We have much to celebrate in this tenth anniversary of the Nuremberg Declaration for Peace and Justice.

Indeed, much has been done and achieved in three decades of international criminal justice. Only 20 years ago we were wondering whether the creation of the ICC would be possible. And it was. It was possible, thanks to the unwavering commitment of many states and individuals, including many of you here. The Court is not perfect but it is working, it has matured, and it is delivering. Many initiatives are under way to ensure that it continues to improve its performance and enhance cooperation and support. Efforts to bring perpetrators of international crimes before justice also continue to develop through national, regional or hybrid mechanisms.

Justice for international crimes has proved to be possible. Together we must continue to ensure that it is strengthened so that it can make a contribution to sustainable peace.

Thank you.

Panel I

The Nuremberg Declaration on Peace and Justice Today

moderated by Christian MUCH

20-21 October 2017

Panel I

The Nuremberg Declaration on Peace and Justice Today

At the outset, highlighting key themes of the Nuremberg Forum 2017, Panel I focused on mapping out the impact of the Nuremberg Declaration on Peace and Justice today. Ten years ago, in 2007, the “Nuremberg Declaration on Peace and Justice” was drafted and presented by a group of experts working under the auspices of Óscar Arias, then President of Costa Rica, following a major international conference entitled “Building a Future on Peace and Justice” held in Nuremberg in June 2007. This declaration was then brought to the attention of the UN General Assembly in 2008 (and included in the UN Document A/62/885) and later to the attention of the ICC Review Conference in 2010. Containing definitions, principles and recommendations, with a particular focus on a holistic view on peace and justice issues, the declaration aspires to guide those involved in all phases of conflict transformation at all levels, i.e. the local, national and international, including mediation, post-conflict peace-building, development, promotion of transitional justice and the rule of law.

The 2007 Nuremberg Declaration sets out the established and emerging norms under international law with regard to ending impunity according to which the most serious crimes that concern the international community as a whole must not go unpunished and that their effective prosecution must be ensured. As a minimal application of the emerging norms, amnesties should not be granted to those bearing the greatest responsibility for genocide, crimes against humanity and war crimes. With regard to peace-making, the Nuremberg Declaration also recognized the imperative to end fighting and suffering and demanded that peace negotiations build the foundation for both peace and justice.

Ten years later, it is pertinent to ask whether these aspirations have become a reality. Have peace-builders, mediators, development agents and practitioners of transitional justice embraced this holistic view, addressed and implemented the tenets of the Nuremberg Declaration? Has the proliferation of justice mechanisms (ranging from international and hybrid tribunals to specialized national jurisdictions) contributed to a more sustainable peace? Has the acceptance of such mechanisms grown among affected populations or are public perceptions shifting?

While looking into these questions, the panel discussions touched upon, *inter alia*, the political impediments regarding the UN Security Council veto powers, politics in relation to Africa and recent withdrawals from the ICC, granting of amnesty exceptions to lower level perpetrators and more broadly, the role of the UN General Assembly regarding the peace and justice agenda. During this panel session, it was acknowledged that while the fight against impunity has established itself as a maxim in the international arena, the political climate nevertheless impedes the effectiveness of this fight. There is a display of mixed attitudes by three permanent members of the UN Security Council, which begs the question of whether the holistic view of establishing peace through justice, development and wide community engagement and participation is truly possible in the long-term if the major powers in the world do not fully participate themselves.

What does the variable state engagement and disengagement mean for the fight against impunity? What happens if certain African States are not engaged? With the largest group of States Parties to the ICC, and the continent with the best track record of bringing heads or former heads of state to justice, Africa has been a tremendously important region for leading this fight. Yet more needs to be done at this critical juncture to relieve the skepticism surrounding the selection of cases and situations warranting international judicial intervention. It is worth recalling at this stage, that five African states had invited the ICC to investigate situations on their territory, which led to the first cases before the Court. However, a concern voiced has been that the future generations in Africa may get lost in the strategic communication and propaganda that certain governments in Africa cascade about the ICC. Many examples are provided where the UN Security Council has not upheld the same standards against its allies, for example, in relation to Saudi Arabia's involvement in Yemen. One potential solution proposed is the French initiative to regulate the use of veto powers in mass atrocity situations, though this is yet to gain further traction. Nevertheless, these real issues of legitimacy and cooperation must be addressed creatively and through education, dialogue and engagement.

Regarding the fight against impunity, the 2007 Nuremberg Declaration speaks of ending impunity and notes that as a minimal application of this principle, amnesties must not be granted to those bearing the greatest responsibility for international crimes. It has been argued that this might still allow for some arguments to be made that amnesties might be powerful tools for lower-level perpetrators for atrocity crime situations and might be used in negotiations to ensure that the peace process can move forward with the aim of disarming the militias involved.

An additional solution to tackle the alleged "double standard" rhetoric, i.e. treating some situations with more attention and urgency, while the other ones are failing to be acknowledged, lies in the hands of policy makers and civil society. In this respect, the Nuremberg Declaration recognizes justice in its broader context and not solely in relation to criminal justice processes. Therefore, while international tribunals are important, prosecutions by themselves are insufficient. Truth commissions have revealed that establishing the truth is an integral process in accountability, reparations, redress, and in recognizing the injuries suffered by victims. Engaging with women's groups and minority groups, for instance, is key to addressing these underlying issues.

Moreover, in situations where the selectivity of referrals of the UN Security Council threatens to undermine the legitimacy of the decisions it does indeed take, it may be worth considering resort to alternative organs. For example, resorting to the UN General Assembly has occurred in the situation in Syria, resulting in the establishment of the International, Impartial and Independent Mechanism on international crimes committed in the Syrian Arab Republic (IIIM). Part of the reform initiative is the UN General Assembly claiming more powers for itself, in recognition of the fact that international peace is crucial for its agenda too. While there is no concrete precedence in relation to this, it is undoubted that civil society will be critical in making a difference here.

Finally, there is a skepticism that the major powers will ratify the Rome Statute in the immediate future. It is rather hoped that the process is underway whereby the major powers hold each other accountable in the strongest possible terms. They must be held to conduct their foreign policy and military affairs without engagement in atrocity crimes, so that their record will be scrutinized with this as the foremost principle in mind. However, unwavering political will is necessary for this to



occur, and in the meantime smaller efforts, such as bringing major powers together for discussion and thinking outside of the box, will go some distance.

Among the key points to take away are the following issues:

1. Major powers' active involvement is essential for peace and justice discussions
2. Participation in these processes should include women, ensuring active participation, but also focus on including younger generation through, *inter alia*, education
3. Peace and justice agenda bargaining should not occur to the detriment of the principles and tenets set out in the 2007 Nuremberg Declaration

Addressing these challenges is not an easy undertaking and offering fora for discussion is therefore an inestimable tool in sharing ideas and developments from experts and practitioners in this field.

Panel I consisted of three renowned experts who critically assessed where the 2007 Nuremberg Declaration stands today. Judge Pillay looked at the main developments in the fight against impunity in the past ten years calling upon, *inter alia*, a necessity to interpret national interests as collective interests of states. Ambassador Scheffer examined the obstacles that are undermining the implementation of the Nuremberg Declaration principles restating the need to embrace ourselves with empirical information that could influence the policy-makers. Finally, Mr. Tolbert addressed the challenges faced with respect to the Nuremberg Declaration and ideas as to how civil society could help overcome these challenges, stressing that smaller progressive states and civil society actors drive the ICC.

What have been the main developments in the past ten years in the fight against impunity that reflect the spirit of the 2007 Nuremberg Declaration on Peace and Justice?

Navi Pillay

For the first time in history in Courtroom 600, in 1945, judicial power backed by punishment was exercised by the international community to achieve justice and accountability of individuals for the commission of war crimes and what was then called crimes against humanity. However, the resort to justice as an integral element to the peace process in the aftermath of great conflicts is a recent development. The international community has witnessed the establishment of a number of tribunals, such as the ICTY, ICTR and ICC, as well as ad hoc tribunals in Timor-Leste, Sierra Leone, Cambodia, Kosovo and more recently now, the two ad hoc tribunals for the Central African Republic (CAR) and South Sudan as mechanisms to address post-conflict justice situations.

In addition to these, other recently formed mechanisms for justice and accountability have come into being, such as the Office of the High Commissioner for Human Rights; a product of civil society pressure calling for the implementation of the framework for the protection of human rights. Another example is the Universal Periodic Review mechanism, where states voluntarily subject their human rights record for review and where the 58 independent experts established by the Human Rights Council can make recommendations for better human rights protection. The reason for doing so is because a human right's violation is often a harbinger for worse things to come. Therefore, it is clear that the fundamental frameworks for safeguarding against violations and crimes are in place and include a strong and growing body of international human rights laws and standards. They also include a vigilant civil society involvement, media, as well as institutions to interpret the laws, to monitor compliance and apply them to new and emerging human rights issues.

However, half a century since the protection of individual human rights and prohibitions against atrocity crimes, some of which are *jus cogens* in nature, the world continues to witness horrendous human suffering and widespread and systematic violence against civilians from rebel groups and terrorist groups, as well as at the hands of governments themselves. Examples include Syria, Islamic State of Iraq and the Levant (ISIL), Iraq, Yemen, Burundi, CAR, Mali, the DRC, South Sudan, Myanmar, to name a few, as well as longstanding unresolved violations in Occupied Palestinian Territories and Libya. These are all stark reminders that impunity for atrocity crimes still prevails.

Within this struggle, international tribunals have found justice in many situations, and have held key perpetrators to account for war crimes, genocide and crimes against humanity. For instance, the ICTR delivered the first judgment on genocide and sexual violence and rape constituting genocide, and the SCSL determined that abduction and sexual enslavement of women constituted the crime against humanity of forced marriage. The same court also convicted Charles Taylor, former President of Liberia, for planning and aiding and abetting the commission of crimes against humanity in neighboring Sierra Leone; an historic conviction of a former head of state for serious crimes committed while in office. Similar progress in ending impunity has been made at the ICC through cases such as Thomas Lubanga and the ongoing cases of Bemba and Gbagbo. The ICTY in 2016 convicted the former Serb leader, Radovan Karadžić, of genocide for the massacre of Muslims in Srebrenica.

Positive examples can also be found in Africa, for instance, in the African Union (AU) Directive to Senegal to proceed with the trial of Hissène Habré, the former dictator of Chad. The successful prosecution of Habré has set a new benchmark to end impunity in Africa and is a significant step forward in holding high-profile perpetrators of crimes to account. It can also serve as an important model of how hybrid courts can reconcile the often-conflicting demands of international law and national sovereignty. The relationship between the ICC and the AU is marked by controversy. At its Extraordinary Session, the Assembly of the AU in 2013 expressed concern “over the political misuse of indictments against African leaders by the ICC” and “that prosecutions against heads of state could undermine sovereignty, stability and peace”. They further resolved that “serving heads of state and high senior state officials, be covered by immunity from prosecution”. In subsequent sessions, there were motions to support withdrawal from the ICC, however, these did not reach the status of resolutions.

The notion that political power can be a safe haven for impunity would create a dangerous double standard for accountability. It is also incompatible with international law and the Rome Statute, under which national immunity is not a bar to the Court exercising its jurisdiction for ICC crimes. On 15 March 2016, the South African Supreme Court of Appeal ruled that the Government of South Africa had contravened national law in failing to arrest Sudanese President Omar al-Bashir while present in the territory of South Africa, who had been indicted for genocide in Darfur by the ICC. The ICC Trial Chamber also ruled on this act of non-compliance. In October 2016, the South African Minister of International Relations and Cooperation gave notice of South Africa’s intention to withdraw from the Rome Statute. Subsequently, the Minister of Justice explained that the Cabinet had decided to withdraw from the Rome Statute because, among other reasons, it considered that the Implementation Act and the Rome Statute were interfering with the South African Government’s important role in resolving conflicts on the African continent, encouraging the peaceful resolution of conflicts. He also stated that both the Statute and the Implementation Act compelled the Government to arrest persons who may enjoy diplomatic immunity.

The High Court has since ruled that the Government must revoke its decision to withdraw from the ICC, yet this is still a very live issue necessitating a great deal of attention and concern. There is no doubt that the fight against impunity is far from achieved. The resurgence of hate speech and racist propaganda against minorities, migrants and refugees in many parts of the world is extremely disturbing – as stated earlier, these are human rights violations that are alerts to conflicts that are bound to arise. Expressions of racial, religious or xenophobic divisions, particularly emanating from leaders, that overtly call for or suggest targeted actions against minority groups, should be anathema to every Member State of the UN. The challenge also arises from the lack of cooperation with the Court from states and international institutions, and the absence of political will to act against impunity. This was also witnessed as High Commissioner for Human Rights, where human rights investigations were met with increased resistance and obstruction as opposed to cooperation. One example of this can be found in the denial of access to the territories of Gaza, Syria and Myanmar for the established Commissions of Inquiry into the situations.

Regrettably, the international community remains unable, consistently, to react strongly and rapidly to crises in the world. Addressing the UN Security Council, attention has been drawn to the incongruity of three veto powers (the USA, Russia and China), possessing the power to determine whom the ICC should prosecute or not. The playing out of geopolitical agendas in this UN Security Council has been catastrophic for the people of Syria, for instance, where hundreds of thousands have been killed, millions displaced, and where the refugee flows are destabilizing neighboring countries, as well as Europe. These geopolitical agendas are also detrimental to building trust in international justice institutions. Many in Africa are suspicious of the selective targeting of countries in Africa for ICC investigations – they question why the UN Security Council referred only African States (Darfur



and Libya) to the ICC, but not the attack on Iraq or the conflicts in Syria or Sri Lanka. It seems that a broader conception of national interests should guide the work of the UN Security Council, given its charter mandate as the guardian of international peace and security. It is also necessary to interpret national interests as the collective interests of states.

What are the key obstacles that undermine the implementation of the principles arising from the 2007 Nuremberg Declaration on Peace and Justice?

David Scheffer

The international community is currently at the 25-year mark in the creation and operations of the modern international and hybrid criminal tribunals. The advancements made until this present day had not been envisaged at the time of embarking on this journey a quarter century ago, nor was the opportunity to review these accomplishments and look to the road ahead. There is therefore much to take stock of, particularly in the context of the Nuremberg Declaration on Peace and Justice of ten years' standing. This contribution focuses on several points from the Declaration and suggests some ways forward. It fully endorses the ICC President, Silvia Fernández de Gurmendi's, remarks on the significant role of justice in the pursuit of peace and some of these remarks will echo hers.

Principle 1 of the Declaration focuses on "Complementarity of peace and justice." A humble approach must be taken, however, in the endeavors to recognize that the tribunals cannot be overloaded with the challenges of achieving peace and of ensuring that societies torn asunder by atrocity crimes are reconciled and rehabilitated. The requirements of peace, while guided by the rule of law, are met by political, sometimes military, economic, and sociological strategies and undertakings. It is often easy to fall into the trap of burdening the criminal tribunal with resolving everything, including acting with such powerful deterrent effect as to jam the weapons and end the conflict.

This trend appears to be only increasing with respect to the ICC, namely that so much is expected of the Court in the resolution of conflicts, in transforming the political leadership, and in meeting the enormous needs of the victims. This pressure emanates from many quarters, including the noble aims of civil society. Yes, the tribunals can have some impact but it is suggested that the potential accomplishments of the tribunals not be oversold beyond their core task: to render criminal justice for those most responsible, particularly at the leadership level, for the commission of atrocity crimes. The tribunals are not the only gateway to comprehensive peace-making.

While the ICTY was an important element, and increasingly so as the years wore on, it still remained a sideshow during those years to the extremely difficult and complex political, economic, and military decisions that had to be made every day in trying to bring the fighting to an end and achieve a peace settlement. Thus, how peace and justice are balanced during the conflict, when the atrocity crimes are being committed, and how they are balanced in the aftermath are two very difficult exercises that should not be underestimated.

Principle 2 of the Declaration correctly states that atrocity crimes "must not go unpunished and their effective prosecution must be ensured. The emergence of this principle as a norm under international law has changed the parameters for the pursuit of peace." The UN High Commissioner for Human Rights, Zeid al-Hussein, emphasized this point in his 2007 statement at the launch of this endeavor. The Declaration goes on to state that the minimal application of the principle means that "amnesties must not be granted to those bearing the greatest responsibility" for atrocity crimes. That is the tectonic shift that has occurred over the last 25 years. It is simply not plausible anymore to argue that any leading perpetrator of atrocity crimes is entitled to a free pass on judicial accountability.

Countless rationales have been heard, both inside and outside of government service, arguing the presumed logic of essentially granting amnesty to a leading perpetrator in order to strike a peace deal. One hypothetical after another is invoked to justify the abandonment of justice. Though this might be understandable, it is

similar to the rule against torture. There is no plausible rationale for the commission of torture, under any circumstances, a point long confirmed in the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment but, as is known, at times violated. There have been new and disturbing arguments, invoked in practice, to trash the rule since 9/11. But nevertheless, many have stood firm against violating the principle or the rule of international law that there are no exceptions for the crime of torture; if a government official wants to violate the rule, let him throw himself at the mercy of the court rather than seek immunity or an odious new rule authorizing such conduct.

Likewise, the days of leadership impunity have ended, at least in theory. It will be a very long time before this principle is fully realized in practice. Negotiations for peace may indeed be hampered, even crippled, by upholding this core element of the rule of law in the 21st Century. Other principles of fundamental importance in peace negotiations are not sacrificed – such as prohibitions on aggression and violations of international humanitarian law and abusive treatment of victim populations – so why should this principle that is of the deepest moral purpose in modern society be sacrificed? Whether the principle has been strengthened since 2007 is a difficult question, as there are numerous examples of impunity surviving in the leadership of Syria, Sudan, North Korea, Zimbabwe, the Philippines, Russia, and some might argue the United States. But impunity does not survive as a matter of law; it survives because of the resiliency of sovereignty and of political and military realities that cannot be easily overcome. This includes the failure of the UN Security Council to effectively enforce the principle.

Principle 3 of the Declaration speaks of “a victim-centered approach” that gives victims’ concerns a “high priority.” As the UN Secretary-General’s Special Expert on UN Assistance to the Khmer Rouge Trials until recently, I can attest that the victims of the Pol Pot regime atrocities play a central role in the trials of the ECCC. They are represented in the courtroom and testify in large numbers. They populate the courtroom and public sitting area every day of the trials. Reparations also are central enough to merit judicial endorsement, provided the reparations projects are planned in advance and voluntary funds are raised for them months prior to judgment. That experience in Cambodia has done much to encourage better action in two areas: how to give victims a voice in the courtroom while maintaining due process and efficiency in the conduct of trials – a challenge the ICC is addressing, as President Fernández described, and how to raise funds voluntarily for reparations projects for the victims. The ICC Victims Trust Fund is addressing that challenge, but so much more can and should be done to raise very significant amounts of funds.

Principle 4 concerns “legitimacy”, that “local circumstances and expectations” be taken into account for both peace and justice. Experiences with Sierra Leone and Cambodia facilitate the idea that bringing at least some trials of leaders responsible for atrocity crimes directly to the victim populations, on their own territory, has great merit once peace has been established and security assured for the court officials. The ICC will need to keep considering this possibility in its own casework. However, it is certain that additional costs are involved and therefore the difficulty in the suggestion does not go underestimated. Hybrid criminal tribunals typically – but not always – are situated near the crime scenes. Perhaps more effort needs to be concentrated on bringing justice closer to those who are struggling to build the peace.

Finally, to close on a point that infuses the Declaration with a political reality that is not expressly stated therein, but should be more sharply considered in the future. The following point comes from personal experience and from our collective knowledge of certain realities. Many of us have spent significant parts of our careers focusing on the prevention of atrocity crimes as well as their prosecution. The stark empirical reality is that the cost of preventing atrocity crimes is almost certainly going to be far less than the cost of restoration, of reconciliation, of promoting development in the aftermath – in the post-conflict environment recognized by the Declaration. Prevention of atrocity crimes also diminishes the costs associated with the international and national investigations and trials that will be required to achieve accountability. Syria and Iraq would be Exhibit A today, as would be numerous crime scenes in Africa, Myanmar, and North Korea.

Policy-makers must be educated, up front, with empirical information that enlightens them about the disparity in cost – in blood and treasure – between taking bold steps to prevent atrocities and the conflicts associated with them rather than wait until years later, after the ravages of war and horrendous atrocities, when the cost, particularly financial, to restore devastated societies will be astronomically greater – and rarely met. Too little attention has been devoted to this dilemma, and the hope is that empirical evidence could be compiled that would have a constructive impact on the thinking of policy-makers in the future.



Does the 2007 Nuremberg Declaration on Peace and Justice make room for the substantial contribution of civil society and how has this been reflected in practice in the last ten years?

David Tolbert

The ICTJ played a key role in the conference leading to the Nuremberg Declaration, as well as a supporting role to the current conference. Despite some of the concerns and challenges that will be discussed, the Declaration is seen as containing a critically important distillation of the principles necessary for sustainable peace that is built on justice.

Before turning to the very real challenges that are being faced in the current international landscape, it ought to be underlined that the Nuremberg Declaration, so eloquently delivered by now UN High Commissioner Zeid al-Hussein, remains an essential distillation of the deep and often complex connections between peace and justice. In particular, the articulation of the role of transitional justice and accountability is one that stands the test of time. Its relevance is illustrated by the peace process in Colombia where a conflict that lasted over half a century is being addressed with these principles, a subject that will be returned to later.

However, at the same time a very different geopolitical landscape to that a decade ago presents itself, and these factors, which are, leading, in a number of instances, to reversals in the fight against impunity across the globe cannot be ignored. Thus, while the importance of the Declaration is affirmed, it must be met with realism and the acknowledgement that the situations in which these questions are addressed are markedly different.

Before turning to those critical challenges, it is worth pausing for a moment to reflect on the Colombia process. It is obviously too early to make any more than tentative remarks, as the process is very much unfolding and there are many difficult hurdles to be addressed. Nonetheless, it is worth noting that this 50-year conflict with estimate by some to be over 220,000 victims is being brought to an end by a peace agreement that takes account of almost all of the key elements identified in the Nuremberg Declaration. With all the ups and downs of a complex negotiation, the parties recognized the central role that justice plays in creating a sustainable peace. Thus, the parties in Colombia have established a truth commission and a special jurisdiction for peace to address the violations of international humanitarian law with a special regime regarding penalties. The ICC Prosecutor has played an important quasi-oversight role in the process. Other important steps include reparations programs, reforms of the military and law enforcement processes and programs on reintegration and efforts to ensure that women and marginalized groups are addressed.

The international community has also played a key role, providing strategic accompaniment to the parties, led by Norway and Cuba, but also joined by the UN, regional organizations and other states.

Some concern should be expressed over the sheer number of complex processes agreed to by the parties, as it could represent a kind of “check the box” approach, simply incorporating in the agreement all known transitional justice mechanisms. Instead, justice measures need to be rooted in the local context and responsive to the needs and demands of victims. Nonetheless, in a number of ways the process in Colombia has taken on board the teaching of the Declaration.

Unfortunately, while other efforts to build sustainable peace through addressing the past and justice are serving as reminders (e.g., CAR, South Sudan), what is largely seen today is a political climate that leans toward populism, denial and a general aversion to human rights and accountability. Obviously, the election of President Trump and the US retreat from human rights is a significant factor that has undermined the international community’s willingness to fight impunity and thus – to a lesser or greater extent – also fall away from the principles and approaches that were set forth in the Declaration.

The rise of populism and illiberalism is, however, a widespread phenomenon that pre-dates Trump, and this is also being witnessed in an international order under considerable strain. The most obvious example is, of course,

Syria where it appears that the situation is headed toward a decline of active hostilities, but it is difficult to call this peace and certainly at this stage there appears to be not a shred of justice.

Even before reaching the nadir in Syria, this question was asked a few years ago in an article published in Project Syndicate, whether the international community had abandoned the fight against impunity.¹ This then led to an online debate led by the ICTJ, including Zeid (arguing against the proposition) and Michael Ignatieff arguing that the international community had indeed abandoned the fight against impunity.² Looking at the situations in Syria and Burma at the moment, at conflicts and massive crimes across a large swath in the Middle East and in parts of sub-Africa as well as a number of “frozen conflicts” or a very cold peace, e.g., Ukraine, Georgia, and Armenia/Azerbaijan, the Nuremberg Principles are not being put into practice.

Therefore, the issues that are being faced should not be framed in terms of the relevance or the efficacy of the Nuremberg Declaration; it still is the blueprint for sustainable peace. Instead, the issue is how – in this difficult time – can the Declaration be made “to live” or at least be more relevant and help revive the fight against impunity? How can these processes be made to work? This is the real question.

While there is no magic wand to change the political climate, it does seem that to breathe new life into the Nuremberg Declaration, the fight against impunity must be renewed, which is at the core of a sustainable peace. In the current climate, that has to be led – as all progressive movements are led – by civil society. Victims groups and other activists understand the need for peace with justice with women leading the way. In Colombia, it was a demand for a just peace that incentivized the politicians to take the right steps. This is also seen in our work on the national level across the globe.

On the international level, the creation of the ICC was not driven by the great powers but by a combination of smaller progressive states and civil society. This is the formulation of most, if not all, progressive developments at the international level.

Thus, the Nuremberg Declaration is entirely too important to be left to wither on the vine. It is our job to make states take the Declaration seriously, our job to support it, to push back against those who want to return to the culture of impunity and to ensure that the failure of peace based on impunity is not returned to.

This is why this conference is so important. The Nuremberg Declaration encapsulates an important – a great – milestone. It represents the path to sustainable peace and thus in a very real way the lives of many millions are at stake.

It is worth fighting for.

1 David Tolbert, “A Wrong Turn for Human Rights”, Project Syndicate (3 September 2014), available at <https://www.project-syndicate.org/commentary/david-tolbert-warns-that-the-gains-made-since-the-end-of-the-cold-war-are-at-risk?barrier=accessreg>, last accessed at 22 April 2018.

2 David Tolbert, “A Debate Whose Time Has Come”, ICTJ (8 February 2015), available at <https://www.ictj.org/debate/impunity/opening-remarks>, last accessed at 22 April 2018.



Panel III

Justice, Prevention and Ending Impunity

In post-conflict contexts, addressing past abuses is not an easy undertaking in view of considerable challenges and deeply rooted grievances. Where institutions are fragile or corrupt, the political, legal and social dynamics remain complex and shifting, exacerbated by underlying grievances regarding inequality and marginalization. Moreover, when powerful political actors are implicated in serious crimes, the quest for justice often faces a deep and long-term struggle. The factors shaping this struggle vary but include impunity and amnesty challenges, as well as denial and power obstruction in obtaining accountability. Thus, the fight against impunity is an ongoing challenge, particularly when there is a shrinking political will on the international level to support accountability efforts.

To start addressing these challenges, following the 2004 UN Secretary-General's Report "The Rule of Law and Transitional Justice in Conflict and Post-Conflict Societies" (UN Document S/2004/616), transitional justice was defined as an essential part of the UN's post-conflict reconstruction and peace-building agenda. Various measures were proposed in post-conflict settings that could contribute to restoring peace, including by establishing individual accountability; contributing to deterring future violations; promoting reconciliation at a societal and/or individual level; providing redress to victims; removing perpetrators from positions of power; restoring trust in state institutions; reinforcing respect for the rule of law; and building capacity through security sector and justice sector reforms. Throughout the years, however, criticism appeared and these measures were described as potentially also destabilizing or derailing peace processes. Furthermore, the critique of victor's justice, in particular in situations where compromise was sought became vocal. These dilemmas prominently surfaced, *inter alia*, in the former Yugoslavia, Uganda and more recently in Colombia. This panel therefore looked into the rather complex constellation of peace and justice, assessed the terminology, preventive effect of justice, and the causal claims between peace and justice.

The panel discussion highlighted that while focusing on the notion of justice, it is important to consider the implications of the use of specific terminology such as retributive justice and restorative justice particularly with the view to prevention and ending impunity. Speaking of justice in times of transition actually begs the questions of justice for what, justice for whom, and justice to what end? When answering such questions, it is important to be cognizant of the number of adjectives and qualifiers associated with justice that are all too often used interchangeably and do not afford clarity to situations in which they are used. Moreover, the relationship between prevention and justice is increasingly coming to the forefront particularly in light of the ICC as a permanent institution dealing with ongoing conflict. At both a policy and practice level, there is a trend towards a deeper understanding of this relationship. For example, one could consider here a recent initiative by the UN Human Rights Council requesting both the Special Rapporteur on the promotion of truth, justice, reparation and guarantees of non-recurrence and the Special Adviser of the Secretary-General on the Prevention of Genocide to conduct a joint study on the contribution of justice to the prevention of gross violations of human rights and international humanitarian law.

The circumstances under which justice can have a preventive effect must also be considered. Academic research shows that the pursuit of justice through tribunals does not necessarily foster peace but may enable a more confrontational atmosphere within the courtroom, as well as within societies, in order to allocate responsibility to individuals. This is particularly important as these individuals are often situated within larger identity groups, which can have negative repercussions. One inference to be drawn from this is to limit the strength with which justice and peace, as well as justice and prevention, are linked. With the aim of managing expectations, courts may be able to deliver justice, which should be seen as a sufficient result with any consequential results, such as peace or prevention, being perceived as additional benefits.

This in turn poses the question of whether justice is an end in and of itself. While a correlation between justice and peace has repeatedly been articulated, zooming into individual cases and understanding that any given society consists of a range of actors and social groups may reveal that there are many versions and definitions of peace, which may not always apply consistently across a whole society or situation. Some success stories nevertheless are championed, especially when considering the more recent development of victim representation and victim participation in justice processes. The key challenge here, however, is engaging in dialogue with the diverse social groups within the communities. Thus, is doing right by all those affected an impossibility that justice cannot achieve? While the end of impunity clearly entails a criminal law approach, justice as such does not necessarily mean criminal justice exclusively; it has other more restorative implications, which may hold the potential to unfold a preventive effect. The Nuremberg Declaration points out that justice may likely reduce violence in conflict and thus assist in the stabilization of society. In order to do so, however, justice must be seen to be done and not appear overly politicized.

Finally, in relation to acceptance, it is important to assess critically whether outreach is able to play a positive role in achieving this. While the ICC, for instance, includes a victim participation scheme, which may be able to produce dialogue, the difference this actually makes within specific contexts certainly merits a systematic assessment.

The key points uncovered during this panel discussion are:

1. There are still unaddressed interlinkages between peace and justice, which have effect on the peace and justice agenda
2. Criminal justice can only be just one dimension of justice efforts
3. Acceptance and understanding of the justice procedure is essential to fostering the peace and justice agenda in terms of long-term achievables

To address some of these questions, three renowned academics looked into interlinks of peace and justice. Professor Sriram addressed the relationship between transitional justice and security in her



post-conference report (as she was unable to attend the conference). She mapped out the evolution of peace versus justice discussions before turning to laying down the pathways that are identified in the academic and policy literature. Dr. Dittrich addressed the question of peace-building and justice by identifying some of the broader conceptual debates, sketching concepts and critiques of peace and justice, and highlighting the importance of actors and the interplay of legal, political and social dynamics. Finally, Dr. Buckley-Zistel presented key findings of the Nuremberg Academy's project "Exploring Multiple Dimensions of the Acceptance of International Criminal Justice in the Post-Nuremberg Era", including the definition of, and the need for, acceptance in this complex undertaking.

What is the relationship between transitional justice and security?

Chandra Lekha Sriram³

Beyond justice vs. peace

For decades, at least since the end of the military junta's rule in Argentina in 1983, countries emerging from authoritarian rule and civil conflict have debated how best to address past atrocities in unstable and transitional societies. Early debates centered around a simple dichotomy: promote justice or promote peace? The arguments were relatively straightforward: both are desirable goals, but pursuing one might undermine the other. With evolving practice and academic study, the discussion became more complex. First, advocates and practitioners argued that each might support the other.⁴

The rapidly developing field of scholarship and practice known as transitional justice offered analysis of individual and comparative country experiences. In time, it was subject to criticism, particularly by quantitative scholars arguing that the evidence base was insufficient or that the analyses presented were not robust.⁵ This led to new datasets and quantitative analysis, and mixed-method approaches, seeking to analyze the effects of transitional justice. Notably, the majority of the newer studies focused upon the effect of one or more transitional justice processes upon democracy and human rights records, not on security or peace as such.

The results of these studies reached somewhat contradictory results. While one found that truth commissions had a negative correlation with human rights records in the first instance but might help set agendas, another found that the use of multiple mechanisms was positively correlated with improved democracy and human rights records. Yet another found the correlation was positive where amnesties were included in transitional justice processes.⁶

Further, with few exceptions, most of the quantitative literature does not address whether transitional justice mechanisms, individually or jointly, are correlated with peace or stability. Yet this is a significant

3 Professor Chandra Lekha Sriram was a leading scholar in the field of human rights and conflict and a significant contributor to the work of the International Nuremberg Principles Academy, including her mapping of the context for national responses to international crimes, as part of the complementarity project that the Nuremberg Academy is leading together with the Netherlands based Grotius Centre for International and Legal Studies. She was an invaluable part of the team that set out the cluster methodology for the project. She passed away in September 2018.

4 United Nations, "The Rule of Law and Transitional Justice in Conflict and Post-Conflict Societies", Report of the Secretary-General (23 August 2004), UN Doc. S/2004/616, available at <https://www.un.org/ruleoflaw/blog/document/the-rule-of-law-and-transitional-justice-in-conflict-and-post-conflict-societies-report-of-the-secretary-general/>, last accessed at 7 September 2018; United Nations and World Bank, "Pathways for Peace: Inclusive Approaches To Preventing Violent Conflict" (2017), available at <https://openknowledge.worldbank.org/handle/10986/28337>, last accessed at 7 September 2018.

5 Oskar N.T. Thoms, James Ron and Roland Paris, "State-Level Effects of Transitional Justice: What Do We Know?", in *International Journal of Transitional Justice* (2010), vol. 4, no. 3, pp. 323-359.

6 Eric Wiebelhaus-Brahm, *Truth Commissions and Transitional Societies: The Impact on Human Rights and Democracy*, Routledge, London, 2010; Kathryn Sikkink, *The justice cascade: How human rights trials are Changing World Politics*, W.W. Norton, New York, 2011; and Tricia D. Olsen, Leigh A. Payne, and Andrew G. Reiter, *Transitional Justice in Balance: Comparing Processes, Weighing Efficacy*, US Institute of Peace, Washington DC, 2010.

claim in the academic and policy literature as noted above. Some studies have examined the relationship between amnesties and durable peace, but there are relatively little that systematically examine the relationship between accountability processes and peace.⁷ Even less of the literature carefully spells out the logic(s) of the relationship between the two.

Possible causal pathways

An examination of the apparent logics at work, which claims that accountability, or transitional justice specifically, can help to engender peace, has been undertaken.⁸ There are many implicit arguments, and though few are fully articulated, several causal pathways can be identified in the academic and policy literature. The first is that transitional justice processes help to improve rule of law and governance processes, which enable peace. The second is that it is improved rule of law and governance, which enable transitional justice, strengthening the promotion of peace. The third is what is depicted as a funnel, in which transitional justice, rule of law promotion, and governance support combine to promote peace. Each of these possible pathways are relatively linear, or unidirectional. There is certainly anecdotal evidence to support each. However, the underlying logic is often less clearly articulated.

Possible explanations include, among others, (de)legitimation, structural reform, as well as empowerment.⁹ Put briefly, (de)legitimation refers to the ways, in which accountability processes may help to make legitimate or illegitimate institutions, ideologies, or individuals such that political, social, and legal change may emerge. This can involve promoting new narratives that challenge the old, or specifically embed the legitimacy of values such as rule of law and human rights. The pathway for structural reform involves the ways, in which accountability processes may propose or promote specific changes: e.g. removal from office of possible perpetrators, elimination or reform of corrupt divisions of security forces as well as judicial and constitutional reform. Finally, empowerment can occur where processes allow return from exile, or reparations and restitution to, individuals who opposed or were abused by the prior regime. It may also involve, similar to legitimation, the opening of political space for civil society and opposition groups as well as traditional state actors to discuss rule of law, human rights, peace and stability. Even when the logic is spelled out in more detail, however, these are opaque processes, which means that tracing them can be challenging. This is the case both because many other factors may be involved (peacekeeping and peacebuilding operations; bilateral and multilateral development assistance) and because predicted causality may actually be incorrect, with causation running in the opposite direction. For example, is it correct to suggest that the various accountability processes in Colombia helped to promote the peace process, or is it the case that demobilization processes helped to promote or even compel accountability processes? Both may be the case.

Finally, it is suggested that these unidirectional arguments may be appealing, but are not clearly borne out by evidence. This may explain why quantitative data is often contradictory, but also why qualitative case studies may also suggest various causal processes. An interactive model is thus proposed, whereby the promotion of peace, transitional justice, and rule of law and governance have feedback effects, both positive and negative, on one another. Demonstrating such processes is a challenge for scholars and policymakers alike, for obvious methodological reasons. However, it is worth the effort to examine these more closely. This is particularly the case because, although accountability continues to be a cornerstone of the UN's rule of law and transitional justice policies, its conflict prevention policies, and those of the World Bank, are not highlighted while human rights and rule of law are.¹⁰

7 Erik Melander, "Justice or Peace? A Statistical Analysis of The Relationship Between Amnesties and Durable Peace", JaD-PbP working paper No. 4, 2009, available at <http://www.diva-portal.org/smash/get/diva2:1170899/FULLTEXT01.pdf>, last accessed at 7 September 2018; Geoff Dancy, "Deals with the Devil? Conflict Amnesties, Civil War, and Sustainable Peace", in International Organization, 2018, pp. 1-35.

8 Chandra Lekha Sriram, "Beyond Transitional Justice: Peace, Governance and Rule of Law", in International Studies Review, 2017, pp. 1-17.

9 Valerie Arnould and Chandra Lekha Sriram, "Pathways of Impact: How Transitional Justice Affects Democratic Institution-Building," 2014, available at <http://www.egmontinstitute.be/content/uploads/2014/10/TJDI-Policy-Paper-Pathways-of-Impact1.pdf?type=pdf>, last accessed at 7 September 2018.

10 United Nations and World Bank, "Pathways for peace", see supra note 4.



Implications

Not surprisingly, then, what is needed is further research. If researchers or practitioners believe that transitional justice can promote peace, then it is their responsibility to explain in greater detail how this might be the case in theory, and detail it further in practice. The same is true for those who may wish to argue the reverse.

The relationship between peace-building and justice

Viviane Dittrich

When reflecting on the peace and justice nexus it is important to address some of the underlying assumptions, the broader conceptual debates and the dilemmas, in which the field of transitional justice, both in theory and in practice, finds itself. Whilst remaining familiar with the short form of the peace vs. justice debate that has captured the attention of practitioners scholars in the field, moving beyond this there is now growing recognition of the complex interplay and variation between both peace and justice in various contexts. The question is thus no longer about whether to pursue justice, but rather when, where and how.

There are certainly a number of broader conceptual debates that shape the practice of the politics and pragmatics of transitional justice in various local settings, and it is important to recognize the enormous efforts and the consolidation of the wider international agenda. Efforts of the UN in particular deserve recognition, in terms of the broader peace-building agendas and the documents that demarcated the various processes. Especially noteworthy is the 2004 UN Secretary-General's report "The rule of law and transitional justice in conflict and post-conflict societies". A number of questions regarding this relationship between peace-building and justice have been raised in response to this. For example, how can transitional justice and peace-building actually be conceptualized and devised as mutually reinforcing processes, in light of how peace and justice have been described in the Secretary-General's report? How can claims of causality or correlation be properly researched in complex environments, and what does this mean in terms of methodological rigor and case study selection? Wider questions also emerge about the role and importance of the rule of law, its rise and decline, whether real or perceived.

In terms of the concept of peace and debates on what it actually means, it seems that peace is often defined in too vague or too narrow terms. Being aware of the poly-semantic and very complex nature of peace, its classic understanding solely posits peace *ex negativo* as the cessation of hostilities; this is very much encompassed in the 2007 Nuremberg Declaration whereby it has become important to move beyond this reductionist view of peace. Conceptualizing peace in a binary framework often prevents an accurate reflection of the enormous variability that exists.

In an attempt to sketch some of the major critiques of what peace-building has entailed, the first critique seems to focus on how peace has been pursued, particularly looking at the sequencing and the timing of peace processes and the particular negotiations that have taken place. The second and maybe more radical critique concerns the concept of peace itself and the possibility of considering alternate concepts to the liberal peace that seems to be encapsulated and institutionalized through major international institutions. Moreover, peace-building as well as transitional justice are not technical endeavors and do not operate in an apolitical vacuum; they are inscribed into ongoing political developments, institutions and events. In other words, the idea that clear guidelines, assessments and assumptions are in place for a one-size-fits-all approach cannot be applied in practice, where case-by-case assessments and sensitivity to idiosyncratic contexts are necessary.

Furthermore, being mindful of politics at the international, regional, national or even local level is of course of fundamental importance. The term 'holistic approach' deserves particular mention and attention, in the sense of looking at the various sectors and arenas of activity involved – peace, security, justice and development. Looking at the actors involved, the Nuremberg Declaration here points to the important

role of victim and communities. There has also been an increasing tendency to approach transitional justice from the bottom-up, which precisely falls in line with the importance of civil society actors and grassroots organizations. A holistic approach also necessitates going beyond legalism and thinking about justice mechanisms – judicial and non-judicial fora – which surpass the legalistic gravitas of a particular approach. Whereas law's place at the heart of any transition may appear secure, an honest appraisal nonetheless of legal humility as well as consideration of the broad spectrum of possibilities and their limitations is needed.

In this respect, the participation of a broad number of actors is important for trust-building in the respective local scenarios and in terms of engagement. This entails a shift away from merely consulting those affected but moves to their active involvement in peace and justice processes. Taking the view beyond a mere legalistic perspective and accommodating for political, social and cultural factors must also be at the heart of a holistic approach. This interplay of theory and practice, and law and politics, very much shapes many of the discussions and bearing in mind the overarching theme of this conference, in a sense, not just the fight against impunity but also transitional justice and peace-building may appear at a crossroads.

Finally, this leads to the importance of bearing in mind Robert Cover's observation that institutions and prescriptions do not exist apart from narratives that locate them in wider meaning and also give them meaning, whereby the aspect of meaning is one that cannot be divorced entirely. In this sense, the meaning that people attribute to institutions, events and processes of both peace-building and transitional justice are as important as the phenomena themselves.

How does acceptance contribute to prevention of atrocities?

Susanne Buckley-Zistel

With the increasing prominence of criminal prosecutions following the commission of international crimes, the question emerges if and how these trials affect the parties to the conflict amongst which the violence occurred. There are many normative assumptions regarding the positive effect of international criminal justice, including that it can prevent future atrocities. If and how this is the case depends on a number of factors that cannot be explored in this short chapter but were subject to a larger research project at the International Nuremberg Principles Academy.¹¹ One aspect that stands out and that shall be discussed below is the acceptance of trials and tribunals by the parties to the conflict themselves. The following contribution shall thus make some general arguments regarding the link between acceptance of international criminal justice and the prevention of future atrocities.

International criminal justice has its roots in the International Military Tribunal in Nuremberg, Germany, which prosecuted Nazi crimes in 1945–6. It refers to the norms underlying the prosecution of individuals for committing the international crimes of genocide, crimes against humanity and war crimes by international courts and tribunals. After a long period of inactivity, mainly due to the Cold War bi-polar world structure, it was only after the violence in the former Yugoslavia and Rwanda in the mid-1990s that international tribunals re-emerged. Since then, a number of international and hybrid tribunals have been institutionalized and the ICC in The Hague established.

¹¹ This chapter draws on the research project entitled 'Exploring Multiple Dimensions of the Acceptance of International Criminal Justice in the Post-Nuremberg Era' at the International Nuremberg Principles Academy, which was conducted by the author in cooperation with Friederike Mieth and Marjana Papa. Between 2015 and 2017, research fellows from situation countries where international tribunals, hybrid courts or the ICC are active, conducted research on the acceptance of international criminal justice in their own countries. The research focused on forms of social, political and legal acceptance in Cambodia, Colombia, Cote d'Ivoire, Lebanon, Kenya, Kosovo, Nigeria, Palestine, Rwanda, Serbia, Uganda, and Ukraine. Please refer to the projects website for more information and the full edited volume. International Nuremberg Principles Academy, "Acceptance of International Criminal Justice", available at <https://www.nurembergacademy.org/projects/detail/acceptance-of-international-criminal-justice-12/>, last accessed at 13 December 2017.



What is understood by acceptance? Acceptance moves beyond the mere reception of international criminal justice, such as the passive acknowledgement of its processes, to a more active reception or approval by various groups. It is thus defined as the agreement, either expressly or by conduct, to the principles of international criminal justice in one or more of its forms (laws, institutions, or processes). This includes a range of active features from recognition or giving consent to expressing outright approval and belief. Importantly, acceptance is a dynamic process and not a matter of yes or no, and it may have many nuances. It may be partial, and it may be conditional. Furthermore, while some aspects of courts or tribunals might be accepted, others might be viewed more critically.

If international criminal justice shall contribute to preventing future atrocities, it is required that it contributes to some form of conflict transformation. Conflict transformation refers to approaches that seek to encourage wider social change through transforming the antagonistic relationship between the parties to the conflict. Based on the understanding that conflicts do not simply occur due to incompatible interests and unmet needs, it situates them in the historically and socially defined relations between the collective identities of the parties to the conflict. Problems of inequality and injustice are highlighted by socially and culturally constructed meanings and suggest it is at this level where interventions seek to take place.

Conflict transformation does not only seek to re-establish the status quo ante but is rather a long-term outcome, process and structure-oriented effort with a strong emphasis on justice and social change. It is necessary to transform structural and asymmetric power imbalances between the parties in order to move to a sustainable peace. This may include the transformation of actors (through changes within parties or the appearance of new parties), issues (by altering the agenda), rules (through changes in the norms and rules governing the conflict) and structures (by changing the relationship and power asymmetry). It may also require a long-term perspective of the promotion of human rights and inclusive governance.

This view on conflict transformation in order to prevent the recurrence of violence highlights the importance of acceptance by all parties involved. For a long-term outcome in which the relations between the parties to the conflict change, these parties have to believe that the interventions of international criminal justice are fair, appropriate, non-partisan and – in sum – just. Only then will they consent to the accusation, trial and conviction of individuals that represent their party to the conflict.

In the absence of acceptance, international criminal justice runs the risk of aggravating the relations between the parties to the conflict. Accusations, trials and convictions may be seen as biased when they are considered to be selective and political. Rather than transforming a conflict, relations between the parties harden and resentments increase, for instance when a person who is celebrated as a war hero is convicted by an international court as a war criminal – this is particularly the case if the other side seems to be held accountable to a lesser degree.

Acceptance of criminal justice is thus key to preventing future atrocities, though it is very difficult to achieve given its dynamic nature and the fact that it changes over time. Over a period, internationalized courts engage in different activities, such as establishing the court, selecting suspects, holding trials, and delivering verdicts. These activities may elicit different responses from different groups of society. While some activities such as the establishment of the court might be accepted, others might be seen more critically. Acceptance might also change with some temporal distance from the end of a trial.

In addition, societies marked by violence, like all societies, are composed of many often highly diverse identity groups, amongst which acceptance of international criminal justice can vary. Political interest groups, victims and their organizations, veterans, faith groups, civil society representatives and many others offer forms of social belonging and group identity, which may also be defined by their attitude to the past, particularly if they were directly affected by the violence. There is thus not one society, which accepts international criminal justice, but many groups with very diverse views regarding acceptance.

For proponents of international criminal justice, it follows that they have to be aware of the effect of trials and tribunals in societies that emerge from violence. So far, there is little research on this topic from legal scholars and only slowly emerging research from social sciences. For instance, acceptance is implied in some of the available literature debating peace and justice in post-conflict situations, local critiques of transitional justice, and in evaluations of specific courts or tribunals. There is thus a necessity to bring these academic fields, as well as practitioners, into a more vibrant conversation with each other in order to draw out a more nuanced understanding of the contribution of the acceptance of criminal justice to preventing future atrocities.

Panel III
Forgotten Voices:
Catering to the Needs of Victims
moderated by Philipp AMBACH

20:21 October 2017



Panel III

Forgotten Voices – Catering to the Needs of Victims

Panel III explored the victim-centered approach as envisaged in the 2007 Nuremberg Declaration, noting that the victims are central to peacebuilding, justice and reconciliation and should play an active role in such processes. Historically, international criminal justice processes have focused on individual criminal responsibility of the accused, the protection of rights and due process standards, and the prevention and redress of wrongs. With the advent of modern international criminal justice, in particular with the creation of the ICC, there has been an increasing awareness of the rights of victims, leading to their participation in proceedings and, in some instances, to reparations, compensation and assistance.

This has been a step towards a different direction from the previous practice of the international and internationalized tribunals. At the ICTY and ICTR, victims had a role primarily as witnesses. Their stories, harm suffered during the conflict, and voices were core to the prosecution's case and much attention was already paid to victims as witnesses of international crimes. The so-called "Victims and Witnesses Unit" provided protection and social and psychological support to victim witnesses before, during and after their testimony. The practice at these tribunals highlighted the need and importance of addressing their needs and providing them with support during the post-judgment period. As an example, despite relocation programs being available for those witnesses whose life and/or privacy was seriously threatened due to their testimony before these courts, these programs had limitations in practice, which carried lessons learned for future tribunals. In contradistinction, at the ECCC, which followed a more civil law approach, victims have been provided an opportunity to participate in the proceedings as *partie civile*, represented by co-lead counsel (post-Duch trial). This structure allowed victims a form of participation, however not at a more advanced stage and definitely not as much as is right now envisaged to be the case before the ICC. For example, the victims' representatives were to only access court files and engage in cross-examination. The Rome Statute has been the only instrument, so far, that has set out and provided, at least in the founding document, a greater role for victims during the proceedings. It has situated them as direct participants during some parts of the proceedings, a right embodied in Article 68 of the Rome Statute. They need to be represented by counsel, however they can express their concerns and views before the Court. The ICC further allows for claims for

reparations either directly from the convicted person or via the Trust Fund for Victims. While the Trust Fund for Victims is an important innovation, challenges and concerns remain. These challenges pertain to the victims' "active" role during the judicial process and it certainly remains to be seen what role post-judgment is ultimately realized.

As a result, this panel assessed the evolution of the role of victims in judicial proceedings, victim-centered approaches and the challenges ahead, mainly focusing on the practice of the ICC. Practitioners and experts in the field discussed, *inter alia*, what needs to be done to ensure consistency in both case law and practice within the ICC; what the actual purpose and scope of the reparations is as understood within the ICC context; and how outreach can effectively address confusions and communication arising from concurrent proceedings. The ICC was chosen as a focal point for the panel discussion given its pertaining relevance as the only permanent international court.

From a victim-centered approach, the ICC still has a number of challenges to overcome and difficult questions must be asked to ensure that victim participation is meaningful, genuine and effective. For instance, experience at the ICC has raised concerns in relation to the equality of arms as many of the filings by victim representatives only corroborated the prosecution's case. Moreover, in the Katanga case, many victims spoke of the historical context in the Congo, which presents complications regarding the quality of victim participation, and forces the re-evaluation of the actual purpose of participation itself. Nevertheless, the inclusion of victims in the criminal justice system by the ICC has provided the necessary legal framework, and the provision of jurisprudence that elaborates on these principles is a step in the right direction. Right now, more needs to be done to assess the nature of participation so that victims and their legal representatives have a clear understanding of what to expect. Inconsistent application of principles, particularly relating to the extent of victim participation, has at times broadened its ambit and at other times limited the victims' rights. It seems essential that a mechanism ensures consistent application of principles being clearly articulated in international criminal law and if any distinction and deferral is made, and the reasoning behind is clearly stipulated.

It is also important to ask the same questions in relation to reparations to victims, in order to ascertain their intended achievements. In the Al Mahdi case, for instance, reparations were referred to as, in part, a form of deterrence. The Basic Principles and Guidelines on the Right to a Remedy and Reparation¹² state that reparation can indeed include the form of guarantees of non-repetition, however, some argue that this becomes a competing interest and that reparations should be focused solely on repairing the damage or harm created. By developing a stronger reparations' record, the ICC may ensure that the goals of reparations are complementary. Nonetheless, the counter argument draws a distinction between reparations and fines, debating that the former repairs damage, while the latter, like other punitive measures such as imprisonment, deters the wrongdoer as well as others from repeating the harm caused.

A further challenge in catering to the needs of victims lies in the outreach and awareness-raising activities of courts. For example, in Uganda, and throughout the discussions, it was raised that concurrent domestic proceedings by the ICD and international proceedings before the ICC have the potential to create levels of confusion pertaining to the jurisdiction and mandate of each. This consequently might create a perceived conflation of roles whereby the affected communities are inadequately informed about the complementary role of the ICC. An ensuing effect of concurrent proceedings might also be created by the disparity in resources between the two. Moreover, an observation was made regarding the arising challenge to avoid creating a hierarchy of victims within a situation and/or case who have suffered comparable harms was further elaborated. For instance, and as discussed, given the ICC's greater resources, victims participating in the Ongwen case have had the opportunity to receive timely information concerning the developments arising in the case, and have had better communications with their legal representatives. The same, however, cannot be said for victims in the Kwoyelo case who experienced greater levels of frustration arising from insufficient outreach from the ICD, as well as slower developments in the case itself.

12 UN General Assembly, "Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law", 21 March 2006, A/RES/60/147, available at <http://www.refworld.org/docid/4721cb942.html>, last accessed at 3 September 2018.



In domestic situations therefore, particularly where the ICC is not a feasible vehicle for justice, support from civil society assumes evermore importance. Assistance in the effective documentation and preservation of information must be given, regardless of any political stalemate, with the knowledge that this information may be invaluable in the future. Taking the conviction of Hissène Habré as an example, while mass atrocities were committed in Chad in the 1980s, it was only in 2016 that justice needs were served.

Key points arising from the discussions include:

1. Balancing the rights of victims with the rights of the accused remains an ongoing battle
2. Consistency must be applied throughout the procedures – ensuring the clarity in terms of law in all directions: participation, reparation and rights
3. Expectation management is critical from the early start of any case

The experts in this field highlighted many challenges but also progress concerning the victim-centered approach as envisaged in the Nuremberg Declaration. Judge Ušacka mapped out her first-hand observation of key developments of this right being used in the context of the ICC proceedings. She called upon the importance of realizing that the vast majority of prosecutions must occur in national jurisdictions.

Ms. Kasande, sourcing also from her practical experience, listed the challenges of such complex procedures, and called for facilitation of effective legal representation of victims, realistic timeframes and provision of adequate information to communities. Finally yet importantly, Ms. McKay scrutinized the Nuremberg Declaration's wording that potentially stretches the active participation of victims, including that victims' concerns "should enjoy a high priority". She particularly warned against over-promising that could lead to waning confidence of victims.

How has the ICC adapted to address the unforeseen challenges of victim participation and what ongoing issues remain?

Anita Ušacka

The Rome Statute provides one of the most advanced schemes for victims' rights in international criminal justice, by way of victims' participation in proceedings and the forms of redress available to victims. This is one of the important challenges the court is facing.

The issue of victims' participation in proceedings has been one of the priorities from the very beginning, particularly because there had not been any similar experience available at the time to draw from. One of the important tasks of the judges was to draft Regulations of the Court, which were adopted by the judges on 26 May 2004, and which regulated victims' participation and reparations – Regulation 86 para. 9 established the Victims' Participation and Reparation Section (VPRS) of the Registry. This unit was to be responsible for assisting victims and groups of victims. Simultaneously, Regulation 81 established an Office of Public Counsel for victims for the purpose of providing assistance to the legal representative of the victims and to victims themselves. Later in 2010, following the first experiences, both these units were branded by judges as a "Frankenstein created by themselves" and a special Plenary Session of Judges was held on 2 November 2011 to deal with the problem.

When the first trial against Lubanga started on 19 January 2005, the Presidency approved two forms created by the VPRS of the Registry, which allowed for victims to request their participation in court proceedings. However, these forms were very long and difficult to understand and work with, thus resulting in many meetings of the judges to discuss how to improve them.

Further in 2005, a special working group was set up by the judges to prepare a concept for the reparation of victims. Article 75 states that the Court shall establish principles relating to reparations to or in respect of victims. The working group submitted two approaches:

1. Principles of reparation should be established on a case-by-case basis by Chambers.
2. Principles of reparation should be established by the Plenary of all Judges of the Trial Division or by the respective chamber of the Trial Division.

After many meetings and much discussion, the common approach, namely, to decide on a case-by-case basis, was accepted. In parallel, the judges continued to discuss the question of victims' participation. From 6-8 July 2006, the judges went on a working visit to the International Institute of Higher Studies in Criminal Sciences in Siracusa, where participation of victims in the proceedings and reparations to victims were discussed with prominent professors and professionals in the field. Later, these issues were important topics for discussion at the plenary meetings of the ICC judges.

Looking at the practice during this time, it can be seen that while the introduction of the right to participate represents a major shift away from the traditional view of victims, in reality the application process is time-consuming and resource intensive. The large number of applications from victims has left the ICC struggling to keep pace, and has led to the inability of victims to present their views in many important proceedings. The ICC has received hundreds of applications from victims who often live in remote villages, such as in the eastern DRC and Northern Uganda. These remote areas may also be entrenched in the conflict, making it difficult, if not impossible, for applicants to travel to nearby cities to obtain proper identification cards or other documentation to be appended to their applications. Recollecting experiences at the Pre-trial Chamber and the Appeal Chamber, 366 victims participated in the case of Katanga and Ngudjolo Chui, and the Appeals Chamber granted 30 out of 32 applications for new victims to participate in Lubanga's appeal against his conviction and sentence.

Returning to the question "Where do we stand in the fight for accountability and against impunity for international crimes?", between 2007 and 2009, the International Institute of Higher Studies in Criminal Sciences in Siracusa undertook a historical survey of world conflicts, which occurred between 1945 and 2008. Later, other experts advanced this survey.³³ The experts, who reviewed data compiled from multiple sources, concluded that:

- Between 1945 and 2012, more than 313 conflicts took place throughout the world;
- These conflicts resulted in an estimated 202 million deaths, which is much more than the number of deaths in both World Wars combined;
- Less than 900 of the perpetrators of international crimes have been brought to justice, and amnesty laws in 125 of 313 conflicts identified by the study were enacted to shield the perpetrators from justice; and
- Some form of victim reparation was only undertaken in 16 of the 313 conflicts, involving less than 1% of the victims.

The preamble to the Rome Statute, for instance, contains the affirmation that "the most serious crimes of concern to the international community as a whole must not go unpunished" and the determination "to put an end to impunity for the perpetrators of these crimes..." However, the reality is that the ICC can only prosecute a small fraction of the perpetrators of atrocity crimes. It is crucial to have national prosecutions to fulfil the mandate of accountability. It is clear, though, that in most conflicts crimes are committed by significantly more individuals than are prosecuted by the ICC and other international courts. If there is to be accountability for the crimes committed, the vast majority of prosecutions must occur in national jurisdictions.

³³ See Linda E. Carter, Mark S. Ellis and Charles Chernor Jalloh, *The International Criminal Court in an Effective Global Justice System*, Edward Elgar Publishing, Cheltenham, 2016, p. 333.



What are the challenges that victims face in practice and in a more general context “on the ground” in light of meaningful participation in peace and justice efforts?

Sarah Kihika Kasande

The international criminal justice system has evolved from the exclusive focus of holding perpetrators of international crimes accountable to giving victims a greater role. For a long time, victims have been at the margins of criminal proceedings, seen in many jurisdictions as instruments of the prosecution and limited to testifying in court to satisfy the evidentiary needs of the prosecution.¹⁴

The adoption of the Rome Statute of the ICC, however, was a giant leap forward in the recognition of victims’ rights. Under Article 68(3), victims are permitted to participate in proceedings when their personal interests are affected. They are entitled to have their “views and concerns presented and considered at stages of the proceedings, determined to be appropriate by the Court and in a manner, which is not prejudicial to or inconsistent with the rights of the accused and a fair and impartial trial”.¹⁵

These aspirations go beyond just the traditional retributive scope of criminal law to include aspects of restorative justice for victims. The ICC has created a new culture of having victims’ interests considered in court, while recognizing their suffering and fulfilling their right to truth and reparations.

Victim participation at the ICC has also had a positive downstream effect elsewhere. For example, in Uganda, the International Crimes Division of the High Court’s (ICD) newly adopted Rules of Procedure provide for victim participation.¹⁶ Based on the Rome Statute model, the pre-trial judge in the Thomas Kwoyelo case has also set out guidelines for victim participation.¹⁷ Also, during the trial of Hissène Habré at the Extraordinary African Chambers, close to 4,000 surviving victims were represented.¹⁸

Beyond direct participation in the courtroom, outreach provides victims and members of affected communities with opportunities to engage with courts. The ICC outreach field office in Uganda, for example, organizes regular community outreach sessions to provide updates on the Ongwen case. It has also partnered with radio stations in northern Uganda to have Acholi translations of proceedings streamed live on radio.

Challenges and opportunities for effective victim participation

Despite the progress in bringing victims to the center of international criminal proceedings, there are still limits to their effective participation.

Complex application process and unrealistic timeframes

One challenge is the application process. Following the capture of Dominic Ongwen, the VPRS of the ICC collected victims’ applications exclusively from Lukodi, which was originally the main focus of his charges.¹⁹ In September 2015, the Office of the Prosecutor amended the charges to include alleged attacks in Odek,

14 Giuseppe Zago, “The Role of Victims at the International Criminal Court: Legal Challenges from the Tension between Restorative and Retributive Justice”, in *Diritto Penale Contemporaneo*, 2014.

15 The Rome Statute of the International Criminal Court, 1 July 2002, 2187 UNTS 3, available at <https://www.icc-cpi.int/NR/rdonlyres/ADD16852-AEE9-4757-ABE7-9CDC7CF02886/283503/RomeStatutEng1.pdf>, last accessed at 7 September 2018.

16 Statutory Instruments 2016 No. 40, The Judicature (High Court) (International Crimes Division) Rules, 2016 – Arrangement of Rules, in Statutory Instruments Supplement to the Uganda Gazette No. 42, Volume CIX, 15 June 2016, Rule 35.

17 International Crimes Division of the High Court of Uganda, *Uganda v. Kwoyelo Thomas alias Latoni*, HCT-00-ICD-CASE NO. 0002 of 2010, 11 November 2011.

18 Human Rights Watch, “Q&A: The Case of Hissène Habré before the Extraordinary African Chambers in Senegal”, available at <https://www.hrw.org/news/2016/05/03/qa-case-hissene-habre-extraordinary-african-chambers-senegal#16>, last accessed at 19 April 2018.

19 ICC, *Prosecutor v. Ongwen*, Case No. ICC-02/04-01/05-10-Conf, Pre-Trial Chamber II, “Warrant of Arrest for Dominic Ongwen”, 8 July 2005; a public redacted version is also available, see further ICC-02/04-01/05-57. ICC in the Ongwen Case and Beyond”, see below note 21.

Pajule and Abok as well as sexual and gender based crimes. Following this, the Pre-Trial Chamber granted the VPRS less than three months to collect additional completed applications from victims in the three locations.²⁰

Limited human resources, low literacy levels among affected communities, a wide geographical spread, the absence of organized victims' groups and, inadequate public information about the application process and eligibility requirements, made the time set unrealistic and the process cumbersome.²¹ Additional applications were also received between June to September 2016 after the confirmation of charges against Ongwen.

At the end of the application process, only 4,107 victims successfully applied to participate in the proceedings against Ongwen. The narrow timeframe gave victims limited time to understand the application process and to make informed choices in the selection of legal representatives.

Selection of victims' legal representatives

In the Ongwen case, 2,607 victims, exercising their right under article 90(1) of the Rome Statute, chose to be represented by an external legal representative. The Single Judge of the Pre-Trial Chamber ruled that this external lawyer was not entitled to financial aid. After concerted advocacy by civil society however, the registrar agreed to provide legal aid to the external legal representative.

It is important for the ICC to recognize and support victims' right to choose counsel to represent their views and interests. This will "ensure that the participation of victims, through their legal representatives, is as meaningful as possible, as opposed to purely symbolic".²² Further, the legal representatives for victims should be provided with adequate resources to enable them, constructively and exhaustively, to engage with victims regularly, to seek their views and to update them on the developments in the proceedings.

Managing Expectations

In contexts where victims of atrocities have not received redress, victims can have huge expectations towards the ICC. The Court has to manage expectations by explaining from the outset its mandate to victim communities. It is, for example, never too early to explain to victims how the Court's reparation process works. This should not be left as an afterthought or done only following obstacles that are encountered anew, as was the case with the Kenyan experience. Unmet expectations can be a source of disappointment and, in some cases, re-traumatization.

In Situ Proceedings

The Court should consider holding in situ proceedings. This would bring the Court closer and would enable victims to feel part of the process. Where this is not possible, equipment to facilitate the live transmission of hearings at central locations should be provided for victims to follow the proceedings in a language they understand. The ICC outreach office in Uganda has set up live transmission centers in strategic locations in Northern Uganda and partnered with local radio stations to transmit the proceedings in Acholi.

Conclusion

The inclusion of victim participation under the Rome Statute is one of the most progressive developments in international criminal trials. To give meaning to this right, it is important to allocate adequate resources to facilitate effective legal representation of victims, establish realistic timeframes for application processes and provide adequate information to communities through robust and regular outreach sessions.

20 Lino Owor Ogor, International Justice Monitor, "Thousands of Victims in Uganda Express Willingness to Participate in the Ongwen Case", available at <https://www.ijmonitor.org/2016/09/thousands-of-victims-in-uganda-express-willingness-to-participate-in-the-ongwen-case/>, last accessed at 19 April 2018.

21 Human Rights Watch, "Who will Stand for us? Victims' Legal Representation at the ICC in the Ongwen Case and Beyond", available at <https://www.hrw.org/report/2017/08/29/who-will-stand-us/victims-legal-representation-icc-ongwen-case-and-beyond>, last accessed at 19 April 2018.

22 ICC, Prosecutor v. Ruto and Sang, Case No. ICC 01/09-01/11, Trial Chamber, "Decision on victims' representation and participation", 3 October 2012, available at <https://www.legal-tools.org/doc/e037cc/> cited in Human Rights Watch, "Who will stand for us? Victims' Legal Representation at the ICC in the Ongwen Case and Beyond", see supra note 21.



What are the main prospects of adopting a victim-centered approach as laid down in the third principle of the 2007 Nuremberg Declaration on Peace and Justice?

Fiona McKay

The 2007 Nuremberg Declaration calls for a “victim-centered approach”. The third principle states the following: “Victims are central to peacebuilding, justice and reconciliation and should play an active role in such processes. Their concerns should enjoy a high priority.”

What does a “victim-centered approach” mean in the context of delivering criminal justice for mass violations, and in particular, what are the prospects of achieving active roles for victims in this domain?

Certainly, it is partly about things all criminal justice systems should do to accommodate victims such as procedural justice, providing regular information on the proceedings, and consultation on matters such as the appropriate form of reparations.

But the Declaration goes further, calling for victims to ‘play an active role’ in the process. This contribution focuses on two aspects that seem central to the prospects for progress in giving victims an active and meaningful role in criminal processes for grave crimes. One is the scope for victims to trigger investigations and prosecutions, and the other is the scope for them to participate actively in trials. In each case, progress has been made in opening up opportunities for victims and those acting on their behalf to play a meaningful role.

The intervention points for victims to trigger criminal investigations and prosecutions varies from one legal system to another in function of the formal role of victims in criminal proceedings. Classically, in national systems based on the so-called ‘civil law’ tradition, victims can play an active role in triggering and contributing to a judicial investigation. In ‘common law’ systems victims play little formal roles other than when called as witnesses. Other procedural means to bring about criminal proceedings can be found in all types of legal systems, such as private prosecution or a range of administrative or constitutional law remedies.

Where atrocity crimes are committed, the first duty is on the state to investigate and prosecute. Unfortunately, they do not always do so. Fortunately, there are many courageous victims and civil society actors determined to make it happen. Where criminal investigations and prosecutions for human rights crimes are instituted, victims’ groups and civil society actors on their behalf are almost always behind it. The prosecution of former Chadian leader Hissène Habré in the Extraordinary African Chambers in Senegal is one extraordinary example of the tenacity and sheer determination of the victims and key civil society actors over many years that finally brought about the prosecution. Incorporation into national law of Rome Statute crimes so they can be prosecuted domestically strengthens legal tools available to victims. Not to paint too rosy a picture, plenty of obstacles remain. But the existence of such remedies is crucial and the few precious successes help encourage others.

Turning to the role of victims once trials are under way, there are signs of a shift towards a more active role for victims in international and hybrid criminal tribunals. Whereas the early ad hoc tribunals (ICTY, ICTR, SCSL) were based on the common law model, the ECCC, STL and KSC were influenced by the civil law systems, on which they were based and allow a more active role for victims. The negotiation of the ICC Statute resulted in a compromise between proponents of the different systems, allowing victims to take part in proceedings as ‘participants’. Since then, the practice of victim participation through legal representatives at the ICC and ECCC has demonstrated that victim participation, even in large numbers, can be managed through an efficient and streamlined application process and common legal representation, that it can be meaningful with good legal representation and outreach, that it can be effectively managed in the courtroom so that it does not slow down the proceedings or undermine defense rights, and can make a valuable contribution to the process. None of that was evident ten years ago, and the fact that it now seems normal to have victims participating in ICC proceedings makes it more likely that this will be established as a norm.

One note of caution, however. The ICC is often heralded as the "victims" court', and is the first international criminal tribunal, in which victims participate actively in the proceedings through legal counsel and claim reparations in the event of a conviction.²³ While the Rome Statute does represent a significant advance for victims, care must be taken to avoid giving mixed messages to victims in the way their role is discussed in the criminal process, which may be unintentionally over-promising. When victims hear rhetoric about how international justice is for the victims, that the ICC will give victims a voice, listen to them, put them at the center of things, that they own the process, it is hardly surprising if this leads them to expect more than can be delivered. In reality, in the ICC, victims have relatively little power to influence the initiation of investigations, who will be prosecuted and the scope of charging. During a trial, victim participation will be carefully balanced with fair trial requirements and the interests of efficiency.²⁴ The frustration caused may well contribute to the pattern often repeated in ICC situations, where the Court's action is welcomed enthusiastically by victims and affected communities initially, but disillusionment sets in as proceedings evolve. This also undermines efforts to make victim participation meaningful.

This pattern cannot be put down to careless rhetoric alone. It is extremely hard to explain all the complexities of how the ICC works, especially when the vast majority of victims will never attend court hearings in person. The ICC cannot provide a complete solution for accountability in any given context. Yet, unless the ICC enhances its efforts to understand the political, cultural and social landscape in each place it operates, listens to advice from local actors about how to communicate the choices that are made in a responsible way, and clearly and realistically presents the role of the Court itself and the place of victims in its proceedings, it will continue to disappoint.

The two aspects that have been discussed are at the heart of a victim-centered approach in criminal processes for international crimes. There are positive experiences and developments on both fronts, though also many challenges. Taking a victim-centered approach is not the same thing as giving victims the central role in criminal proceedings, and does not mean victims are the main drivers of every stage of criminal processes. This needs to be made clear, and care must be taken not to over-promise and inadvertently lose the confidence of victims. The stakes are high; the legitimacy of international tribunals rests in large measure on how they are perceived on the ground, and it is vital to make continued efforts to get it right.

²³ See Articles 15(3), 68(3) and 75 of the Rome Statute in particular, see *supra* note 15.

²⁴ Article 68(3), Rome Statute, see *supra* note 15.



Panel IV

Reconciliation

In the aftermath of massive human rights abuses, relationships often require rebuilding and trust to be restored, hence reconciliation has been understood as a core component of peace and justice processes as outlined in the Nuremberg Declaration and explored in Panel IV. Victims of alleged violations often struggle to coexist with perpetrators and to trust state institutions. Moreover, alleged perpetrators of crimes might similarly find it difficult to reintegrate back into society. Reconciliation processes thus aim to build, rebuild or repair relationships at various levels, where the very social fabric of societies has been heavily disrupted and where governance structures and the rule of law are fragile or non-existent.

In these contexts, reconciliation can have different meanings and different objectives. The Nuremberg Declaration offers no precise definition of reconciliation, despite affirming it as one of the objectives of transitional justice processes in general. It indicates that reconciliation is usually determined at different national and local contexts, which is the place where the decision making power rests in terms of assessing, which relationships are to be restored and how much progress is made. On its own, reconciliation processes remain very complex and often include apportioning opposing blame, discrimination allegations, and repression charges. For this reason, and due to its complexity, it is critical that when transitional justice mechanisms are being created, designed and implemented, an inclusive approach involving relevant parties and actors is implemented. Only when addressing challenges from all sides and all parties, including women, there is a chance of meaningful contribution to reconciliation at both the individual and collective level.

Confronting potentially harsh and uncomfortable truths in the aftermath of a conflict may be a prerequisite to achieving long-term reconciliation that is based on the respect of rights and is rooted in values of democracy and peaceful coexistence. In the short-term, however, some mechanisms, like criminal trials or truth commissions, may also generate the opposite effect and further polarize societies that are already fractured, particularly if these mechanisms face criticisms of selectivity, political interference and contested legitimacy. Given this complexity of transitional justice processes, there are often

questions related to whether reconciliation should be a goal, whether it should be an officially sanctioned goal or whether it is too high an ambition and achievement out of reach. Moreover, it is even questioned whether reconciliation really is necessary for peaceful co-existence.

The discussion particularly focused on these questions, and experts drawing from their experiences from, *inter alia*, Bosnia and Herzegovina, Kenya and Sierra Leone provided international perspectives on these larger questions. While reconciliation is often articulated and portrayed as a desirable outcome of transitional peace processes, its inclusion into the mandate of institutions and mechanisms as an officially sanctioned goal is often portrayed as less desirable. Reconciliation may often be perceived as an overly ambitious goal which ultimately sets institutions up to fail; institutions, which most likely, will already encompass inclusive mandates from truth-telling to institutional reform, investigating crimes for future prosecutions, or even healing. It thus follows that reconciliation is often not included as a mandated goal, particularly given the time constraints under which many of these bodies operate, together with the fact that reconciliation is an individual and societal process, which cannot be forced by virtue of any official mandate. It may indeed be feared that failure to achieve reconciliation, as part of an officially sanctioned mandate, may tarnish other more positive aspects of an institution's work in relation to other, perhaps more achievable, goals and consequently reduce the public's trust and confidence in the relevant institution. During the discussion sequencing was proposed to be a preferable compromise to return to reconciliation once other measures, such as structural reform and measures of justice, are in place, so that reconciliation can be pursued in a manner in line with the Nuremberg Declaration.

Another question raised is whether, or what degree of, reconciliation is in fact necessary for a society to move forward. Would measures of acceptance or tolerance be sufficient for this to happen instead? In Bosnia and Herzegovina, for instance, following the Dayton Peace Agreement, many ex-combatants returned to their homes, which often provoked further attacks against them. However, over time, these attacks on returnees became more infrequent and have almost ceased in the present day. This in and of itself may be perceived as a degree of tolerance for the sake of co-existence; is it thus necessary to impose reconciliation on top of this, or would a peace-building dialogue be more effective?

There is also contestation and debate as to whether the term 'reconciliation' itself is appropriate in the transitional justice discourse. Related processes such as democratization, inclusion and participation are pinpointed in order to decrease levels of confusion or deception associated with reconciliation. This stems from the perception that reconciliation may insinuate a return to relations prior to the conflict, and does not signal a process by way of which society rather moves forward and changes its perception from that, which had created divisions and grievances amongst members of the same community in the first place.

The circumstances under which peace agreements are concluded also may contribute to the chance of success of the subsequent peace and justice processes. Agreements accompanied by underlying political difficulties and unbalanced compromise directly affect the agenda of how reconciliation is generated. For instance, should a peace agreement fail, any reconciliation agenda may also fail alongside it. On the other hand, should it succeed and institutions are created to progress this agenda, reconciliation becomes an official project, which creates further problems. It is thus better to strive for justice mechanisms that are created organically.

Much is left to be systematically studied in relation to reconciliation. More research is needed into the integrity of any reconciliation process, and whether reconciliation has in fact occurred at a community or individual level, and not just at a state level. The complexity of reconciliation opens the door for many additional underexplored themes, such as: the importance of timing; the frequency of situations that complicate reconciliation dichotomies, such as the use of child soldiers; the increased resistance towards reconciliation from certain victims, such as those of sexual violence; and the potential harm that may be created from linking different types of processes together, either by requiring transitional justice to be part of a peace agreement, or by linking the results of truth commissions to reconciliation.

Key questions that remain for further research are:

1. How can reconciliation be measured and assessed empirically?
2. If reconciliation is not *per se* mandated as a primary goal, is it still effective?
3. How can reconciliation create more synergies with other transitional processes?



Adding context to these points with case studies and lessons learned, three experts in the field focused on whether truth contributes to reconciliation, whether reconciliation should be part of the disarmament, demobilization and reintegration (DDR) process and what lessons can we already assemble in relation to peace building. Covering lessons from Kenya, Ms. Murungi pointed out that truth coupled with justice might allow for better contribution to reconciliation. Regarding the DDR process, Ms. Smith, sourcing particularly from her experience in Sierra Leone, noted that it is impossible to force people to reconcile and it is definitely impossible to achieve reconciliation in just a given particular time frame. Regarding Bosnia and Herzegovina, Ms. Šarić pointed out several lessons including, *inter alia*, the need for a stronger link between trials addressing the atrocities committed during the conflict and reconciliation. She also warns of the lack of national reconciliation spirit in divided societies that can damage the reconciliation efforts, and the need to think ahead when incorporating donor-led reconciliation initiatives to ensure long-term functioning. Reconciliation is, in the end, a long-term process that merely may begin with the signing of a peace agreement or cessation of hostilities.

Can truth and justice contribute to reconciliation?

Betty Murungi

While it may be possible for truth to play a role in reconciliation, coupling both truth and justice allows for better contribution to reconciliation at both an individual and community level. The legislation establishing the Kenyan Truth, Justice and Reconciliation Commission (TJRC) importantly included the notion of justice in the mandate of the Commission. This followed long deliberations during the elaboration of the legislation.

At the very outset, the commissioners recognized that reconciliation was a process and recommended that the project of reconciliation be addressed by several other bodies already in existence and also by ensuring that institutional reforms are undertaken in relation to the many institutions that had been found complicit in abetting the violations that had taken place in Kenya over the period of the commission's temporal mandate. However, five critical issues come to mind as one contemplates the more complex subject of the role of truth in reconciliation.

Firstly, the manner, in which truth is generated must be considered. Is the truth arrived at through officially sanctioned bodies such as truth commissions? Or is it arrived at through the newly, very popular method of national dialogue processes, also officially sanctioned and very often elite driven? A further route taken to generating truth is via community and traditional processes. Once again, these traditional processes are increasingly officially sanctioned, whereby states appoint traditional leaders who lead the community dialogue processes. The outcome of the truth telling process might often be semi-authentic and officially sanctioned truths. Without getting into very detailed definitions about the type of truths – especially in this era of mass atrocities – one cannot escape the fact that the version of truth necessarily influences the trajectory of the reconciliation that is achieved, if at all. There are good examples from South Africa and Rwanda of the nature of reconciliation that occurred at different levels; whether it be racial gender, or among different ethnic communities.

The second issue to consider is the legitimacy of the truth telling and reconciliation processes. The Nuremberg Declaration recognizes that peace and stability are more likely to prevail when causes of conflict are addressed in a manner that the affected societies perceive as legitimate, non-discriminatory and just, and when societies are able to deal honestly with their past. Many of these processes often do not fulfill all of these conditions – for instance, women are often excluded, certain victims of certain offences are excluded, and victims of sexual violence in particular are not provided with the necessary opportunities to participate because of structural deficiencies or lack of necessary expertise that would not just permit victims of certain atrocity crimes to come forward and speak their truths but also recognize the full extent of such violations.

The third issue, and this is where justice is implicated, is that truth must lead to accountability. For 'truth' in context of violations cannot be an end in itself. It is a right that victims are entitled to, serves many purposes but one of the most important is that it must contribute to accountability before it can lead to reconciliation. The notion that truth leads to justice and is therefore able to contribute to reconciliation has been the

most problematic to achieve, as in many cases the process is cut short much too early. For instance, in the recent past as in the case of the Kenyan TJRC, no accountability followed the truth telling process. However, where the perpetrator was identified as an official body – once again using the example of Kenya where the judiciary was one of the institutions that was found to be complicit in violations – institutional reforms took place in parallel to the truth-telling processes, with the institutional restructuring thus ensuring that the judiciary’s reform led to some measure of justice in terms of that particular institution.

The fourth issue we must consider is the typology and nature of the conflict. Different truths will be told in relation to the atrocities occurring in inter-state and inter-communal conflicts than say in contexts of a repressive authoritarian state. In what kind of context are these truth-telling bodies being established? Do conditions exist that would permit truth-telling in safety? In most cases, these official truth-telling bodies are mandated by peace agreements in contexts of ongoing conflict raising issues around witness security and related dilemmas.

Finally, reconciliation as a state-building goal must be considered. This is particularly dangerous when truth commissions or truth-telling processes are themselves being utilized by states to shift the focus from truth to justice to truth to reconciliation. In such situations, reconciliation becomes the ultimate goal of all the transitional justice processes, resulting in the unfortunate developments of encouraging continued impunity, allowing victims to become increasingly cynical and making real reconciliation – whether between individuals or communities or at a state-level – almost impossible to achieve.

Should reconciliation always be a goal of disarmament, demobilization and reintegration?

Alison Smith

To answer this question, it is important to bear in mind how disarmament, demobilization and reintegration (DDR) has evolved over the years. Broadly speaking, there have been three generations of DDR since it first became formalized in the 1960s. The first generation is what might be termed as more “traditional” DDR. It generally took place in the context of a well defined peace agreement, with well-defined parties to the conflict, with a quite formulaic process and phases of “D”, “D” and “R”, generally going in that order. In this first generation, the focus was on combatants, namely removing them from armed groups, taking away their weapons and reintegrating them into post-conflict society. The second generation of DDR was more complicated in terms of the context of the conflict. DDR was occurring during ongoing conflicts, was not necessarily happening in the context of peace agreements, the parties to the conflict were less defined and it was harder to distinguish in general terms between combatants and non-combatants. This generation of DDR saw a shift of focus away from combatants towards communities.

DDR has broadened further in the third generation. The context of more modern-day conflicts has become even more complicated. DDR does not necessarily proceed according to the well-defined formula seen in the previous generations. It is still informed by DDR principles, especially those developed by the UN, but often DDR will be negotiated “from scratch” with the fighting parties. Furthermore, the scope of what DDR should achieve or contribute to has broadened. It is no longer just about disarmament, demobilization and reintegration, but now often also includes elements of transitional justice, security sector reform, economic development and a range of other issues.

This makes modern-day DDR quite complicated and the overload of expectations on different parts of post-conflict reconstruction is challenging. In some ways, this is self-inflicted as the need to broaden matters has often been advocated, as has the need to look at different elements and factors and for them to be reflected in the totality of the package to achieve reconstruction and peace in a post-conflict setting. The problem is that institutions and processes whose mandate is linked to post conflict reconstruction are struggling under the weight of these broader mandates. The situation may need to be simplified and distinguish between issues that are mandated to a particular element of post-conflict reconstruction and the effect that different



elements can have on issues that are not part of their formal mandate. For example, one could argue that DDR should not be mandated to do transitional justice, since DDR itself is a large and complicated process, but nevertheless the effect DDR has on transitional justice, and vice versa, must be reviewed.

This leads to the current context and possible lessons learned, particularly in relation to extremist groups. One of the main challenges is that of perception. It is well-known who extremist groups like ISIS or Boko Haram are, how bad they are, the terrible crimes they commit and the fear that they create. Nobody really wants former ISIS members living in their backyard, much like nobody really wanted the Revolutionary United Front living in their backyard. An extreme example of this is the case of 44 Tunisian children somehow associated with ISIS who are currently residing in a Libyan prison. These children are not combatants; some are only three years old, they have only known this prison in their short lives. But the Tunisian authorities are unable to get them back because every time they get close to agreement with the Libyan authorities, the Tunisian public says they do not want the children back because they are associated with ISIS.

Another challenge is the counter terrorism framework, which will continue to present increasing problems, not least because governments are required to prevent and punish people, for example, for their membership in terrorist groups. This is a particular problem when it comes to children: whether captured in Mosul, or released by Boko Haram, they do not go through DDR, but are put into administrative detention, which is often indefinite. For some reason, it is forgotten that they are children, that they have rights and that there is a DDR framework. It is also forgotten that there is applicable international humanitarian law and that action must be taken in the best interests of the child. This will become increasingly challenging as the number of children in this situation continues to grow. Their reintegration will be problematic, even if they are ever released from administrative detention. Within that kind of framework and the almost overwhelming challenges, expecting reconciliation to be a goal of any DDR or release program would overload it to the extent that it would be extremely difficult for that program to reach its primary goal.

Should reconciliation be a goal of transitional justice? It is increasingly tempting to think it should not be a mandated goal. It is impossible to force people to reconcile. If reconciliation is a goal of a transitional justice institution, it seems set up to fail, since there is no control over whether it is achieved or not. Furthermore, transitional justice institutions usually have numerous other goals as well – such as truth-telling, accountability, and participation of victims. If that institution has a goal it cannot and does not reach, what happens to the good work the institution does to reach other goals? And does the failure tarnish the institution's good works and positive impact? This should be distinguished from the inclusion of transitional justice or accountability in peace agreements, since this goes to the question of whether a peace agreement would be accepted by a population, which is critical for its success. In Syria, for example, No Peace Without Justice's Syrian partners simply will not accept a peace agreement that does not include accountability, so it would be doomed to fail. There may not be the need for too much prescriptive detail, but peace agreements should at least include a commitment to accountability and transitional justice, or they risk failing to achieve the goal of sustainable peace.

An additional question about reconciliation, which may help guide thinking on whether and how to include it in a post-conflict reconstruction process, is whether "reconciliation" is a real need for a society to make a successful transition from war to peace or from political violence to stability. Maybe acceptance or tolerance is enough to facilitate the transition, at least in the short term, since by its nature, reconciliation is a long-term process. This highlights the problem with including reconciliation as a goal of an institution or process, including DDR, that by its nature is time limited, be it six months, two years or four years: reconciliation cannot be achieved within that limited time. Rather, what can be done is to take necessary steps to create conditions within which people can reconcile over the longer-term, which may end up being a generational issue.

This longer-term perspective is equally important for DDR. Reintegration, especially of children, is often one of the elements that is less considered in terms of preparing ex-combatants and society for their return. Nonetheless, there seems to be an expectation that it can be done in six months, which is not possible, especially when considering groups like ISIS or Boko Haram. Donors need to start focusing on this as a long-term process supported by adequate sustained funding over a sufficient period of time to achieve its goals.

What lessons can be learned from the Western Balkans in relation to reconciliation and when looking at rebuilding relationships?

Velma Šarić²⁵

Reconciliation, as the rebuilding of relations broken from violent pasts, has seen in Bosnia-Herzegovina's post-conflict reconstruction a series of challenges arising from various fronts. The process of state-building established via the Dayton agreement, cements ethnic divisions within the country's political system, running against the spirit of reconciliation. Also, as reconciliation has been promoted as an outcome of transitional justice, the fact that such process originated from external intervention has brought concerns about the legitimacy in the goals and work under the name of reconciliation. Added to this, processes for dealing with past truths, as requirements for reconciliation, have encountered political and social challenges that obstruct the establishment of a truth commission in the country. Also, as reconciliation has been the banner of civil society organizations, their dependency on foreign agendas and Western frameworks has made this discourse a site for socio-political contestation.

1. Ethno-politics limiting reconciliation

The process of state-building which sought to transform Bosnia-Herzegovina into a liberal state, was founded on the premise that democratic governance would manage the country's ethnic diversity. Via the Dayton agreement, state-building relied on federalization and internal territorial partition as mechanisms for managing ethnic conflict. This led to the recognition of three constitutive peoples as well as the implementation of human rights standards, right to return for refugees and internally displaced persons.

Ethnicity was institutionalized via a tri-ethnic rotation of the presidency as well as an ethnic-based federalism with veto powers, which contributed to reinforcing divisions within society. Moreover, political power did not remain with the central state, power-sharing mechanisms lacked societal trust, reinforcing ethno-politics and keeping the state in deadlock.²⁶ The potential for reconciliation was obstructed by political and territorial divisions and unresolved conflicts regarding internal state reconstruction: some favoring future reintegration, others pushing for decentralization, autonomy and secession.²⁷ Politics encouraging mistrust and fear among ethno-communal groups has hampered socio-political integration.²⁸ The state has been weakened by ethno-politics and nationalist strategies, affecting development, evident in high levels of unemployment and low foreign investment, derived from reservations regarding stability.²⁹

2. Justice and reconciliation as 'foreign discourses'

Justice and reconciliation are influenced by the ICTY. The core belief was that prosecution and accountability individualize guilt, end collective blaming, and permit reconciliation.³⁰ However, this claim has failed to recognize gaps between international justice and the experience of local communities, signaling weak linkages between trials and reconciliation. Trials often divide small multi-ethnic communities, causing suspicion and fear.³¹

25 This article was written in collaboration with Mr. Louis Monroy-Santander. Mr. Monroy-Santander holds a fellowship position at the Post-Conflict Research Center and currently works at the University of Durham in the United Kingdom, teaching postgraduate students at the Durham Global Security Institute.

26 David Hoogenbom and Stephanie Vieille, "Rebuilding social fabric in failed states: examining transitional justice in Bosnia", in *Human Rights Review*, 2010, vol. 11, no. 2, p. 9.

27 Anders Stefanson, "Coffee after cleansing? Co-existence, co-operation and communication in post-conflict Bosnia and Herzegovina", in *Focaal: European journal of anthropology*, 2010, vol. 57, p. 64.

28 Carlos Yordán, "Society building in Bosnia: A critique of post-Dayton peacebuilding efforts", in *Seton Hall Journal of Diplomacy and International Relations*, 2003, vol. 4, no. 2, p. 64.

29 Florian Bieber, "After Dayton, Dayton? The evolution of an unpopular peace", in *Ethnopolitics*, 2005, vol. 5, no. 1, p. 17.

30 Johanna Mannergen Selimović, "Perpetrators and victims: local responses to the International Criminal Tribunal for the former Yugoslavia", in *Focaal European journal of anthropology*, 2010, vol. 57, p. 52.

31 Marita Eastmond, "Reconciliation, reconstruction, and everyday life in war-torn societies", in *Focaal European journal of anthropology*, 2010, vol. 57, p. 8.



Such linkages become tenuous in genocide cases where the trials have missed dealing with the broader responsibilities of bystanders, identifying individuals with genocidal intent or bringing closure to victims.³² The ICTY's view of a universal justice jurisdiction (based on the idea that a Western concept of justice is applicable to all mankind), disrupted delicate but culturally relevant domestic peace and reconciliation processes.³³ It was also problematic how war crime accountability efforts were hijacked by political elites for their own nationalistic goals, thus creating skepticism against the ICTY.³⁴ As the Tribunal's discourse addressed guilt and innocence, transitional justice was reinterpreted within dominant ethno-political narratives, denouncing ethnic bias. Moreover, perceptions of lenient sentences were also problematic and did not correspond to the victims' understanding of punishment. The ICTY's distance from the post-conflict zone, and excessive international influence in judicial processes established a legitimacy gap.³⁵

War crimes chambers have been created, yet their work faces prejudice and is not always supported by Balkan governments and societies. As suspects have moved between countries, a lack of extradition agreements has also complicated the deliverance of justice. Furthermore, an excessive retributive focus has avoided restorative elements for trauma-healing and relationship-building.³⁶ Transitional justice's retributive spirit has overshadowed its socio-economic potential: that is, socio-economic justice as a remedy for crimes and economic and material compensation as a tool for healing and empowerment.³⁷

3. Fact-finding and truth-telling difficulties

Ethno-politics, reliant on hate speech and genocide denial, has negatively influenced truth-telling and fact-finding. A lack of a national reconciliation spirit has left ordinary citizens little room to debate past truths, thus leaving collective silence and keeping a respectful distance as strategies for peaceful coexistence in everyday life.³⁸

Accordingly, approaching 'truths' has been a task left to civil society, which has been marked by a lack of political support from authorities. Activists work isolated, with the risk of being misunderstood by wider society, and become targets of verbal attacks by nationalist politicians.³⁹ Non-judicial truth-telling mechanisms originating from international organizations and donors, such as the US Institute for Peace's attempt at a truth initiative in 1997, have lacked broad public support and have been perceived as an elitist endeavor. In 2003, the Srebrenica Commission published historical findings regarding killings, missing persons and mass graves, and yet this failed to impact the political discourse aimed at negating the genocide.⁴⁰

Illustrative of the difficulties faced by truth and reconciliation initiatives has been the experience of RECOM, a regional fact-finding mechanism, which began as a potentially unifying initiative for Balkan civil society. It evolved from a consultation process aimed towards establishing a coalition, and developed from the drafting of its statute and garnering support from donors and international organizations, including the ICTY. However, RECOM has been internally criticized for issues of transparency, with divided views on the definition and inclusion of victims, the space for establishing official versions of the past and concerns

32 Elin Skaar, "Reconciliation in a transitional perspective", in *Transitional Justice Review*, 2013, vol. 1, art. 10, p. 72.

33 Roland Kostić, "Transitional justice and reconciliation in Bosnia-Herzegovina: Whose memories, whose justice?" in *Sociologija*, 2012, vol. 54, no. 4, p. 651.

34 Eastmond, 2010, p. 8, see supra note 31.

35 Denisa Kostovicova, "A deliberative and participatory aspect of transitional justice", in Svetlana Slapšak and Nataša Kandić (eds.), *Transitional justice and reconciliation in Post-Yugoslav countries: voices of institutions, religious communities, activists, academics, culture and victims*, Coalition for RECOM, 2014, p. 29.

36 Martina Fisher, "Struggling with the legacy of war. Croatia, Serbia and Bosnia-Herzegovina 1995-2015", in Martina Fischer and Olivera Simi (eds.), *Transitional justice and reconciliation: lessons from the Balkans*, Routledge, New York, 2016, p. 11.

37 Daniela Lai, "Transitional justice and its discontents. Socioeconomic justice in BiH and the limits of international intervention", in *Journal of Intervention and Statebuilding*, 2016, vol. 10, issue 3, p. 364.

38 Stefanson, 2010, p. 71, see supra note 27.

39 Fischer, 2016, p. 46, see supra note 36.

40 Ukrainian-Helsinki Human Rights Union, "Transitional justice in Bosnia and Herzegovina: challenges and opportunities", available at <https://helsinki.org.ua/en/articles/transitional-justice-in-bosnia-and-herzegovina-challenges-and-opportunities//>, last accessed at 14 January 2018.

about its mandate's scope.⁴¹ RECOM's main challenge is engagement with Balkan politicians, where securing concrete political support has turned into a long and difficult process.⁴² Despite successful campaigning for the collection of signatures in its support – signifying its importance for social engagement – to date the RECOM commission has still not been established.

4. Reconciliation work: civil society's obstacles

Civil society associations, in the form of Non-Governmental Organizations (NGOs), have led the promotion of reconciliation initiatives. NGOs have implemented projects for dealing with the past, trauma-healing, peace education, victims' and veteran support, human rights advocacy and gender-related work. Yet, the sector is characterized by stagnation, a state of constant survival and crisis.

The sector suffers from dependency on aid from Western donors who aim to strengthen civil society and establish non-nationalist alternatives to the dominant ethno-political organizations present in the region. However, civil society is weakened through this dependency trap marked by Western assessments on local needs, changes in donor priorities, lack of quality controls and, NGO and citizen disconnection. A credibility gap, inherited from grounded perceptions of international intervention, has also affected NGOs.⁴³ As the sustainability crisis deepens, some organizations have changed their vision in order to adapt to donor-funding trends. The encouragement of donors for NGOs to view themselves as technical, apolitical and distinct from the dominant nationalist political sphere has adversely affected the democratization potential of civil society's development strategies.⁴⁴

41 Fischer, 2016, p. 46, see supra note 36.

42 Nataša Kandi, "Recom is the cornerstone of the attitude to the past", in Svetlana Slapšak and Nataša Kandić (eds.), *Transitional justice and reconciliation in Post-Yugoslav countries: voices of institutions, religious communities, activists, academics, culture and victims*, Coalition for RECOM, 2014, p. 9.

43 Florian Bieber, "Aid dependency in Bosnian politics and civil society: failures and successes of postwar peacebuilding in Bosnia-Herzegovina", in *Croatian International Relations Review*, 2002, Vol.8, No.26/27, p. 27.

44 Adam Fagan, "Civil society in Bosnia ten years after Dayton", in *International Peacekeeping*, 2005, vol. 12, issue 3, p. 408.



Panel V

Development in the Service of Transitional Justice

Panel V focused on development in the service of transnational justice in terms of theory and practice, relevance and potential cross-fertilization. There has been increased sensibility and attention given to addressing the root causes of conflict, which includes addressing social and economic grievances, as well as supporting institutional reform processes. This, in turn, has allowed some space for socio-economic development, allowing the nexus of justice and development to come into sharper relief. Nonetheless, in situations where there is support for accountability for past atrocities but the state is failing or where alleged perpetrators still detain powers, development programs advancing a justice agenda might have a higher potential to generate a negative shift in the internal political dynamics. Donors may therefore choose to support those programs where impact is more easily measurable and where negative impact appears avoidable. As such, understanding various implications might help advance the investment that can help strengthen societies after conflict.

The last ten years have witnessed major changes in connecting transitional justice with development needs. It has also witnessed trends at a policy level that could contribute to more effective synergies between the distinct, yet complementary, transitional justice and development cooperation programs. The World Bank's World Development Report entitled "Conflict, Security and Development" (World Bank, 2011) linked transitional justice to security and development for the first time. The "New Deal for Engagement in Fragile States" (G7+ Group, 2011) set out in its five peace-building and state-building objectives that justice and good governance are paramount to traditional aid development goals. In an unprecedented approach, the New Deal placed the onus on donors to engage with the obstacles to pursuing these goals and the risks associated with working in unstable and fragile contexts. Moreover, from 2011, the ICTJ, the UN Development Program, the ICC focal points for Complementarity, and Denmark, South Africa and Sweden held a series of high level meetings on "Supporting Complementarity at the National Level", allowing international and national justice actors and development practitioners to discuss ways to strengthen cooperation between development and rule of law actors in order to support domestic systems investigating serious crimes. In 2015, the adoption of the Sustainable Development Goals (SDGs) helped to solidify a framework for understanding and advocating

the value and fit of transitional justice within broader international development policies. In particular, SDG 16 incorporates peace and justice as an explicit and related development goal, emphasizing the importance of the rule of law, access to justice and inclusive institutions.

The panel focused on development actors and agencies and looked into how they can integrate support for judicial mechanisms and other transitional justice programs to their agendas, what factors affect their decision to engage in transitional justice processes and how they determine which specific initiatives will be supported.

Linking transitional justice to development also calls for an integrated approach at the state level. The Federal Government of Germany's Guidelines on Preventing Crises, Resolving Conflicts, Building Peace (Germany, 2017) were mentioned in discussion as providing a positive example of this. The interaction of the Ministry of Development and Cooperation, the Ministry of Foreign Affairs and the Ministry of Defense reveals the interconnectedness of development stabilization and peace-building, at least at a theoretical level, though practically further issues arise. Looking at peace as one of the central pillars to the 2030 Agenda, it has been stressed that the principle of universality has provided for new grounds of cooperation, as it postulates shared responsibility of all states and actors for a worldwide transformation towards greater sustainability. However, universality can also be perceived as a challenge, particularly when global indicators can be viewed negatively by fragile states who often find themselves at the bottom end of statistics. Global indicators may not always be developed with sufficient sensitivity to local peculiarities, and thus, in order to find and forge new partnerships, it may be more effective to provide space for fragile states to set their own agendas; for example, the New Deal advocated by the G7+ is seen to provide this potential to build mutual trust through allowing indicators for goals to be developed by fragile states themselves.

Consequently, in order to successfully integrate both peace and justice into development agendas, it is essential to contextualize any given situation and provide space for a bottom-up approach. For experts in international criminal law, it is often easy to fall into the trap of assuming that justice for core crimes is a high priority on the agenda of an affected community. While this may be the case for some, an authentic effort to actually ascertain the pressing needs of a community and adapting interventions to respond to these needs may be key towards complementing domestic systems. For example, in post-Gaddafi Libya, it has been argued that for solving the political crisis itself, an understanding of the deeper significance of property rights issues is essential. Before peace and prosperity can have a chance of succeeding in Libya, the country's citizens will have to resolve the longstanding historical grievances in a manner, which all perceive to be just.

Development in fragile states has also been hampered through natural resource extraction and exploitation. An increasing number of industries that contribute to the economy of the state may be accompanied by allegations of serious human rights violations whereby multinational corporations – with the support of the state – have for example displaced populations without adequate and prompt compensation. These allegations and other mistreatments have intensified inter-community tensions and created emerging conflicts, raising significant challenges of aiding and abetting in relation to international financial transactions. Furthermore, illicit trade and flow of funds have resulted in estimated \$50-80 billion leaving Africa in a year; a sum far greater than development aid received by the continent, and the expenditure of African states on education or health. Such illicit outflows have been blamed for reducing Africa's tax revenues, undermining trade and investment and worsening poverty. Associated problems identified have been a lack of cooperation from developed countries in sharing information, a lack of cooperation in repatriating funds back into the continent and a lack of cooperation in loosening financial secrecy measures to effectively trace the key operatives in the illicit trade. Technological advances, such as block chain, may provide assistance in this field, however, to what extent this development is able to incorporate and address simultaneously transitional justice challenges is yet to be seen.

The key points for further discussions include:

1. Effectively including a bottom up approach in integrating the peace and justice agenda into development programs
2. Ways to build and ensure long lasting mutual trust between developing and developed states
3. Transitional justice agenda adds challenges to the development programs and vice versa



Three expert panelists advanced the ongoing thematic discussions and sketched lessons learned so far. Ms. Wierda voiced concern about the need to revitalize the justice agenda, seeking, *inter alia*, effective measures learned from the past mistakes and advancing new innovative elements in addressing the critical issues. Dr. Mahony sought to identify how objective and perceived discrimination or objectivity in justice processes exaggerate or mitigate grievances related to exclusion of social groups. Finally, Mr. Vammos-Goldman, who was represented by Mr. Samuel Emonet on the day of the conference, provided some suggestions as to which factors should be considered prior to any intervention, and this includes understanding the environment and advancing local ownership, “do not harm” principles, and the need to adhere to international law.

How can development be conceptualized and implemented in the service of transitional justice and what is, if any, the missing piece in the 2007 Nuremberg Declaration on Peace and Justice?

Marieke Wierda

Ten years ago, in 2007, the title of the conference that was held here at the Nuremberg Academy was “Building a Future on Peace and Justice.” The more tentative title of “The Fight against Impunity at a Crossroads” this time is a reflection of the current global context. More conflicts are raging now than ever before since the end of the Cold War. In addition, the world is faced with increasing cross-border challenges including mass migration, climate change and terrorism. The international donor community is constantly torn by large-scale and competing demands. For instance, humanitarian needs are at an unprecedented scale, with 65 million persons displaced, out of which 20 million are refugees. Man-made famines threaten in four major conflicts: Yemen, South Sudan, Somalia and Nigeria.

At the same time, many donor countries face a restricting political climate, with less public support for development cooperation, less funds allocated from national budgets and greater alignment of development cooperation spending with national interests. There is an increasing call for donors to demonstrate concrete results for their own constituencies.⁴⁵ Donor countries progressively display few ambitions to engage in large-scale state-building projects, as those attempted in Afghanistan after 2001 or Iraq after 2003. Increasingly, donors are pursuing a narrower agenda of “stabilization” in countries such as Iraq after ISIL, Libya and Yemen.⁴⁶ It is not clear how transitional justice, which is about addressing the past in order to build a better future, fits with this narrower approach.

Within all of this, the rule of law is facing many challenges. The international legal order is under attack. International humanitarian law is widely disrespected in current conflicts such as Syria, Yemen, Libya, South Sudan and elsewhere. The ICC has also come under criticism.

Furthermore, in transitional justice, a general skepticism has crept into the minds of many donors, who are asking whether it actually works, and who are demanding more empirical evidence.⁴⁷ Also, what is the connection between transitional justice and other policy priorities, such as tackling root causes of conflict like socio-economic inequalities or corruption, conflict prevention, the SDGs, or even countering violent extremism? At the same time, there is a clear relation between lack of development and peace and justice: the Overseas Development Institute has estimated that by 2025, four out of five persons living in poverty will reside in conflict-affected states.⁴⁸

45 Ministry of Foreign Affairs, The Netherlands, “Dutch Development Results 2016 in Perspective”, available at <https://www.dutchdevelopmentresults.nl/>, last accessed at 20 April 2018.

46 See for instance, “Stability: International Journal for Security and Development” available at <https://www.stabilityjournal.org/>, last accessed at 19 April 2018.

47 See for instance, Colleen Duggan, “‘Show me your impact’: Challenges and Prospects for Evaluating Transitional Justice”, in International Development Research Center Evaluation Unit, Paper prepared for the Annual Meeting of the Canadian Political Science Association, 2009.

48 Homi Kharas and Andrew Rogerson, Overseas Development Institute: Horizon 2025, “Creative Destruction in the Aid Agency”, available at <https://www.odi.org/sites/odi.org.uk/files/odi-assets/publications-opinion-files/7723.pdf>, last accessed at 19 April 2018.

This points to a need to revitalize the justice agenda (whether international or national). Relevant here are two strategies that are increasingly accepted in the realm of international development. First, lessons must be learned from interventions, adapted accordingly in order to increase their effectiveness. Second, there must be room for innovation and for new concepts and new models that help to address large-scale problems, in spite of limited resources.

In the field of development cooperation, there is increased pressure to measure impact, and to learn and adapt in order to increase the effectiveness of interventions. This requires clarity on the assumptions that are applied in interventions. These underlying assumptions can be described as a “theory of change”, which should be constantly tested and adapted if the approaches are ineffective or the assumptions are not borne out in practice. In relation to the Dutch security and rule of law policy, this theory of change is based on the perspective of the citizen, and the need to restore the social contract between citizen and state in order to restore “legitimate stability”.⁴⁹

It is also important to understand the political economy of the context, in which one operates. The barriers to progress in the field of rule of law in conflict and post-conflict states are often political rather than technical. In many countries, corrupt elites use state institutions not to serve citizens, but rather to serve themselves. For example, the self-immolation of Tunisian vegetable-seller, Mohamed Bouazizi, which served as a catalyst for the Arab Spring, was in response to police extortion and repression of the population by corrupt elites.

The impaired social contract that results in situations in countries such as Afghanistan and Somalia cannot just be fixed by the passage of new laws, or by building courtrooms or training judges and lawyers. This is sometimes referred to as the “first generation” of rule of law interventions, which focuses on the “hardware” of the justice system. Instead, in many societies there is a need for a more fundamental shift in the rule of law culture.⁵⁰ One methodology is to take a problem-solving approach and to find ways to improve the lives of ordinary people. Data is an important aspect of this. What are ordinary people’s justice needs?⁵¹ Which institutions do they trust to resolve their justice problems? How can perceptions be measured? How can ordinary people be empowered, through bottom-up approaches, to access justice to improve their own situations? For instance, where can a woman who is subjected to the frequent crime of domestic violence in Afghanistan, physically go to file her complaint? Is there a special capacity within the police to hear her complaint, and can she go to a shelter? Can she press charges?

There may be some lessons here for the international justice agenda and the ICC. For instance, it may help to identify more clearly the assumptions underlying the ICC. Are there expectations for the ICC to contribute mainly to deterrence or prevention? What about its level of acceptance on the ground? Do perceptions of its work among affected populations matter, and how does this impact victims? If such areas are measured, is there an opportunity to learn and adapt to become more effective? What about efforts on complementarity under the Rome Statute, and developing domestic capacities: do these focus too much on passage of laws and training of judges and lawyers, and too little on the rule of law culture? These areas must be worked on in order to increase the effectiveness of interventions.

Moreover, what is the role of innovation, and devising new methods of working? In the rule of law field, it is being explored how the SDGs, in particular SDG 16 on peace, justice and strong institutions, can help to revitalize the justice agenda. The SDGs are a universal agenda but also allow for local ownership and will bring a renewed political focus on areas such as access to justice. The SDG’s indicators, still limited in scope,

49 See Ministry of Foreign Affairs, The Netherlands, “Department for Stabilization and Humanitarian Aid, Theory of Change”, available at <https://www.government.nl/ministries/ministry-of-foreign-affairs/organisational-structure/policy-theme-departments>, last accessed at 20 April 2018.

See also Pilar Domingo and Deval Desai, Overseas Development Institute, “Experimentalism in International Support to Rule of Law and Justice”, available at <https://www.odi.org/publications/11048-experimentalism-international-support-rule-law-and-justice>, last accessed at 19 April 2018.

50 United States Institute for Peace, “Towards a Rule of Law Culture: Exploring Effective Responses to Justice and Security Challenges”, available at <https://www.usip.org/publications/2015/12/toward-rule-law-culture>, last accessed at 20 April 2018.

51 See The Hague Institute for Innovation of Law, “Innovating Justice on Justice Needs Surveys”, available at <http://www.hiil.org/projects/?servicetypeID=281>, last accessed at 19 April 2018.



emphasize data collection and measurement. The SDGs will require unconventional partnerships to achieve them. To allow for innovation under the SDGs, it is important to reach across disciplines and build new bridges, to collaborate with those who are less likeminded. For instance, the private sector may play an important role, as may technology.

Innovation is flourishing in the humanitarian sector, including the use of data, technology, and innovative financing models. This is because new answers are needed to face the scale of the challenge. This can also be seen in the field of transitional justice, which has had to cope with a challenge of scale. Recent examples include the justice approaches found in the recent Peace Accord in Colombia; the establishment of the IIIM; the new hybrid Special Court set up in CAR; and the Commission against Impunity in Guatemala. These continuous innovations are much needed and must be suited to the context.

The Nuremberg Declaration on Peace and Justice, submitted to the General Assembly in 2008, references promoting development, but it is not treated extensively. Many crucial and long-term issues, including addressing the root causes of conflict and supporting equal access to goods and services, economic resources and opportunities, are mentioned in a cursory manner. If the Declaration could be rewritten, the role of development in promoting peace and justice ought to be given more prominence, along the lines of SDG 16.

We are indeed at a crossroads, but we need to keep building a future on peace and justice. The SDGs demand it. We need to revitalize the justice agenda, pulling together lessons from different silos and fields. We need to keep questioning our assumptions and to innovate. In this way in 2027 we will be able to assess progress in the many situations that seem so daunting today.

Criminal Justice Responses to Violent Conflict

Chris Mahony

After violent conflict, states often adopt responses to conflict's causes and consequences intended to provide redress for victims and prevent repetition. These responses include prosecutions of alleged core international crimes cases.

Democratization of access to law and capacity to enforce it, constitutes a critical component of the interdependence of 'inclusive', 'just', and 'peaceful' societies envisaged by Sustainable Development Goal 16. Inclusive processes demand equality of access to public goods and services, particularly justice processes. The United Nations and the World Bank recently published its joint flagship report on Conflict Prevention.⁵² The report cites grievances based on horizontal inequality as primary drivers of conflict.⁵³ Real or perceived discrimination in application of law to fact, particularly in relation to core international crimes cases, can enable or deepen social group-specific grievances that drive conflict. Inequality of access to information, to participation in the design of justice processes, and to technical capacity in process implementation, foster grievances by undermining confidence amongst social groups that all will be treated equally.⁵⁴

A study conducted to inform the joint United Nations-World Bank report found that only prosecutions of low- and mid-level human rights violators are associated with a 70 per cent decrease in the likelihood of

52 United Nations and World Bank, "Pathways for peace", see supra note 4.

53 Ibid.

54 Chris Mahony, "The Justice Pivot: US International Criminal Law Influence from Outside the Rome Statute." in *Geo. J. Int'l L.*, 2014, vol. 46, p. 1071; Chris Mahony, "International Criminal Justice Case Selection Independence: An ICJ Barometer", in FICHL Policy Brief Series, Torkel Opsahl Academic EPublisher, Brussels, 2016; „A Case Selection Independence Framework for Tracing Historical Interests' Manifestation in International Criminal Justice“, in Morten Bergsmo, CHEAH Wui Ling, SONG Tianying and YI Ping (editors): *Historical Origins of International Criminal Law: Volume 4*, Torkel Opsahl Academic EPublisher, Brussels, 2015, pp. 865-903.

conflict recurrence. Conversely, the study found that prosecutions of high-ranking actors is associated with a 65 per cent increase in the likelihood of conflict recurrence.⁵⁵ The study did not find that amnesties or truth commissions affect conflict recurrence, in either direction.

Trials of high-ranking actors may be more vulnerable to fostering the kind of grievances the Joint United Nations-World Bank report identifies because social groups may perceive the selection of accused as attempted persecution of their social group. Much work remains to provide independent approaches to selection of persons for prosecution as frameworks for assessing the risk that criminal processes exaggerate social group-specific grievances.

The report suggests that elite agreement and pursuit of direct perpetrators and field-based actors, may be more closely associated with conflict non-recurrence. Developing domestic capacity to pursue these approaches is therefore important.

The Centre for International Law Research and Policy, in collaboration with the International Nuremberg Principles Academy and with support from the Norwegian government, has sought to bridge inequalities of information and technical capacity to prosecute crimes through a tool called Lexsitus.

Lexsitus integrates, visually and functionally, access to lectures, commentary, case law, preparatory works, and digests. It does so by offering access to the following resources, at the level of each article and main provision of the Rome Statute of the International Criminal Court (ICC). The service includes 234 subtitled lectures by a Lexsitus Faculty of 50 experts from all regions, with transcripts of every lecture available as full-text searchable PDF-files. An easily navigable commentary made up of 915 separate comments by 58 lawyers, has legal sources hyperlinked and immediately accessible. Lexsitus will soon also cover the ICC Rules of Procedure and Evidence and the ICC Regulations. The preparatory works from the negotiations of the ICC Statute are also immediately available, sorted under the relevant articles of the ICC Statute. Two digests offer excerpts from several hundred international judgments on the elements of ICC crimes. There are more than 860 separate pages for individual elements of crimes, in each of the two digests. The mental elements are also included.

By enhancing equality of access to law, and participation in its development and implementation, Lexsitus inclusively builds capacity to meet complementarity in advance of Sustainable Development Goal 16.

When providing expert/specialist assistance to justice mechanisms, what factors must be considered prior to any intervention and what risks must be borne in mind going forward?

Andras Vamos-Goldman⁵⁶

Routes to accountability for serious crimes such as genocide, war crimes, and crimes against humanity are nearly always the result of a group of actors: from those funding mechanisms to those responsible for implementing the investigations. These processes increasingly rely on a variety of donors, governments, civil society practitioners and even the private sector. When any of these consider providing or supporting specialized assistance to justice mechanisms, it is of paramount importance that at a minimum, some specific factors are considered, in order to mitigate a variety of risks. These factors fall within three broad areas described below. They are: adhering to the “do no harm” principle; understanding and maximizing the environment; and maintaining the international justice context.

⁵⁵ Payne, L., A. Reiter, C. Mahony, and L. Bernal-Bermudez. 2017, “Conflict Prevention and Guarantees of Non-Recurrence.” Background paper for United Nations–World Bank Flagship Study, Pathways for Peace: Inclusive Approaches to Preventing Violent Conflict, World Bank, Washington, DC.

⁵⁶ Justice Rapid Response was represented by Samuel Emonet, who was standing in for Andras Vamos-Goldman at the Nuremberg Forum 2017.



Why is it particularly important that these questions are revisited now? It is because of significant paradigm shifts in the field of international justice. Since the coming into force of the Rome Statute of the ICC in 2002, there seems to have been a slowing-down in the enthusiasm for other international accountability mechanisms, such as tribunals and hybrid courts. To those involved in international criminal justice at the time of the establishment of the ICC, this was somewhat anticipated. It was fueled by the expectation that the ICC would assume much of these responsibilities.

But some important factors intervened. The ICC did not achieve as global a reach as hoped for (especially in some of the most troubled parts of the world). Then there was the understandably realistic prosecutorial strategy that focuses the attention of the ICC on those bearing the greatest responsibility. Nor have national level prosecutions been sufficiently numerous, even when there has been the required jurisdictional nexus. This has meant that without the previous decade's energetic establishment of accountability mechanisms, the "global impunity gap" – between the few places where accountability is a possibility and the many where it is an aspiration – has grown, not shrunk.

At the same time, there has been an exponential upsurge in documentation, fact-finding, and investigations in most conflicts. This is especially true in the case of local groups, but also by outside or international organizations. While there has always been documentation of atrocity crimes by a variety of actors, new technologies have made this easier (and introduced new risks and complications). Sadly, in many parts of the world, the lack of accountability opportunities has left "documentation" as the only outlet for peoples' need to see some credible justice for mass atrocities, as a necessary condition for lasting peace.

This new reality has also created a situation where most of such widespread information collection efforts now precede the creation of accountability mechanisms – the very mechanisms that normally determine the applicable rules of procedure and evidence that guide the work of documenters. In the absence of agreed international standards, this begs the question: how can those documenting core international crimes ensure their actions do not cross fundamental lines that would render the fruits of their efforts inadmissible? Or cause harm to the very people that the accountability is to serve?

The best answer is that it comes down to the judgement of those collecting or accepting information. The more expert, professional and experienced the people involved, the more likely that they will ask the relevant questions. The more they understand working under international human rights and criminal justice norms, the more likely they will be able to balance the probative value of information against the potential cost of harming witnesses and survivors.

Thus, because it is now vital that there be a variety of professional expertise involved in the documentation of international crimes, it is increasingly important that all actors involved in international justice, from implementers to donors, get the factors right, and mitigate the risks, in their deployment. In the experience of Justice Rapid Response, after deploying over 200 experts on 140 investigative and related missions over the last eight years, to every region of the world, the following categories of considerations are paramount for most professionals working in this field:

Adherence to the "Do No Harm Principle"

This includes experts being able to carry out their work with sufficient safety and security that mitigates risks to themselves, as well as the people and organizations they come in contact with for information. There is an emphasis on the long-term safety and security of witnesses and survivors, where the probative value of any information is weighed up against the risks involved in collecting it. There is also a "do no harm" element in relation to certain kinds of information that serves as potential evidence. One example is the question of when and how to attempt to investigate a mass grave site. Without sufficient time and resources for proper exhumation, cataloguing, storage and analysis, the more preferable solution for professionals would be not to disturb it. This however must be balanced in light of the likelihood that non-professionals may decide not to wait (sometimes for positive reasons, like families attempting to learn the fate of loved ones or retrieve their remains; or negative reasons, like those trying to destroy potential evidence).

Understanding and Maximizing the Environment

Providing expertise should not just focus on the present, it must also be a positive factor for the future. The folly of “outside experts” coming in to do a job instead of locals and then leaving has hopefully been left far behind. The consideration of providing expertise must include factors such as ensuring local ownership since that is where responsibility and jurisdiction lie under international law. Building local capacity must also be among the considerations, and this is best achieved through tailored mentoring, to ensure that both accountability and a sustainable knowledge transfer are both achieved. Manuals that end up collecting dust after short, “off the shelf” training do not achieve either capacity building or accountability goals. Understanding and maximizing the environment also includes coordination with other actors – national, international, civil society and private sector – to avoid duplication.

Maintaining the International Justice Context

Overall, this means, keeping in sight the effect of the specific assistance on the broader goal of advancing international criminal justice. It includes elements such as ensuring that the work is being done in accordance with international law. It also means ensuring that it is for a positive purpose; for example, to find out what happened and who may be responsible within a set of geographic and temporal coordinates. By contrast it means avoiding “victor’s justice” scenarios, or investigations that are designed to whitewash one party’s role, or investigating just what one side may have done in a complex conflict. It also includes ensuring that information collected or received is not the result of torture, falsification or insufficient care in observing the “do no harm” principle. Succinctly put: to avoid anything that would be antithetical to, or seriously damage, whichever accountability proceeding that uses the information collected with the assistance of these experts.



Political Impediments to the Fight against Impunity

Bringing alleged perpetrators of international crimes before a court or holding them accountable through other judicial mechanisms is shaped by a complex interplay of law and politics at various levels. At the international level, the prevailing power structures and the politics of the UN, especially the veto powers vended within the Security Council voting system, can cause delays in decision making, and have now often resulted in an impasse. At the national level, various factors may delay or derail accountability, including political self-interest, lack of capacity or willingness to arrest alleged perpetrators, dynamics of denial and vengeance and competing trends of remembering and forgetting.

In addition, over the last ten years, the number and variety of transitional justice mechanisms have increased, and justice-related issues have found their way onto the agenda of an increasing number of civil society organizations, governments and development organizations working in post-conflict settings. At the same time, a trend towards securitization has been observed as well as a penchant to protect one-self from either outside interference or from accountability altogether. Old and new authoritarian leaders are occupying several of the political front benches, and some states have either announced to withdraw their signature from, and some major states have never signed or ratified the Rome Statute. In sum, political fault lines have (re-)emerged within the UN Security Council and regional organizations, and key norms remain contested among different actors.

Against this backdrop, key points were raised during the discussion. It was noted that the international community has an important role in light of universal jurisdiction cases and the provision of capacity building. It was also stressed that there are solutions available to political impediments that could be found. In this sense, “thinking outside the box” is needed to constructively address the arising needs.

The principle of universality, and particularly that of universal jurisdiction, has seen a renewed focus following the recent practice of countries such as Germany and Sweden investigating cases of violence in,

inter alia, Syria, Iraq or Afghanistan. While this may be seen as the ideal situation, in which to reduce the number of cases before international tribunals, obstacles such as operational incapacities and political dynamics often prevent this from becoming a global reality. Moreover, particular care and caution must be taken to avoid losing this fight against impunity on the universal jurisdiction front when faced with criticism such as potential biases.

When speaking of universal jurisdiction, the principle of complementarity under the Rome Statute system deserves attention. Complementarity requires that capacity is built at the national and regional level, including training of judges, prosecutors and lawyers on international criminal law issues, providing specialized methods of investigation and aiding in the understanding of the contexts of international crimes. While it has been suggested that the ICC stretches its mandate in the current geopolitical context to become an actor in providing training, a potential conflict of interest issue was raised. It was suggested that it could be preferable to look at lessons learned from the ad hoc tribunals who have adopted a completion strategy to ensure that national capacities are supported so that national cases can be transferred to domestic bodies for effective prosecution. While the obvious dilemma for the ICC is the number of situations opened and therefore potentially corresponding number of completion strategies required, adequate support from the international community in simultaneously providing support for national capacity building could help in bridging this gap.

It is important to manage expectations from the very beginning and to be able to measure success of international efforts not solely in terms of the number of cases, but also in light of the principled politics, the expressive value and effect of the work being undertaken. Criticisms have also been aimed at some international tribunals, such as the STL, in relation to the perceived disparity between the resources invested into the mechanism and the limited number of cases and progress made. However, it has been argued that the very establishment of the tribunal has far-reaching consequences for achieving the main political signal; the fight against impunity in a region where political assassinations have been a recurring phenomenon.

Solutions to the many political obstacles discussed must also be found by thinking outside of the box. For instance, African states may include trade and investment on the international agenda as crucial points of engagement. Forging relationships with the World Trade Organization and the World Intellectual Property Organization, for instance, may help in placing emphasis on the rights to food, shelter and education where in fact essential human rights are embedded. Other innovative solutions may lie in greater levels of empowerment for the UN General Assembly, as seen in relation to Syria with the establishment of the IIIM and in relation to North Korea with the Human Rights Council adding investigative capacity to its team in Seoul in 2016. In relation to the African Union, though currently facing challenges in bringing reality to its commitment to accountability, the operation of the hybrid court in South Sudan hopes to provide a positive example of the aforementioned integrated approach, though its prospects are yet to be seen.

The key arising and important points remain:

1. Universal jurisdiction is vital in the fight against impunity at the domestic level
2. Strengthening political will and national capacities is core to peace and justice
3. In view of emerging challenges, more thinking outside the box is needed

Three experts in the field addressed some of these arising questions. Prosecutor Brammertz focused his remarks on the importance of state cooperation and the impact it had on the functioning of the ad hoc tribunals. Ms. Moreno highlighted compromise and consensus in the political participation in divided societies, sourcing from her experience in Colombia. Finally, Dr. Molokomme noted, particularly in light of African states, the lessons learned regarding the intersection of international and regional politics to be taken from African countries.



How have some political impediments to state cooperation been dealt with in the last ten years, and what more can be done in light of the 2007 Nuremberg Declaration on Peace and Justice and the effectiveness of international justice?

Serge Brammertz

Cases involving international crimes often concern massive violations, involving hundreds if not thousands of victims, committed by many perpetrators at all levels of the political and military hierarchies, over the course of many years. Often the crimes occur in one or more countries remote from the body prosecuting them. This means that international prosecutions are most of the time more complex than prosecutions conducted at the domestic level and face many more challenges, one of the most important being state cooperation.

Over the past two decades, all international criminal tribunals have had to face the critical challenge of securing state cooperation, a feature which fundamentally distinguishes them from their national counterparts. In stable domestic systems, a national prosecutor has control and authority within the territory where the crimes occur, and operates within a clear legal framework with clear judicial remedies. The national prosecutor relies on a law enforcement body and can expect and receive full cooperation from the government. These factors are mostly absent at the international level. Among the many issues shaping the work of international prosecutors, international tribunals lack enforcement powers. As a result, to carry out arrests, to conduct search and seizure operations, to obtain evidence from government archives, international tribunals need states to act on their behalf. State cooperation is therefore a necessary condition for international tribunals to operate effectively. Yet, state authorities may often be reluctant to cooperate.

This contribution addresses one specific aspect of state cooperation: the arrest and surrender of fugitives. States' refusal to arrest or surrender suspects wanted by international jurisdictions provides a stark illustration of how political considerations may be a major obstacle to the fight against impunity.

At the ICC, the President of Sudan, Omar al-Bashir, who is charged with genocide, crimes against humanity and war crimes, has still not been arrested almost ten years after the first arrest warrant was issued.⁵⁷ He has been travelling freely without fear of arrest, including to the territories of States Parties to the Rome Statute.⁵⁸ The ICTR closed its doors with nine individuals indicted for genocide still fugitives from justice; eight individuals remain at large until today.⁵⁹ The STL has been unable to secure the arrest of any indictees, and their trial has begun in *absentia*.⁶⁰

The ICTY – which closed its doors in December 2017 – has been cited as a success to the extent that it is the only international tribunal with no fugitives from justice. However, it took the ICTY 18 years to achieve this result.

57 ICC, Prosecutor v. Omar Hassan Ahmad Al Bashir, Warrant of Arrest for Omar Hassan Ahmad Al Bashir, ICC-02/05-01/09, 4 March 2009; ICC, Prosecutor v. Omar Hassan Ahmad Al Bashir, Second Warrant of Arrest for Omar Hassan Ahmad Al Bashir, ICC-02/05-01/09, 12 July 2010.

58 These States Parties appear to include inter alia South Africa, Uganda and Jordan. See ICC, Prosecutor v. Omar Hassan Ahmad Al Bashir, Report of the Registry on information received regarding Omar Al Bashir's travels to States Parties and Non/States Parties from 5 October 2016 to 6 April 2017 and other efforts conducted by the Registry regarding purported visits, ICC-02/05-01/09, 11 April 2017; Prosecutor v. Omar Hassan Ahmad Al Bashir, Decision under article 87(7) of the Rome Statute on the non-compliance by South Africa with the request by the Court for the arrest and surrender of Omar Al-Bashir, ICC-02/05-01/09, 6 July 2017; Prosecutor v. Omar Hassan Ahmad Al Bashir, Report of the Registrar on the Information received as regards Travel by Omar Hassan Ahmad Al Bashir to the Republic of Uganda, ICC-02/05-01/09, 14 November 2017; Prosecutor v. Omar Hassan Ahmad Al Bashir, Decision under article 87(7) of the Rome Statute on the non-compliance by Jordan with the request by the Court for the arrest and surrender of Omar Al-Bashir, ICC-02/05-01/09, 11 December 2017.

59 United Nations Mechanism for International Criminal Tribunals, "Searching for the Fugitives", available at <http://www.unmict.org/en/cases/searching-fugitives>, last accessed at 26 January 2018.

60 Special Tribunal for Lebanon, Prosecutor v. Salim Jamil Ayyash et al, Decision to Hold Trial In Absentia, STL-11-01/I/TC, 1 February 2012.

The arrest of fugitives was an almost impossible task in the ICTY's early years because of the poor cooperation of states. Initially, the ICTY's only tool was a legal obligation imposed on states to cooperate with the Tribunal, as provided for in the ICTY Statute and in binding resolutions of the UN Security Council, and a corresponding capacity to report the recalcitrant state to the UN Security Council. The ICTY was thus largely dependent on the states of the former Yugoslavia to cooperate by arresting and handing over fugitives. Arrests were however not carried out, because there was a lack of political will to do so not only at the national level, but also at the international level. Many indicted war criminals were seen as heroes in their own communities. Others remained in power or were protected by new governments.

There were a number of factors that ultimately led to the arrests of all indictees of the ICTY. But the decisive factor in securing the arrest of the last ICTY fugitives was the diplomatic pressure applied to the states of the former Yugoslavia by the international community.

Sanctions and incentives were effectively blended by the policies of 'conditionality' imposed on Serbia and Croatia by the European Union (EU) and the United States. These were vital to generating a change of political attitude, and securing the arrests of the fugitives. First, in 2001 the United States Congress placed conditions on aid to Serbia, requiring the US President to certify that Serbia was cooperating with the ICTY.⁶¹ Second, in 2002, the EU made membership conditional on full cooperation with the ICTY,⁶² which created powerful pressure. At each and every step of the EU accession process, the state's level of cooperation with the ICTY was evaluated, based on ICTY assessments provided to the EU and to the UN Security Council. When progress was considered insufficient, the EU did not shy away from taking tough decisions. They postponed accession talks with Croatia in March 2005 and with Serbia in 2006, for example.⁶³

Without EU and the United States conditionality, many fugitives – and in particular Radovan Karadžić and Ratko Mladić – would still be at large. That said, to ensure the success of the conditionality policy, political action had to be coupled with investigations on the ground. The ICTY Office of the Prosecutor (OTP) could not direct local authorities in their investigations as to the whereabouts of fugitives, but it could facilitate results by being present. The ICTY OTP tracking unit, and often the chief of investigations, were on the ground, asking questions and requiring information about the progress of the local investigation. What the OTP obtained informed the assessments provided to the EU Member States and the Security Council.⁶⁴ Based on what the OTP learned, the absence of concrete results could be criticized, shortcomings in the search methods for tracking fugitives identified, and remedies proposed.

The lesson learned is that international prosecutions are taking place in a realpolitik world. Prosecutors must remain independent, but accept that politics impacts their work.

Although the particular means by which the ICTY secured state cooperation were specific to the circumstances of the former Yugoslavia, the approach is transferable to other international tribunals. The political conditions applicable to situations over which they have jurisdiction may be complex and challenging; but the ICTY's experience tells us that solving these challenges begins by recognizing that there are political issues to be taken into consideration.

61 "U.S. Makes Arrest of Milosevic A Condition of Aid to Belgrade", *New York Times*, 10 March 2001; "Conditions on US Aid to Serbia, Congressional Research Service Report for Congress", 7 January 2008, 1, available at <https://www.fas.org/spp/crs/row/RS21686.pdf>, last accessed at 26 January 2018.

62 E.g. European Commission Press Release Database, "Croatia – one step closer to the EU, provided there is full cooperation with ICTY", available at http://europa.eu/rapid/press-release_IP-05-110_en.htm?locale=en, last accessed at 26 January 2018; Report from the Commission, "The Stabilisation and Association process for South East Europe", Third Annual Report, COM (2004) 202/2, 30 March 2004.

63 European Commission Press Release Database, "2649th Council Meeting, General Affairs and External Relations, General Affairs", available at http://europa.eu/rapid/press-release_PRES-05-44_en.htm?locale=en, last accessed at 26 January 2018; EU suspends talks with Serbia, *EUobserver*, 3 May 2006.

64 E.g. ICTY, "Address of Mr. Serge Brammertz, Prosecutor, International Criminal Tribunal for the Former Yugoslavia to the United Nations Security Council", available at http://www.icty.org/x/file/Press/Statements%20and%20Speeches/Prosecutor/111207_proc_brammertz_un_sc_en.pdf, last accessed at 26 January 2018; ICTY, "Address of Mr. Serge Brammertz Prosecutor, International Criminal Tribunal for the Former Yugoslavia to the United Nations Security Council", available at http://www.icty.org/x/file/Press/Statements%20and%20Speeches/Prosecutor/120607_proc_brammertz_un_sc_en.pdf, last accessed at 26 January 2018.



Outside the context of Europe, and in the complex political conditions in situations before the ICC, political and financial incentives need to be identified. The US State Department 'War Crimes Rewards for Justice' program is a good example.⁶⁵ This program has resulted in payment of rewards for information leading to the arrest and conviction of fugitives from the ICTY, the ICTR and the SCSL.

In the end, it is only with strong political and diplomatic support from the international community that justice can be achieved. When support for accountability is low on the agenda, non-cooperation is an almost insurmountable obstacle.

What is the interplay between compromise and consensus with respect to political participation and regarding divided societies in transitional periods and how does this impact the peace and justice agenda?

Maria Camila Moreno

The main objective of most peace processes between insurgencies or rebel forces and governments is the transformation of rebel groups into political parties or movements. The negotiations seek the disarmament of the rebel group in exchange for allowing them to pursue their political agenda in democratic elections. Before the Rome Statute entered into force, this transaction was accompanied by general amnesty laws and, in some cases, by extrajudicial truth-seeking mechanisms, such as truth commissions. This was the case in the peace processes undertaken in El Salvador and Guatemala, in Latin America, and in Nepal and Sierra Leone, among others.

These transition processes have not been exempt from public debate, the intensity of which varies depending on the level of polarization triggered by the peace processes in different societies. There is no universal rule for determining the correlation between a peace process and the polarization or divisions within society, because every context is different and because polarization tends to have multiple causes (e.g., unequal distributions of wealth, exclusion of broad sectors of society from the benefits of development; weak and restricted democratic models, etc.).

In some processes, the agreement reached by the parties is not supported by the majority of the population, as was the case of the negotiations between the former FARC guerrillas and the government of Colombia. This means that the agreement lacks the legitimacy necessary for society to defend or take ownership of it.

Even though the peace agreement with the FARC was a historical milestone in the 50-year-old internal armed conflict, the majority voted no in the plebiscite. There are several explanations for this unexpected result in a country with more than eight million victims from an armed conflict that increasingly deteriorated over time and produced pain and death throughout its territory. One of the main factors influencing the decision of most voters was that the peace agreement stipulated the transformation of the FARC into a political party and, after disarmament, allowed the demobilized combatants to participate in politics, regardless of the types of crimes they may have committed during and because of the armed conflict. In practical terms, this meant that the former FARC guerrillas were not required to have been prosecuted and sanctioned for their crimes as a precondition to being elected legislators, mayors or governors.

For many sectors, especially those on the right of the political spectrum, the fact that criminal accountability was not a precondition or requirement made this an agreement of impunity. They believe that the Colombian state would be breaching its obligation to investigate, prosecute and sanction the serious crimes committed by the FARC.

65 U.S. Department of State, "Fugitives from Justice", available at <http://www.state.gov/j/gcj/wcrp/c56848.htm>, last accessed at 26 January 2018.

However, the Havana agreement created a comprehensive model of transitional justice that includes judicial and extrajudicial accountability mechanisms for the crimes committed by all actors to the conflict. The criminal justice mechanism of the Comprehensive System of Truth, Justice, Reparations and Non-Recurrence is called the Special Jurisdiction for Peace (SJP), which takes a restorative approach to justice and whose primary principle is: greater truth, less punishability. Those who tell the whole truth about their responsibilities in the most serious crimes may be given a restorative sanction by the Peace Tribunal; while those who do not acknowledge their responsibility, and are convicted shall receive a sanction of up to 20 years in prison. While not all sanctions will entail the effective deprivation of liberty, there are some sanctions that will seek redress for the damages caused to the victims.

The definition of punishment in transitional justice contexts should aim to achieve objectives that to a large extent transcend the classic objectives of criminal sanctions. James Stewart, Deputy Prosecutor of the ICC, has said that “states have ample discretion when it comes to sanctions. Domestic law need only carry out investigations, prosecutions and sanctions to support the overall objective of the international criminal justice system of the Rome Statute: end impunity for the most serious crimes of international concern. Consequently, effective criminal sanctions can take various forms. However, they must pursue adequate objectives related to the punishment, such as a public condemnation of the criminal behavior, recognition of the victims’ suffering, and deterrence of future criminal conduct”.⁶⁶

Conducting serious, rigorous and public criminal proceedings, with clear rules, and that reaffirm the public reproach of behavior that cannot be repeated, can reduce the social demands for harsh sanctions that restrict liberties. As stated by the ICTJ in its briefing on the objectives of punishment and the pursuit of peace, “The more the trial proceedings are seen by society as a genuine means to establish and communicate responsibility for serious crimes, the more they will successfully meet their objectives. The more they are seen as a maneuver to subvert the exposure of crimes and those responsible for them, the more pointless and counterproductive they will become. There may be some justification in compromising on the nature of penalties, but there is no justification in compromising on the essential virtue of the trial – the social exposure of wrongdoing, the harm caused to social values, and holding those responsible publicly to account. Far from any compromise being justifiable regarding the nature of the trials, every effort should be made to ensure publicity and access to serious and transparent proceedings”.⁶⁷

If these principles are followed, it could hardly be said that the SJP will lead to impunity for the actors to the internal armed conflict in Colombia. Rather, it could achieve the legitimacy and social support for the Peace Accords that is lacking.

Now, is accountability for the most serious crimes enough for society to accept that an armed group like the FARC enter the political arena? Are the country’s elites willing to share political power with those who took up arms against an unjust regime that they represent?

They will probably need to see more than former FARC combatants acknowledging their crimes in the SJP chambers. Since the armed conflict in Colombia has deeply eroded the essential values of social coexistence, including trust, respect for differences, economic, social and political inclusion, and equality, among others, it may be necessary to rethink the ethical pact amongst Colombian society.

This ethical pact would be based on the firm conviction that weapons never have a place in politics and that ideological differences should never again be resolved through the use of violence. It should mobilize broad sectors of society at this historic moment when the democratic space is opening to allow the FARC, now the Common Revolutionary Alternative Force, to openly defend its political platform and compete for votes with words, not force.

66 James Stewart. “La justicia transicional en Colombia y el papel de la Corte Penal Internacional”, Office of the Prosecutor of the International Criminal Court. Conference organized by: Universidad del Rosario, El Tiempo, the Cyrus R. Vance Center for Transitional Justice, the Hanns Seidel Foundation, the United Nations in Colombia, the International Center for Transitional Justice, and the Coalition for the International Criminal, 13 May 2015, Bogotá, Colombia.

67 Paul Seils, “Squaring Colombia’s Circle: The Objectives of Punishment and the Pursuit of Peace”, ICTJ, available at <https://www.ictj.org/publication/squaring-colombia-circle-objectives-punishment-peace>, last accessed at 26 January 2018.



What are the lessons regarding the intersection of international and regional politics to be taken from African countries?

Athaliah Molokomme

Many of the political impediments to the promotion of the fight against impunity have already been discussed, such as the prevailing power structures and the politics of the UN Security Council, its veto powers, the pursuit of political self-interest by states and the undue dominance of the security paradigm over one that favors the pursuit of peace, justice and the human rights of victims.

While this is not the place to discuss some of the structural challenges and limitations in the UN peace and security infrastructure, it is important to keep them in mind when addressing the specific issue of 'the Rome Statute and Regional Politics.' This is because the impediments that have presented themselves to the implementation of the Rome Statute in the Africa region are intimately linked to – and some in Africa would say – a direct result of the pursuit of political self-interest and geopolitical power imbalances that prevail at the United Nations.

It has generally been agreed that even with its imperfections, the Rome Statute that created the ICC presented a watershed in the global quest to end impunity and bring perpetrators of the most serious crimes to justice; indeed, it provided the backdrop for the development of other instruments, such as the Nuremberg Declaration. However, the Rome Statute also has certain inherent limitations, such as its lack of universal application, and the fact that three members of the UN Security Council possess veto powers and are not parties to the Rome Statute.

A further and related complication is that the Rome Statute itself provides that one of the routes to the ICC, in addition to self-referrals and an investigation by the OTP, is referral of situations to the Court by the Security Council.

It should be recalled that the relationship between Africa and the Rome Statute started very well, with African states comprising the largest single bloc of states parties to the instrument. This is a matter for which Africans have prided themselves; ending impunity is a stated goal in the Constitutive Act of the AU. Moreover, most of the cases before the ICC are self-referrals by African states themselves.

It is common knowledge that this relationship began to break down following the issuance of an arrest warrant against Sudan's President al-Bashir in 2009, and the indictment trial of President Uhuru Kenyatta of Kenya and his deputy, in relation to the post-election violence in that country. This inevitably led to a perception by some in Africa that the ICC was dispensing selective justice by targeting the continent's leaders while ignoring atrocities taking place elsewhere in the world.

Consequently, the AU passed a resolution in 2013 to the effect that African countries would not cooperate with the Court, and that no heads of state should be indicted because this undermined state sovereignty, immunity and efforts to promote peace in sensitive post-conflict situations. Since then, the relationship has not improved, and the AU passed successive resolutions calling for the deferral of the cases against African heads of state until its concerns had been addressed.

The AU felt vindicated after the collapse of the case against Kenyatta and his deputy leading to a call for African countries to withdraw collectively from the Rome Statute. In fact, in January 2016 the AU set up a Ministerial Committee to put together a collective withdrawal strategy to inform action by AU member states who are also members of the Rome Statute.

Murmurings of withdrawal had already started when the South African Government had failed to arrest President al-Bashir when he attended the country for the AU Summit in June 2015. Successful court challenges by the Southern African Litigation Centre, an NGO that pursues public interest litigation, eventually led the Government to announce in October 2016 that it had sent a notice of withdrawal from the Rome Statute. In November 2016, the Minister of Justice introduced the ICC Repeal Bill in Parliament, but a successful legal challenge led to the court invalidating the notice of withdrawal. Both the notice of withdrawal and the repeal bill were subsequently withdrawn in March 2017.

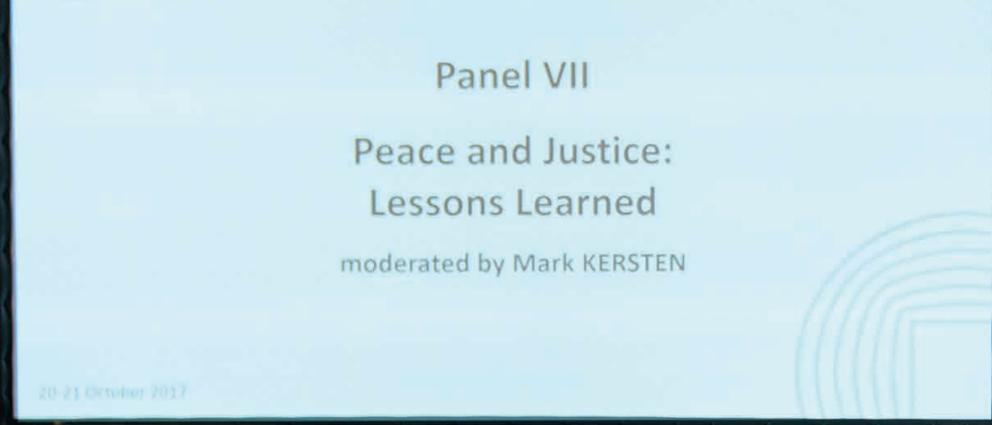
In the case of Burundi, the ICC announced in April 2016 that it would conduct a preliminary examination into the violence and human rights abuses in Burundi. The Government reacted by passing legislation in October 2016 withdrawing Burundi's membership of the Rome Statute, and the deposit of its notice of withdrawal during the same month. In accordance with the Rome Statute, the Burundi withdrawal has become effective as of 27 October 2017. Unless the notice of withdrawal is withdrawn, it seems that Burundi has indeed removed herself from membership of the Rome Statute.

The Gambia was the third African country to announce its intention to withdraw from the Rome Statute, however, this never materialized due to the loss of the election by the long-term president and his eventual dramatic departure into exile after a failed attempt to remain in power. It appears that the current government will keep the Gambia in the Rome Statute of the ICC.

A number of very positive lessons can be learnt from these experiences. The first and most important lesson of all from the South African experience is that civil society can play an important role in ending impunity by opposing a government's attempt to escape its international obligations. Most importantly, it showcases the importance of an independent judiciary to ensure accountability, something that was again demonstrated by the decision of the Kenyan Supreme Court annulling the recent presidential elections in that country.

The dramatic turn of events in The Gambia also reflects how quickly people can respond to a situation once they are given an opportunity to assert their democratic right to elect a government of their choice. And how a government can be relied upon to fulfil its pre-election promises to refrain from withdrawing from the Rome Statute.

These developments have dampened the so called collective ICC withdrawal strategy from the AU, and so far, Burundi seems to be standing alone in this respect. Although perceptions of selective justice persist in some African countries, these are developments Africans should be proud of, thanks to their membership of the Rome Statute, their self-referrals to the ICC, and should not be seen negatively as selective justice. The most important consideration should be given to the victims who are at the receiving end of crimes against humanity and other atrocities, and who the Rome Statute of the ICC was designed to protect.



Panel VII

Peace and Justice – Lessons Learned

Looking into actual case studies and peace and justice processes over the past ten years, including challenges, achievements and lessons learned, was the focus of Panel VII. By looking into the situations of Rwanda, Bosnia and Herzegovina, and Afghanistan, the panel turned to the question of the importance of contextual factors in relation to justice considerations. Given the political dynamics that played a role in the given context and among different actors, certain questions came to the forefront, i.e. the exclusion of justice-related issues from negotiations or an agreement affecting the broader peace process, the impact of particular justice mechanisms and the durability of the peace process. Moreover, the question of amnesties was debated as well as potential lessons learned regarding their role in the transitional justice toolkit, conflicting narratives and transfer of cases from the international to the national level.

The peace and justice debate has raised concerns as to whether amnesties ought to be included in every negotiator's toolkit. On the one hand, proponents for their inclusion argue that their removal may increase tensions between seekers and negotiators and thus confirm the polarity of the peace and justice debate itself. On the other hand, arguments were made that amnesties are often perceived as being illegitimate and impossible to use and cannot be assumed to be unconditionally lawful within an international legal framework. However, in the discussion, it was pointed out that two types of amnesties have to be distinguished: explicit *de jure* amnesties and *de facto* amnesties. According to some, the second principle of the 2007 Declaration on Peace and Justice does not specifically address the latter, but does so with the former, reflecting the general direction of practice exhibited by the UN. An example mentioned was the Lomé Peace Accord negotiated to end conflict in Sierra Leone in 1999. The UN representative Francis Okelo signed the agreement with the explicit caveat that the UN would not recognize amnesties in relation to genocide, war crimes and crimes against humanity. In the comprehensive Peace Accords in Sudan in 1995, there was no explicit amnesty provision, but rather a *de facto* amnesty. At the level of the UN, it would be fair to say that it does not recognize the international validity or applicability of *de jure* amnesties. That being said, a much closer look needs to be undertaken and further assessment made with regard to the current situation for example in Yemen.

Regarding transitional justice, a call for more holistic approaches has been made, and, given the dominance of legalism within transitional justice, it becomes important to ask how this dialogue works in practice and on equal, neutral and fair grounds. One of the key considerations here is the actual location of such discussions – where these conversations take place often affect the type of conversation that can take place. Another consideration is that these conversations are framed by a strong desire for a justice process, with violence-affected communities often being the strongest supporters of a justice-oriented response. Understanding first what these communities are currently doing and demanding should open the floor up to the sets of responses that are perhaps more established, but also to wider developmental agendas.

Looking at the lessons learned in Bosnia and Herzegovina, questions were posed as to how sharp divisions of political memories and conflict narratives infuse daily politics and make sustainable peace difficult to achieve. While this has been observed with the trials at the ICTY, questions remain asked how, if at all, the localized trials at the War Crimes Chamber alleviated some of these political contestations or in fact exacerbated them. In deeply divided societies, justice does not automatically heal wounds or bridge these divides, but has the potential to become another issue that the community is also divided about. From the view of civil society, strict data protection laws have ensured that the identities of perpetrators before the local courts are unknown, and no access is given to the relevant indictments and judgments. In Bosnia and Herzegovina, there are calls to build a new kind of political settlement recognizing that justice alone is inadequate in healing divides. This, however, might come at the price of severe compromises from certain affected communities and their willingness to do so.

Discussing the ICTR's impact, the tribunal has been credited for serving a useful purpose in establishing an official record about the genocide, and has brought perpetrators of genocide to account. However, and looking at the other side, the transfer of cases from the ICTR to national courts has seen delays, challenges and criticisms. While attempts of negotiating the conditional transfers of cases had taken place, political impasses appeared to once again have hampered progress in this respect. Nevertheless, considering the domestic legal framework in Rwanda, important legal changes have occurred given the work of the ICTR, including the abolition of the death penalty. Following the Akayesu judgment, there is also increased recognition of the role that sexual violence has played in the conflict, which has been prominent in the gacaca proceedings. Moreover, the Rule 11bis process and transfer of cases from the ICTR to Rwandan national courts has formed the basis for a much wider global phenomenon of transfer of cases of alleged génocidaires. It is therefore important to remain cognizant of the real impact and lasting expressive value such proceedings bring, such as the continual condemnation of genocide.

In light of the overall theme of the panel, whilst subscribing to the demand of no peace without justice, some experiences – such as the situation in Colombia – pose the question of whether this also means no justice without peace.

Key questions that remain open for further discussion include:

1. What type of amnesty is covered by the Nuremberg Declaration?
2. How can one ensure that the understanding of the idiosyncratic context of a given conflict is satisfactory to address meaningfully demands for justice in any transition?
3. How and when is international mentorship and capacity building called for when aiming to advance the application of the Nuremberg Declaration?

Three expert speakers discussed key issues and lessons learned from the vantage point of past and present practice. Mr. Dicker addressed the current interface between justice and peace and appealed to thinking outside the box for improving the mechanisms in place and in order to effectively address new and quickly arising challenges. Dr. Palmer focused on Rwanda and called upon a needs assessment on the local level before embarking on imposing new structural schema in place. She also noted that fostering information is crucial and channeling information between the personnel involved in different processes is highly demanded and essential to the wider transitional justice process. Finally, Mr. Hartmann, focusing on the lessons from Afghanistan, voiced his concern about the missed opportunity to establish a court in the country, and called for more capacity building, training and international mentorship to further address the issue of justice as the next step.



Is the current interface between justice and peace reflective of the 2007 Nuremberg Declaration on Peace and Justice and what could be done to further strengthen it?

Richard Dicker

Reviewing the current interface between peace and justice, my intervention will cover three areas: 1) a quick assessment of the status of the Second Principle adopted as part of the 2007 Nuremberg Declaration (“the Second Principle”); 2) a brief consideration of the situation in Yemen; and 3) a number of reflections looking to the future.

Articulated ten years ago, the Second Principle calls for an end to impunity for the most serious crimes of concern to the international community. It goes on to state that these crimes must not go unpunished and that their effective prosecution must be ensured. The emergence of this obligation has changed the parameters in the pursuit of peace. This placed criminal justice on the international landscape as a new standard that contends with other long-standing state interests. The Principle has also caused, and will continue to cause, great controversy among international institutions, regional organizations, states, and civil society organizations. One result is that those mandated to conduct peace negotiations have found their toolkit diminished with the elimination of formal amnesties as an acceptable option.

Bearing in mind the Principle, there are a number of examples where the commitments to justice was contentious in peace negotiations. Going back to the experience of the International Criminal Tribunal for the former Yugoslavia at the time of the Dayton peace talks (1995) as well as the issuance of an arrest warrant against Slobodan Milosevic while the NATO air campaign against Serbia was underway (1999), occurred when there was little, if any, precedent to advise on handling these two objectives. The tension has been further exacerbated by the International Criminal Court (ICC) which works amid ongoing conflicts from Uganda to Darfur (with Darfur coming under the Court’s jurisdiction by virtue of a UN Security Council referral). This is also true, though to a lesser degree, of the Democratic Republic of the Congo. In 2008, President Kabila, while signing a peace pact aimed at ending years of conflict in the east, appointed Bosco Ntaganda as a general in the Congolese armed forces, despite charges of war crimes by the ICC and accusations that he had responsibility for using child soldiers.

The intense debate that these developments generated have yielded a positive result in that the different sides to the argument have gained a greater understanding of each other’s perspective and that is no small feat. This is reflected in the current thinking that what was once dubbed “the peace vs. justice debate” no longer places these two important objectives in contention with each other, but rather accepts that the two go together with the devil being in the details. Determining the manner in which to implement this interface in concrete situations has not diminished the urgency of the debate or its resolution.

It is noteworthy that the situations most frequently cited in the current debates all involve non-states parties to the Rome Statute of the ICC. These include Yemen, Syria, Myanmar, South Sudan and Iraq. It is worth pondering why this is the case. I will focus on the example of Yemen for two reasons; first, there is an important lesson to be learned from the dreadful experience there; and second, this lesson sheds light for the future. The Second Principle of the Nuremberg Declaration holds that no explicit amnesty should be granted to those bearing the greatest responsibility for genocide, crimes against humanity and war crimes. Yet, in 2011-2012, an explicit amnesty was granted to former Yemeni President Saleh, as well as to members of his family, who were believed to have been responsible for serious crimes over decades in power and especially during his last 12 months in office. The current situation in Yemen requires consideration of the initiative taken by the Gulf Cooperation Council and agreed to by major Western powers. They all bought into the logic that to obtain peace in Yemen, a *de jure* amnesty for President Saleh was an unavoidable necessity. Without being overly simplistic and reducing what has happened in Yemen solely to this amnesty – the situation is far more complex than that – the people in Yemen have paid an extremely high

price for the President's amnesty. Lessons must be drawn from the misguided insistence that amnesty is a requirement for peace. Rather, bad actors do not change their stripes when their previous alleged crimes are overlooked through an explicit amnesty.

With this in mind, it is important to review some of the initial points of discussion within this Forum. The current international landscape, on which the peace and justice interface is unfolding, with much less peace and less justice in the world today, is significantly more challenging than it was in July 1998, in July 2002 or indeed in 2007 when the Second Principle of the Nuremberg Declaration was adopted. The United Nations Security Council is not working when atrocities are committed. This has become the norm resulting in it being highly unlikely, if not impossible, for the situation in Yemen to ever be referred to the ICC. The same can be said for the situations in Myanmar and Syria.

One resulting question is where does this leave the international community committed to accountability? To offer some direction, a first step is strengthening the ICC, which includes expecting it to improve its performance. It is essential that ICC states parties step up their support – political and financial for the court.

In terms of “thinking outside the box” attention must be turned to the UN General Assembly as a possible force to move accountability forward for countries like Myanmar. The establishment of the Independent Impartial Investigative Mechanism for Syria by the UN GA in December 2016 is testament to the potential such new approaches may possess. In this spirit, it is also important to look to the Human Rights Council as a key vehicle. It is worth considering the positive example provided by the Netherlands at the Human Rights Council where it worked courageously to bring about a fact-finding mechanism for human rights abuses in Yemen in the face of intense odds. Could the mandates of Commissions of Inquiry (COI) be extended beyond the tasks they have been given to date? Specifically, might these COIs be given some staffing to look at events through a criminal lens for possible use in future trials? Finally, an effective response must also encompass the strengthening of groups of like-minded states committed to accountability? For example, pressing for a more coherent approach on accountability at the Security Council as ACT (Accountability Coherence Transparency) has tried by placing a higher political price on the use of vetoes in situations of mass atrocities.

New, more difficult, times call for new solutions. It is imperative to think creatively inside and outside the box to find those workarounds.

What are key lessons in terms of peace and justice from Rwanda in light of the principles that arise from the 2007 Nuremberg Declaration on Peace and Justice, particularly in relation to legitimacy, inclusiveness, and cooperation?

Nicola Palmer

The Nuremberg Declaration on Peace and Justice aspires to “guide those involved at the local, national and international levels” in their decision-making on how to establish both a just and peaceful response to large scale atrocity. In the wake of the 1994 genocide, Rwanda provides an early example of international, national and localized post-conflict courts operating in concert with one another. Examining how the ICTR, the national Rwandan courts, and the gacaca community courts have interacted with one another offers key insights in how to realize this aspiration of integrated multi-level decision-making.

The case of the Rwandan courts brings into focus two key lessons for future practice: first, when looking at holistic and multi-level responses to mass atrocity, compatibility between concurrent international, national and localized initiatives cannot be assumed. However, such compatibility can be fostered through equal dialogue and exchange on the objectives of justice-seeking processes, fostering inclusivity and co-operation among the people involved. Second, the legitimacy of these justice institutions is of



central importance and can be enhanced through identifying and working with the existing assets and capacities within violence affected communities while acknowledging the real constraints under which they may be operating.

There is now an extensive body of scholarship on the operation of post-genocide justice in Rwanda, and the scholarly assessments of the courts are not without their controversies. While the ICTR has been credited with contributing to the building of an international system of criminal justice, and securing peace through removing key players from the political landscape,⁶⁸ it has also been criticized for failing to more fully investigate allegations of international crimes committed by the current ruling party in Rwanda, the Rwandan Patriotic Front.⁶⁹ Similarly, while some of the scholarship on gacaca has highlighted its innovative approach and its potential for realizing the broader social goals of reconciliation and truth-telling,⁷⁰ other scholars have focused on concerns about its procedural safeguards⁷¹ and its role in reinforcing social divisions.⁷²

These criticisms and insights are important to acknowledge when examining the potential lessons that could be learnt from Rwanda. It has been interesting to examine how the personnel involved in these multi-tiered legal processes made sense of their own work, taking seriously what those inside the institutions claim to have achieved and what this has meant for the concurrent operation of international, national and localized justice processes. The examination of this issue is based on 182 interviews inside of the ICTR, the national Rwandan courts and the gacaca community.⁷³ This paper draws on this qualitative data to build its argument for the importance of taking seriously the objectives of different justice mechanisms, not only in terms of what is stated in their mandates or founding legal documents, but also in terms of what the judges and lawyers inside these institutions have understood themselves to be doing.

Among the international judges and lawyers that were interviewed, the ICTR was understood to have been principally concerned with the development of international criminal case law, while inside Rwanda the national court personnel generally argued that they had focused on internal judicial reform, and, the lay community judges inside gacaca saw their central contribution as having been towards obtaining a better local understanding of the violence. It is arguable that the three courts could still have a complementary and balanced impact on justice with the ICTR contributing to a global legal order, the national courts to the development of domestic judicial capacity and gacaca to providing a local mechanism of truth-telling and accountability.

However, the empirical work showed that how one process is justified affects how the others are viewed and understood. How the courts understand their own work elucidates aspects of the institution's legal culture. It is within this specific legal culture that the work of the other courts is assessed. For example, within gacaca, the work of the ICTR and the national courts were understood in a way that was consistent with what the local courts themselves purport to have achieved. Those inside gacaca, seeing local accounts about who participated and who was the victim of the genocide as their central objectives, criticized the ICTR and the national courts for their failure to contribute through direct testimony to these very local understandings of why neighbors killed neighbors.

68 William Schabas, "Post-genocide Justice in Rwanda: A Spectrum of Opinions", in Phil Clark and Zachary D Kaufman (eds.), *After Genocide: Transitional Justice, Post-Conflict Reconstruction and Reconciliation in Rwanda and Beyond*, Hurst and Company, 2008.

69 See for example Victor Peskin, *International Justice in Rwanda and the Balkans: Virtual Trials and the Struggle for State Cooperation*, Cambridge University Press, Cambridge, 2008.

70 Phil Clark, *The Gacaca Courts, Post-Genocide Justice and Reconciliation in Rwanda: Justice without Lawyers*, Cambridge University Press, Cambridge, 2010.

71 Gerald Gahima, *Transitional Justice in Rwanda: Accountability for Atrocity*, Routledge, New York, 2013; Lars Waldorf, "Mass Justice for Mass Atrocity: Rethinking Local Justice as Transitional Justice", in *Temple Law Review*, 2006, vol. 79, p. 88.

72 Bert Ingelaere, *Inside Rwanda's Gacaca Courts*, University of Wisconsin Press, 2016; and Anuradha Chakravarty, *Investing in Authoritarian Rule: Punishment and Patronage in Rwanda's Gacaca Courts for Genocide Crimes*, Cambridge University Press, Cambridge, 2016.

73 A detailed discussion of these findings has been published as a recent monograph, Nicola Palmer, *Courts in Conflict: Interpreting the layers of justice in post-genocide Rwanda*, Oxford University Press, Oxford, 2015.

Similarly, however, at the ICTR, while the focus on international criminal case law was consistent with the Court's aspirations to establish an international system of criminal justice, it also meant that the international judges and lawyers assumed that the national courts were trying to contribute to a similar project, while in practice the domestic drivers were actually quite different. In addition, the international lawyers tended to deliberately distance themselves from the gacaca proceedings at the rhetorical level, however they were unable to do so in the legal decisions themselves. Since the national wide implementation of gacaca in 2005, 47 out of the 49 cases decided by Trial Chambers at the ICTR made direct reference to the decisions and processes of the localized courts. A deeper and more thorough engagement with the type of information gathered through gacaca, particularly when charges related to the murder of specific named individuals, would have benefited the work of the international institution.

The question that this work brings to the fore is why have such disparate objectives emerged within this multi-tiered justice system? One of the answers is about legitimacy. In transitional periods or periods following large scale violence, the legitimacy of courts and other state institutions is often in question. One of the outcomes of this uncertainty is that these institutions, including international courts, engage in an active process of self-legitimation. Rodney Barker describes self-legitimation, as the actions that those in power take "to insist on or demonstrate, as much to themselves as to others, that they are justified in the pattern of actions that they follow".⁷⁴ The ICTR, the Rwandan national courts and the gacaca courts were all using claims about what they were trying to achieve as a means of legitimating their actions as much to themselves as to those they exercised power over. This then necessitates an explicit understanding of what enhances the legitimacy of courts. It is suggested that this depends on a number of important factors, drawing from David Beetham's work on legitimacy:⁷⁵

- their ability to make decisions based on established rules
- that these rules draw on a shared belief between those who are exercising the power and those who are subject to it
- that they gain the consent of the communities who are affected by the violence and who are subject to the authority of these institutions.

The legitimacy of the courts among the Rwandan citizens interviewed who were subject to the authority of the post-genocide institutions was most strongly supported when the courts were understood to contribute to the need for truth-telling. There is undoubtedly malleability in the notion of what meaning is attached to "truth-telling" that enables people to be talking about very different things when they make claims to establishing the 'truth' about a conflict as hugely divisive as genocide. Nonetheless, what is clear is that this was one of the major bench-marks against which the ICTR, the national courts and gacaca were all assessed.

If, as argued in this paper, legitimacy and competition between international, national and local processes are two of the core issues, what are some of the possible responses? First, prior to points of intervention, maybe before it is even possible for there to be a justice process, the Rwandan experience shows that there is a need to begin by examining what are the existing assets and capacities of people who have been affected by the violence to respond to its harms and if, and how, those responses can be supported. It is important to note that some of these responses may be about development as well as connected with recordings of abuse. Second, if there are going to be a variety of holistic responses to the violence, it is crucial that there are open channels of communication between the personnel involved in the different processes, not only to foster information sharing but also to critically engage with what these processes are actually trying to achieve.

74 Rodney Barker, *Legitimizing Identities: The Self-Preservation of Rulers and Subjects*, Cambridge University Press, Cambridge, 2001, p. 30.

75 David Beetham, *The Legitimation of Power*, MacMillan, 1991.



What are key lessons from Afghanistan in light of achieving the principles laid down in the 2007 Nuremberg Declaration on Peace and Justice?

Michael E. Hartmann

While many of the mass atrocity examples were in countries without any significant international judicial technical support or judicial intervention, a study of the situation in Afghanistan displays the contrary. In this respect, both peace and justice – at least in the Afghan context – need to be redefined. From my perspective after ten years of working to assist the Afghan justice system, the choice is not between peace OR justice, but rather about obtaining justice for historical and ongoing wrongs, and in doing so strengthening the public support for the Afghan government. It is a false dilemma to state that gaining justice will then result in paying the heavy price of causing the country to lose a war, which has been raging since 2001. While bringing warlords and those who are corrupt and have (or still do) committed gross violations of human rights to justice may in the short term create some military weaknesses, in the long run this demonstration that no one is excepted from the rule of law, and that no one may commit such acts with impunity, will in the long term cause the people of Afghanistan to give wholehearted support to the Government, necessary for the Government's credibility and strengthen peace negotiations. Many of the major parties involved, both national – Afghan authorities and the anti-Government elements – as well as international interventionists have much at stake; this includes politics in their own countries, but also importantly, the lives and resources that have already been lost, and are being lost, within this conflict.

In addition to the above, the ongoing conflict in Afghanistan is also attributable with admitted hindsight to the failures and omissions at the very beginning of the interventions. The 2001 Bonn Agreement had marked the beginning of what many had hoped would be a transition from the fundamentalist authoritarian Taliban rule and post-9/11 conflict to peace. However, the Bonn Agreement failed to fully acknowledge the importance of justice as a precondition to a long-term peace. The failure to adequately fund intelligent, consensus-driven and Afghan-centric justice sector reform, and to create new judicial mechanisms such as hybrid prosecution offices and courts, within the first few years, resulted in a lost opportunity by not striking during that “golden hour.” The final agreement dropped all attempts to include references to dealing with war crimes and human rights violations, and had also omitted many standard parts of UN mediated peace agreements, such as commitments to disarmament or demobilization, or an attempt to address the underlying causes or consequences of the war.⁷⁶

Nor did the result bring all parties to the current conflict into the transition government. Thus, in reality, Bonn had not been a peace agreement between warring groups, but rather an agreement between selected Afghan leaders of four anti-Taliban groups who had been fundamental to the coalition that overthrew the Taliban regime. With respect to the “other side” of the negotiations – namely and most importantly, the Taliban – they were still at war with the United States, NATO and the transition government after having been ignored by the peace process, despite being major parties to the post-911 conflict, and having been the pre-9/11 government that ended the fighting over Kabul as spoils of the war with USSR by the warlords in 1996. As a result, Afghan signatories to the Bonn Agreement consequently included a number of alleged human rights abusers with no attempt to extract any significant commitments to justice from them.⁷⁷

In hindsight, a much heavier footprint was needed from Bonn through 2004, when President Karzai was given his transitional Presidential seat. This footprint should have come from specific actors within the international community, but most importantly given the authority of the UN Charter and Security Council Resolutions from the UN itself, to adopt and persuade Afghan leadership to accept aid and assistance for a Kabul-based hybrid court and prosecution office, staffed by national and international judges and prose-

⁷⁶ See for example Emily Winterbotham, “The State of Transitional Justice in Afghanistan: Actors, Approaches and Challenges”, Discussion Paper, Afghan Research and Evaluation Unit, available at <http://www.refworld.org/pdfid/4bc6ccb42.pdf>, last accessed at 26 April 2018.

⁷⁷ Ibid.

cutors, based loosely on the models of UNMIK (Kosovo), UNTAET (East Timor) and the later Bosnia & Herzegovina and Cambodia War Crimes Courts. The need for a hybrid court at the time was glaringly evident thanks to two studies and surveys conducted in 2004 and 2005, one of which was “A call for Justice” by the Afghan Independent Human Rights Commission, and the other by the Open Society Initiative’s Afghan Justice Project. Besides laying out who the major responsible perpetrators of the conflict were, interestingly, these surveys had polled thousands of Afghan citizens on integral questions such as: how important is justice to you? Who can play the most important role if war criminals are brought to justice? Where should trials be held? Who do you trust to hold the trials?⁷⁸ In 2004, 77% of those polled stated that they would want either an entirely international, or a mixed hybrid court to try – in their own territory – these cases of serious human rights abuses. Only a minority of those polled wanted (and thus trusted) their own judges and prosecutors to do the job.⁷⁹ This need for international in-country hybrid courts in such circumstances had been demonstrated in 1999 and 2000 in Kosovo and East Timor, given the threats against and pressures upon, and the biases and prejudices of national justice officials.⁸⁰

At the time of survey, there was huge potential for a hybrid court to be established, there was relative peace in the region and enough safety for this to come to fruition. However, those involved in the international community, political and aid community chose the cheaper option of providing funds to the major states parties’ chosen avatars and to the war lords who were already in possession of large militia groups, in a power-sharing deal between the perpetrators of the conflict.

The contemporaneous reports from Human Rights Watch and the Open Society Institute-funded Afghanistan Justice Project⁸¹ identified Afghan commanders - from communists to Mujaheddin to Taliban to many identified as warlords and current politicians now - as being responsible for war crimes or gross violations of human rights. The citizens of Afghanistan believed that it was necessary to have a partnership between international and national justice officers given the power of those who may be in the dock. This logic is as applicable now in 2017 as it was then; however, the political realities and 16 years of sovereignty do not now allow the creation of such a hybrid court today – as it would have been possible to do in 2004 or 2005. The mandate of the NATO mission would have required either UN Security Council Resolution Article 6 (through Afghan agreement) or Article 7 language allowing modification of national laws limiting courts and prosecution to nationals, as well as concise definitions of the subject matter jurisdiction of such a hybrid court.

Following these studies and the lost opportunity of donors and the international community using political persuasion and the Afghan people’s desire for justice through a hybrid justice court, the security situation in Afghanistan plummeted, particularly in 2008, where any prospects of a roadmap to justice had been destroyed and would be seen as impinging on the ability to win the war. The blanket amnesties were granted by the National Assembly (consisting of the lower house or Wolesi Jirga and the upper house or Meshrano Jirga – the Council of Elders) to “all political wings and hostile parties who had been in conflict

78 Afghan Independent Human Rights Commission, “A call for Justice”, Annex V, Survey and Focus Group Charts, available at <http://www.refworld.org/pdfid/47fdfad50.pdf>, last accessed at 26 April 2018.

79 For “war criminals,” 49.6% preferred a court with only international judges, 27.6% a court with international and Afghan judges and only 21.5% a court with only Afghan judges. Afghanistan Independent Human Rights Commission, “A Call for Justice - A National Consultation on past Human Rights Violations in Afghanistan,” 25 January 2005, available at <http://www.refworld.org/docid/47fdfad50.html> last accessed at 26 April 2018.

80 Michael E. Hartmann, International Judges and Prosecutors in Kosovo: A New Model for Post-Conflict Peacekeeping, United States Institute of Peace Special Report, 13 Oct. 2003,4-5, available at <https://www.usip.org/sites/default/files/sr112.pdf>, last accessed at 26 April 2018.

81 See EurasiaNet, “Afghan human rights abuses: A chance for change” (4 August 2005), available at <http://www.refworld.org/docid/46f257f9c.html>, last accessed at 26 April 2018; the OSI-funded report “Casting Shadows: War Crimes and Crimes Against Humanity, 1978-2001,” available at <https://www.opensocietyfoundations.org/reports/casting-shadows-war-crimes-and-crimes-against-humanity-1978-2001>, last accessed at 26 April 2018; and Human Rights Watch’s report, “Blood-Stained Hands: Past Atrocities in Kabul and Afghanistan’s Legacy of Impunity,” available at <https://www.hrw.org/report/2005/07/06/blood-stained-hands/past-atrocities-kabul-and-afghanistans-legacy-impunity>, last accessed at 26 April 2018. As to the first source, over 4,000 Afghans were surveyed in 2004, as reported on 25 January 2005, right after the election of President Karzai and before any National Assembly (“parliamentary”) elections, in the Afghan Independent Human Rights Commission issued report, “A Call for Justice – A National Consultation on past human Rights Violations in Afghanistan.”



before the formation of the interim administration”. Amendments to this law, in light of criticism received from Islamic scholars who stated that victims, not the court, held the power to forgive the perpetrators, has placed the burden of bringing forward cases on the individual – an unlikely scenario given the power dynamics on display in Afghanistan.⁸²

Afghanistan, as a party to the Rome Statute, finally enacted a new consolidating Penal Code, which for the first time includes any war crime; it incorporates to be applied prospectively all war crimes and crimes against humanity as defined in the Rome Statute, as well as command responsibility, effective as of February 2018. However, what it does not have is any dedicated and adequately trained judges or prosecutors in this specific area. Perhaps the most important step would be for the Government and Attorney General, in conjunction with the Chief Justice (and National Assembly) to follow the path it took in 2016-2017 to enact into law and bring into reality a specialized court, prosecution office and investigating unit with police powers to implement the new war crimes and crimes against humanity.

While I continue to believe a hybrid institution would have an advantage over a purely national court and prosecution office, in 2018 the political reality will almost certainly see the Government refusing to cede any of its sovereignty over such cases, which will involve many from the leadership and powerful men in the Government and National Assembly, as well as in business or who were in the Government and continue to be involved in it. The “Golden Hour” (the first few years) has passed. The potential and current examples of specialized courts to end impunity in the Central African Republic, and possibly in South Sudan, also involve the first years of a peacekeeping mission. Thus, regardless of the legal possibility by use of either Security Council Resolution or treaty between the UN and host country, practical reality will require it to be only a national institution, albeit with international mentors and advisors and funding for support.

In designing and establishing such a War Crimes Court and Prosecution Office, as well as a Police (and parallel Army) Investigation Unit, Afghanistan should take into account lessons learned in the positive example of the new national Anti-Corruption Justice Centre (ACJC) in Afghanistan. The threats that will come to these justice officials are real and dangerous, as three targeted killing of the ACJC’s Major Crimes Task Force investigators has demonstrated. It is thus necessary to insulate the prosecutors and judges from the serious and strong pressures of those who are suspects, targets, or patron of those suspects. This must be done structurally and with law for permanence, should the next election result in a less supportive President, Attorney General, or Minister of Justice, among others.

There will be the argument that the investigation and prosecution of a Government provincial commanding general who is “effective” against the Taliban, but who also is committing war crimes (e.g., in Kandahar, named by the Office of the High Commissioner of Human Rights in Geneva in their 2017 report on Afghanistan), will weaken the war effort. Perhaps, in the short run, but in the long run justice will allow a lasting peace to prevail. Moreover, prosecution and adjudication of both anti-government elements and government security forces for such crimes (as well as for any committed by NATO forces) will demonstrate the rule of law, lack of impunity and gain credibility for the Government with all Afghans.

International support in the form of focused and specific training is needed for what must be a new Deputy Attorney General-level Division for Gross Violations of Human Rights (including torture; 2 cases against Afghan security and corrections personnel is obviously insufficient given the UN monitoring and reporting on torture in detention of those suspected of national security crimes). Moreover, while training is indeed a positive and much-needed intervention in providing the prerequisite skills and knowledge to investigate, prove and bring forward cases to adjudication, a more pressing need is that of effective mentorship. International mentorship in particular has the potential to provide national prosecutors and investigators

82 Experience and common sense demonstrates that trained investigators and prosecutors are needed, with access to national and international witnesses, resources and intel, to assemble evidence for the judicial process. Citizens do not have the resources, legal authority and police powers to investigate and compel production of evidence, nor would they be able to stand against the suspect Warlords’ and Gross Human Rights violators’ threats against their lives and families.

judges with case specific advice critical to learning (as it is how prosecutors and investigators learn on the job from their senior colleagues around the world) the best practices and methods for successful investigations and prosecutions.

More importantly, mentorship will give the Afghan War Crimes Centre's prosecutors and investigators, who will need armoured cars, close protection of their persons, and security measures to prevent and mitigate threats to life and body to them and their families, the protection against and confidence of that protection the Afghans need to bring forward these significant cases. Individual mentors in this respect, do not simply represent themselves, but rather represent the backing of outside nations. Without them, progress can and will be hampered, as was seen in 2012 when President Karzai effectively shut down the first Attorney General anti-corruption unit and Police Major Crimes Task Force investigation unit, through political gamesmanship, political attacks and an order (through an insufficiently independent Attorney General) to stop giving the international mentors (from primary USA but also UN and EU) access to Afghan investigative and prosecution files. That turned the mentors into trainers of general principles, and removed any confidence from that unit that it would be supported by going after any "big fish."

This result of removing international mentors, combined with no support for the prosecutors' security needs or political insulation, was confirmed to me in 2014 when I talked to the head of that unit (the ACU was based in the original Attorney General's Office "Butcher Street" area Headquarters), and was told that no, he and his unit would not even attempt to prosecute any "big or powerful men" for corruption. When I asked why, he said, "Michael, do you see my bodyguards outside my door (he pointed outside)?" I answered his rhetorical question with 'no.' He then said, you are right, and that is why we will not even try, as it would only get us threatened and likely killed. He added that without both international and national high-level support and assistance, protecting against pressures, political as well as security, and providing skills and specific advice on cases, that any attempt to resist those pressures and to prosecute would be futile.

Accordingly, I ask, and emphasize, based on my ten years in Afghanistan working with and providing assistance to justice officials, judges, prosecutors and investigators, as well as defence attorneys, is that such support to Afghanistan as to war crimes and crimes against humanity investigations and prosecutions, is indeed the last chance the international community has to support the Afghan justice system to provide justice to those who have suffered so much since 1978 till today, as well as those who will be the victims of gross violations of human rights in 2018 and beyond.

Panel VIII

Peace and Justice: Current Challenges

moderated by William PACE

20-21 October 2013

Panel VIII

Peace and Justice – Current Challenges

Peace negotiations are increasingly seen as a more complex exercise than discussions between warring parties as they often include – although misbalanced in terms of representations - representatives of various sectors of society directly affected by the conflict, including victims. These negotiations have multiple and often competing objectives, e.g. putting an end to conflict; addressing on-going humanitarian crises; proposing viable solutions for the underlying causes of conflict and finding ways to address the needs of victims. Yet, due to complexities arising from the conflict, the prospect of dealing with egregious violations of human rights and international humanitarian law frequently represents a profound challenge for states and societies. In such scenarios, transitional justice tools have been developed to be viable options to answer victims' quests for justice; but also bearing in mind that in some settings, where significant political constraints exist, some states might wish to address atrocity crimes through different types of national justice mechanisms.

This panel discussed various challenges, options and implications from different approaches taken in ongoing peace-building processes in four cases: Central African Republic, Colombia, South Sudan, and Syria. Looking at the specific challenges elaborated above, each country reveals a whole list of follow-up questions and considerations in light of the surrounding context, as well as the relevant stages of each conflict. Idiosyncratic factors of each setting were highlighted.

For example, in Colombia, the effects of the ratification of the Rome Statute on the Colombian peace process must be considered, and whether indeed the peace agreement would have been reached in the absence of ratification. Moreover, the role of the ICC as a watchdog to ensure that justice is dispensed in line with international standards in light of the agreement for the establishment of the Special Jurisdictions for Peace by the parties, deserves scrutiny. In relation to South Sudan, inclusive participation has been a particularly pressing concern, given the uncompromising violence perpetrated against women, children and minority groups. There has been relatively little inclusive participation in the ongoing efforts to either implement or modify the 2015 Agreement, which in turn has led to grassroots activism by many civil society actors and women. This includes travelling to the affected communities, bringing the peace process closer to the people, developing feedback

loops and popularizing the Agreement so that people are able to understand what it is and how it could help them. However, challenges arise in reaching out to the millions who are internally displaced and are currently in internally displaced persons camps, often in dangerous locations. Therefore, while inclusion has been advocated e.g. via the new revitalization forum and the government's national dialogue initiative, its actual meaningfulness must be considered in light of these current ongoing efforts by women and civil society to have their voices heard.

Bearing in mind these challenges, the lessons learned from previous peace processes and transitional justice efforts must not be forgotten. For example, the situation in CAR, and particularly the creation of the hybrid SCC, is an opportunity to consider best practices from earlier models and adapt them to the current context. This includes the executive mandate missions of Kosovo and Timor-Leste, as well as the hybrid Regional Assistance Mission Solomon Islands, and of course the ECCC. In the case of CAR however, it is in a unique situation whereby the UN peacekeeping mission itself has been responsible for setting up the court, which creates different challenges on the ground, including for the SCC. Furthermore, the broad jurisdiction of the SCC calls for the investigation of serious human rights violations and violations of international humanitarian law committed on the territory of CAR since 1 January 2003. This covers potentially every single crime committed in CAR following this date, and may also encompass serious violations of economic and social rights. How this will be dealt with is yet to be seen, but what is certain is that a prosecutorial strategy must be devised at the outset to overcome the specific challenges. With the international community's eye on the SCC, the Court will have to ensure that it anticipates as many obstacles as it can going forward. This includes some of the more substantive issues as discussed above, but also technical competencies, such as witness protection, timelines, selection of international personnel and the manner in which disagreements between the international and national judges, prosecutors and staff will be dealt with, to name a few. With the SCC, the ICC and ordinary courts all present in CAR, this is certainly a big opportunity to effectively coordinate and complement efforts to bring about criminal justice.

The case studies built on some of the more abstract, conceptual discussions of some previous panels. Has tying transitional justice mechanisms to peace agreements had any effect in these situations? Has the role of development organizations been beneficial in these settings? Considering the former question, for example in Colombia, placing the burden of reconciliation on the mechanisms established from the agreement has been avoided. While reconciliation is considered as an overarching goal, the idea that cumulating the successes of individual mechanisms in the hope that they will bring about reconciliation eventually has rather been opted for, with the addition of some early measures of reparations to start the ball rolling. In relation to development, for example the inundation of international development programs in South Sudan has in some ways resulted in negative impacts, such as an increased dependency on international efforts, as opposed to more initiative and responsibility-driven approaches to the ongoing problems.

The key questions that remain include:

1. How can all tools available in addressing ongoing conflicts be combined smartly and sensitively?
2. What are priority areas today for implementing the Nuremberg Declaration?
3. How can international efforts in fighting impunity and ensuring sustainable peace through justice be strengthened?

Four experts addressed current challenges and four case studies. Looking at Colombia, Mr. Sánchez Leon identified some continuous challenges regarding the implementation of the peace agreement and the ongoing transition, seeking further dialogue and negotiations to clarify varying terms and paths to sustainable peace through justice. Mr. Labuda outlined lessons learned in CAR, including the difficulties associated with pursuing justice without peace; the possibility of ruling out amnesties; and raised the issue of prioritization in terms of justice mechanisms. Mr. Ziadeh, addressed the situation in Syria in his written contribution (as he was unable to attend the conference). Outlining the weaknesses of the transitional processes in Syria, he calls upon the community to work hard towards rebuilding democracy. With respect to South Sudan, Ms. Case noted, *inter alia*, the difficulty connected with the ongoing impunity challenges in the government but also the opposition side, and lack of development actors in South Sudan.



What are key lessons from Colombia and what are the current challenges in light of the 2007 Nuremberg Declaration on Peace and Justice?

Nelson Camilo Sánchez León

In the decade following the Nuremberg Declaration on Peace and Justice, the world has seen several attempts at political negotiations to end armed conflicts, especially internal conflicts such as those in Nepal and Colombia. Indeed, the latter country has been the source of much discussion regarding its peace process between the oldest guerrilla group in the Western Hemisphere and the Colombian Government.

Having brought its 50-year civil war to an end, Colombia must now face several of the challenges addressed by the Nuremberg Declaration. For example, how to formulate a proposal for justice that promotes peace and reconciliation; how to meet the socioeconomic needs of large sections of the population during this institutionally fragile moment as the country transitions from conflict to peace; and how to ensure that the transition process centers on victims.

Colombia's peace agreement, with all its shortcomings, features several elements that embrace the Declaration's appeal to mediators to contribute responsibly and creatively to the "immediate ending of violence and hostilities while promoting sustainable solutions" (Nuremberg Declaration, Recommendation 1.2). In this regard, five reflections shall be shared on the relationship between peace and justice.

The first is the need to acknowledge a general international obligation to investigate, prosecute, and, ultimately, punish grave human rights violations. The existence of this duty is a positive and humanitarian step forward in contemporary international law. As a general international obligation, it requires states – particularly those that have ratified the Rome Statute – to adopt measures to comply with it, which means abiding by it even in situations of political transition following episodes of mass violence.

Second, in order to reconcile with the demands of negotiations for sustainable peace, this duty should not be seen as absolute, for in practice – especially during political transitions – its implementation may come into tension with other duties and values that the state must uphold, such as the value of peace and the rights of victims. Thus, this obligation must be balanced against these other specific obligations and in accordance with the context in question. As a result, it is impossible to indicate in the abstract how this duty can or should be implemented. At the same time, given that each context is unique, a weighting system that is appropriate in one case might not be propitious in another.

Therefore, thirdly, such situations call for a dialogue between, on the one hand, the legal standards establishing the international duty to investigate, prosecute, and punish and, on the other, empirical evidence and philosophical debates concerning the objectives of the political transition, the role of criminal prosecution in the process, and the aims and functions of sanctions. In situations where there are several options for implementing international standards at the domestic level, a dialogue is needed among the normative categories, the political project sought by the transition, and the specific capacities and constraints of the society implementing it. Only thus will it be possible to determine the concrete role that should be played by a criminal prosecution strategy as part of a broader policy of political transition.

In this regard, a fourth reflection emerges from the Colombian experience: in accordance with a given country's magnitude of violence and the state's capacity to implement its obligations, concentration strategies of criminal prosecution (prioritization or selection measures) may be worthwhile, provided that they are part of a comprehensive and honest policy of transitional justice and that they set clear, achievable, and verifiable objectives. Thus, prioritization and selection measures focused on securing the individual responsibility of those most responsible for the gravest crimes could constitute – depending, of course, on the measures' design and on the context at hand – legitimate responses on behalf of the state to comply with its international obligation to investigate, prosecute, and punish.

Finally, one last reflection inspired by Colombia's experience is the need to reevaluate the aims and functions of sanctions in transitional contexts. Philosophical debates and a wide range of empirical studies underscore the complexity of directly transferring the objectives attached to punishment in contexts of isolated violence to contexts of atrocious and mass violence. Although there is no conclusive evidence on this point and it

remains an open debate, there is a general consensus that the objective of sanctions in the wake of situations of mass violence should adhere to different parameters. If the possible normative aims of criminal sanctions are evaluated, the ones that seem the most relevant for supporting a political transition are those associated with moral reproach, the setting of responsibilities, and the setting of a culture of non-repetition. Therefore, a balance between the afflictive and expressive dimensions of sanctions should be considered as part of a responsible strategy of criminal prosecution during political transitions. Moreover, in contexts of brokered peace, it is also worth considering strategies for the application of sanctions in which the sanction's expressive dimension is emphasized and greater allowances are provided in terms of its afflictive dimension.

What are key lessons from the Central African Republic in light of achieving the principles laid down in the 2007 Nuremberg Declaration on Peace and Justice?

Patryk Labuda

The CAR, a landlocked country in the heart of Africa, has experienced decades of cyclical conflict. In 2012, clashes between rival armed groups inaugurated the most recent chapter in this long history of violence, causing thousands of deaths and forcing millions to flee their homes. As of 2018, despite years of international mediation, low intensity hostilities continue throughout the country, creating serious challenges for the pursuit of peace and justice.

This article examines the situation in CAR in light of the 2007 Nuremberg Declaration on Peace and Justice. Specifically, it discusses several transitional justice initiatives that have emerged in response to the recent conflict – including a hybrid criminal tribunal, amnesties, and a truth and reconciliation commission – before assessing to what extent the Nuremberg Declaration resonates with the challenges of peace- and state-building in CAR.

One of the most striking developments in CAR over the past five years has been the centrality of justice in the country's peace process. As early as 2013, the ephemeral administration of Michel Djotodia (himself implicated in the commission of various crimes) promised to investigate allegations of serious human rights abuses. After Djotodia's overthrow in late 2013, a new technocratic government led by Catherine Samba Panza reiterated that justice would be a non-negotiable element of CAR's transition. Samba Panza personally invited the Prosecutor of the ICC to intervene in May 2014, and then supported a parallel initiative to establish a hybrid international-national court to carry out prosecutions from Bangui. In May 2015, the Bangui National Forum, a reconciliation conference involving CAR's main armed groups, recognized once more that justice would be a pillar of the peace process.

Yet, despite this rhetorical emphasis on justice, translating ideas into policy has proved challenging. In particular, CAR's authorities have struggled to square the need for criminal accountability with recurring demands for reconciliation and amnesty. Moreover, deteriorating security conditions have stretched the capacities of the UN's peacekeeping mission, UN Multidimensional Integrated Stabilization Mission in the Central African Republic (known by its French acronym MINUSCA), which provides vital support to the Central African government and several transitional justice initiatives, in particular the Special Criminal Court (SCC).

Established by domestic legislation in June 2015, the SCC was expected to ensure that the worst crimes of CAR's conflicts dating as far back as 2003 did not go unpunished. The SCC is mandated to investigate and prosecute serious violations of international humanitarian law and human rights law, including war crimes, crimes against humanity and genocide. As a hybrid tribunal with international and national staff, the SCC draws on the expertise of foreign investigators, prosecutors and judges to strengthen the capacity of its domestic counterparts.

However, the establishment of the SCC has run into myriad logistical, financial and political obstacles. Limited progress was made between mid-2015 and the end of 2016, raising legitimate concerns in some quarters about the Central African Government's commitment to criminal accountability. Moreover, the SCC, an institution funded by voluntary donations, struggled to convince foreign donors that a hybrid court would be a



worthwhile investment. The impasse was broken in 2017, following the appointment of the SCC's international prosecutor and several international and Central African magistrates. At the time of writing, investigations were expected to begin in April 2018, with the first trial tentatively scheduled for late 2018.

As MINUSCA and the Central African authorities worked to 'operationalize' the SCC, other actors involved in the peace process tried to revive the amnesty question. Although the AU has on several occasions floated the possibility of broad-based amnesties for armed groups, these proposals have been met with skepticism from other international actors, including the UN, the US and European governments, and outright hostility from local civil society groups. Although it does not prohibit amnesty expressly, the law establishing the SCC read conjointly with other Central African laws – not to mention various political declarations between 2013 and 2016 – create a strong presumption against the permissibility of amnesty, at least for international crimes. Interestingly, there has been little attempt thus far to differentiate between amnesties for low-level and high-level perpetrators, as suggested by the 2007 Nuremberg Declaration. However, this question is likely to resurface once the SCC launches prosecutions and the financial limitations of an absolute anti-impunity policy become more apparent.

In the background of this tense political debate, there has also been some discussion of truth and reconciliation either as a complement or as an alternative to criminal accountability. However, the Truth, Justice and Reconciliation Commission – foreseen by the 2015 Bangui National Forum – has received much less attention from international actors, most of whom remain focused on the SCC. Central African actors have periodically revived the idea of a truth and reconciliation commission, but it has often functioned as a bargaining chip – similar to amnesty – within the broader justice debate, rather than as a standalone objective.

The Central African case study provides a few lessons for the pursuit of peace and justice, as articulated in the 2007 Nuremberg Declaration. First, it underscores how difficult it is to pursue criminal justice in the absence of peace. Although widespread violence is not the only reason the SCC has struggled to get off the ground, the government's inability to control vast swathes of territory outside Bangui raises seemingly insurmountable security and operational challenges for the SCC's staff as it prepares to launch investigations. Second, CAR illustrates the vitality of the anti-impunity norm – although amnesty has been proposed time and again by some international and regional actors, the Central African authorities have so far taken an uncompromising stance and ruled out any such discussion, even amnesty for low-level perpetrators. Lastly, this case study suggests that difficult choices must be made about, which types of justice to prioritize – peace agreements in CAR have mandated the establishment of a truth and reconciliation commission, and there is even discussion of reviving traditional dispute mechanisms, but in a world of limited resources it is not possible to give the same priority to competing transitional justice projects. In CAR, international and domestic actors have decided that the primary response should be – at least for the time being – international criminal justice.

What are the key lessons from Syria in light of the principles of the Nuremberg Declarations, and what are the challenges going forward?

Radwan Ziadeh

The situation in Syria continues to defy an observer's understanding of reality. Indeed, no Syrian in 2011 imagined that Syria would be like it is today; the brutality of Bashar al-Assad's Syrian regime went far beyond any imagination, whilst Syrian society held high expectations from the international community to provide assistance so as not to allow an all too familiar scenario of war crimes and crimes against humanity to unfold in their country. Moreover, the rise of terrorist organizations in the country, such as ISIS and Al Qaeda, added a new dimension to the suffering and misery of the Syrian people.

The UN Human Rights Council and the Independent International Commission of Inquiry on Syria have both published multiple reports documenting what they described as "everyday war crimes and crimes against humanity".⁸⁹ However, the UN Security Council has thus far failed to refer these crimes to the ICC in order to hold the perpetrators accountable, which is becoming more difficult with time especially after Russian involvement in Syria since September 2015.

In 2013, the Assad regime's indiscriminate barrel bombs started raining down on the population, and have continued to do so, becoming the most systematic and widespread weapons the Government has used against civilians, in clear violation of international humanitarian law. By July 2015, as areas in Syria were no longer under Government control, more than 120,000 people lost their lives as a result of the use of barrel bombs.⁸⁴ The response of the international community has been to ignore this grave violation of international humanitarian law.

In August 2013, the Assad Government used sarin gas,⁸⁵ killing more than 1,000 people and bringing the total number of casualties from chemical attacks in Syria to 1,500 as of March 2016. Again, the Syrian Government stated that it had relinquished its arsenal of chemical weapons following a deal between the United States under the Obama Administration, and Russia, in 2013. Nevertheless, the Government brazenly used sarin gas again in April 2017,⁸⁶ leaving at least 83 dead in Khan Sheikhoun, in Idlib province. The Syrian American Medical Society has documented 109 chlorine gas attacks in Syria since the civil war began in 2011.⁸⁷

In 2016 and 2017 different types of violations of international humanitarian law were witnessed whereby parts of the population were transferred against their will. The so-called population swap deal came after five earlier deals, which included Sunni cities that had participated in anti-government protests in 2011. Their populations have now joined the armed opposition to defend their towns and prevent Syrian Government troops from invading or entering them and massacring civilians. International organizations have reported that these massacres or displacement deals had been perpetrated based on sectarian lines.

The first city that was subject to such an enforced displacement deal was Homs.⁸⁸ The neighborhoods of the old city, which are predominantly Sunni, were subjected to massive shelling and near-total destruction, forcing most of their people to flee. The agreement led to the emptying of the old town completely from its native inhabitants and attracting more loyalists to the Government. The population of Homs dropped from 1.5 million in 2011 to nearly 400,000 people today, with 65 percent of the city's indigenous population leaving to Idlib province.

Rule 129 of the International Committee of the Red Cross' Database on Customary International Humanitarian Law states clearly that, "Parties to a non-international armed conflict may not order the displacement of the civilian population, in whole or in part, for reasons related to the conflict, unless the security of the civilians involved or imperative military reasons so demand".⁸⁹ Further, the Statute of the ICC states that in non-international armed conflicts, "ordering the displacement of the civilian population for reasons related to the conflict, unless the security of the civilians involved or imperative military reasons so demand" constitutes a war crime.⁹⁰

Unfortunately, these events in Homs and later in Darayya in December 2016, were repeated in Aleppo in early 2017. As a result, the responsibility falls on the international community in the post-Assad era to prosecute those responsible for human rights violations. Whether at the national or international level, justice must be sought on behalf of the victims of violent events surrounding the "Syrian revolution". The culture of impunity that has thrived under the Syrian regime for the last forty years must finally be brought to an end. Syria can

83 The Independent International Commission of Inquiry on the Syrian Arab Republic was established on 22 August 2011 by the Human Rights Council through resolution S-17/1 adopted at its 17th special session with a mandate to investigate all alleged violations of international human rights law since March 2011 in the Syrian Arab Republic. For all related reports, see United Nations Human Rights Council, "Independent International Commission of Inquiry on the Syrian Arab Republic", available at <http://www.ohchr.org/EN/HRBodies/HRC/IICISyria/Pages/IndependentInternationalCommission.aspx>, last accessed at 21 April 2018.

84 The Syrian Regime's Barrel Bombs Kill More Civilians Than ISIS And Al Qaeda Combined, International Business Times, Alessandria Masi, 18 August 2015.

85 Almost 1,500 killed in chemical weapons attacks in Syria, The Guardian, 14 March 2016.

86 Survivors of Syrian attack describe chemical bombs falling from sky, CNN International, 6 April 2016.

87 How chlorine gas became a weapon in Syria's civil war, Aljazeera International, 23 March 2017.

88 Homs: Syrian revolution's fallen 'capital', BBC News, 9 December 2015.

89 International Committee of the Red Cross, IHL Database, Customary IHL, available at https://ihl-databases.icrc.org/customary-ihl/eng/docs/v1_rul_rule129, last accessed at 21 April 2018.

90 Article 8(2)(e)(viii), Rome Statute, see supra note 15.



establish a new culture of legitimacy and overcome the legacy of the past by engaging in national reconciliation efforts carried out through a comprehensive transitional justice process.

The war crimes and crimes against humanity committed by the Assad regime are certainly within the scope of work of the ICC. However, given Russia's position in the UN Security Council, this has thus far prevented the referral of Syrian criminals to the Court. Any future government formed post-Assad should ratify the Rome Statute in order to enable a prosecutor to open an investigation into these crimes. The path of international justice is certainly not an ideal choice; it is too slow, particularly because Syrian victims need their rights guaranteed, which must not be discarded through political compromises. Therefore, the preferable option for the Syrians would be the creation of a hybrid court, which should be held in Syrian territory and involve the direct participation of Syrian judges, and be supported by international expertise, perhaps under the supervision of the UN. The necessity of international experts participating in hybrid courts, especially when held in divided societies, is key in serving as a reminder to all Syrians that revenge is not the goal, and rather to reassure them that the toughest standards of justice and international transparency will be guaranteed. The goal is not to target specific religious groups and hold them accountable, but to establish the course of justice that can ensure the establishment of a future Syria on valid grounds. At the same time, such international involvement gives more confidence to the international community regarding the credibility and inclusiveness of the new system and its commitment to justice and reconciliation, as well as its assurance that there is no place for the policies of revenge or retaliation within its program. Syrians will need the international community, which has failed them so far, to rebuild their country and construct their future institutions. However, Syrians should also recognize the limits of the help that can be provided by the international community and realize that they must ultimately rely on themselves alone to build their democracy.

What are the key lessons from South Sudan with regard to inclusivity in the peace process?

Kelly Case

South Sudan has been in violent conflict for over four years. What started off as a conflict between forces loyal to President Salva Kiir Mayardit, who is from the Dinka tribe, and forces loyal to former Vice President, Riek Machar, who belongs to the Nuer tribe, quickly devolved into a tribal conflict of horrific brutality. According to the most recent figures, there are 1.76 million internally displaced persons, 2.45 million refugees in neighboring countries, and over six million – half the population – are severely food-insecure. The UN Special Representative on Sexual Violence estimates that the levels of sexual violence in South Sudan now represent the highest of any conflict environment in the world. Tens of thousands have been killed, (potentially hundreds of thousands) and the conflict has created the largest refugee crisis on the continent.

Women, despite their significant contributions in both fighting war and building peace, are not considered vital decision makers or constituents whose participation in peace and security processes is essential for stability. More than a decade has passed since the United Nations adopted Security Council Resolution 1325 to ensure the inclusion of women in all peace and security processes. However, inclusion is still not a global norm, currently the global system dictates that those who pick up weapons and perpetrate horrific violence are the ones who get a seat at the table where the future is determined. This often results in discussions of power, position and territory as opposed to discussions on the root causes of war. Over the last several years the narrative around inclusion has certainly increased in recognition of its significance, however, the statistics do not bear this out.

Women in South Sudan face similar challenges. They are not newcomers to the battle for inclusion having played a vital role in the liberation struggle during the war with Sudan by coming together across borders to call for peace between the warring sides. Despite their history of collaboratively promoting peace and their own participation in the conflict, the current context of rising political tensions and extreme violence prevents women from effectively participating in the peace process.

Bearing in mind the context of the conflict as highlighted in the preceding paragraphs, the below outlines some of the key lessons and challenges in relation to inclusivity in South Sudan.

Continuation of Violent Conflict

South Sudan is still in active conflict so while a peace agreement was signed in 2015, violent conflict continues unabated. Given the rampant insecurity, severe economic downturn, and lack of space for civil society to operate normally, inclusion in the peace process is challenging.

Traumatized population

South Sudan has a long history of war and a population deeply traumatized because of it. The population has lived in a state of insecurity for decades, which has a deep impact on one's emotional wellbeing. There are a lot of historical grievances from the war with Sudan that were never resolved. Violence is normalized and trauma is cyclical. If the trauma is never addressed, it is often repeated and passed on. Additionally, a Multi-generational Transmission of Trauma is witnessed where trauma is passed onto generations. This occurs often through the form of violence, but may also take the form of dignity-destroying beliefs and structures created in response to trauma that in turn create trauma for others, which can be seen in South Sudan. Trauma is experienced at all levels in South Sudan, from the government to the grassroots and this can make it challenging to have any sort of effective peace process, let alone an inclusive one.

Regional cooperation

The regional community has not been strong enough in pushing for an inclusive process. Several countries in the region such as Uganda, Ethiopia, Kenya and Sudan all have vested interests in South Sudan, Oftentimes, however, such interests do not complement each other resulting in a regional community that is not working together for a common goal. It may be in some of their interests to not have an inclusive, effective process and thus they do not place pressure on the warring parties to prioritize inclusion.

Lack of political will or resistance to inclusion by elites

While the peace process in 2015 was inclusive on paper (i.e. there were women and civil society at the table), the leaders of the warring parties never truly had the political will to create an inclusive process. They were pressured into it by the international community and some regional countries, but ultimately, they did not want impartial actors involved. The consequence was that many of the impartial actors at the table were co-opted by one side or another and therefore the voices of the people ultimately were not present. Resistance and indifference to women's inclusion can greatly constrain the quantity and quality of women's participation.

Impunity

Both the Government and opposition have been able to act with near impunity, particularly the Government. While a ceasefire was supposed to be in place to allow implementation to move forward on the peace agreement, violence is rampant. There have been extreme amounts of sexual violence including gang rape, sexual mutilation and sexual slavery. The Government is also blocking critical humanitarian aid and the international and regional community have failed to follow through on their threats. Although the Agreement provides for the establishment of a Hybrid Court for South Sudan by the AU Commission; a Commission on Truth, Reconciliation and Healing; and a Compensation and Reparations Authority, very little progress has been made.

Lack of capacity of civil society

While there are a lot of development actors in South Sudan trying to build the capacity of civil society, much still needs to be done. Capacity building on key aspects of engaging in a peace process such as mediation, negotiation and advocacy are needed. In addition, civil society in South Sudan has had trouble coming together with a unified voice. There is a lot of infighting between NGOs within South Sudan that has made it more challenging to be effectively engaged in the process even when they are invited in.

Funding

Sustained, long-term support is needed. Achieving results in the field of women, peace and security is most often a long-term endeavor that requires continuous support. Funding for women's groups should be increased with a focus on inclusion in the peace process. This continues to be a challenge for creating an inclusive and effective peace process.



Closing Remarks

Zeid Ra'ad Al Hussein

Video statement by the UN High Commissioner for Human Rights

Excellencies, Dear Friends,

I am so sorry I could not be with you today - ten years after we met to negotiate the Declaration in Nuremberg and settle some basic questions: whether peace should be attained at any cost? Even if it meant impunity for the perpetrators or forsaking justice for the victims of atrocity crimes. And, ultimately, would it even be peace? - a sustainable peace and not some superficial peace or temporary cease-fire. And why do victims sink so quickly to the bottom of a mediator's set of priorities, once the final peace negotiations begin?

The Declaration answers, and then settles, these issues and yet, a simple glance today at Colombia or Sri Lanka is evidence enough just how relevant the Declaration still is. Also, should we not ask: Would we have had a war in Yemen, had an amnesty not been provided to Ali Abdullah Saleh the former president of Yemen? I think not. Or, as the conflict seemingly begins to wind down in Syria - although few doubt it will be an easy transition to a post-conflict environment - will amnesties rear their ugly head again? Maybe yes. We human beings are still unreliable and untrustworthy.

This meeting therefore is centrally important and I look forward to hearing about your conclusions. Allow me finally to thank Ambassador Christian Much for his inspirational leadership over this initiative - his energy and passion for these issues hasn't changed over the twenty years that I have known him. Thank you Christian and a thank you to all the governments, civil society organizations and the distinguished participants who have continued to support this crucial, crucial work.

Viviane Dittrich

On behalf of the International Nuremberg Principles Academy, I thank you very much for your participation in the Nuremberg Forum 2017 as we look back with gratitude over the last two days and take the fruitful discussions as sources of inspiration and encouragement. The Nuremberg Forum 2017 has been dedicated to the topic "10 Years after the Nuremberg Declaration on Peace and Justice 'The Fight against Impunity at a Crossroads'".

Ten years on, it is indeed an opportune moment to reflect upon and critically examine the possible synergies and tensions between peace and justice, security and development, and it is a testament to the wealth of experience and expertise assembled in Courtroom 600 that allowed for such rich discussions to take place. Over the past two days, we have reflected upon the Nuremberg Declaration, a document that resulted from the important conference entitled "Building a Future on Peace and Justice", held in Nuremberg in 2007. This theme is still topical today and is infused with new urgencies and ongoing challenges, some of which have been dissected during the course of this conference. A series of eight panels have sketched and illuminated various aspects of these debates and three immediate observations can be made.

First, it is important to reaffirm and revisit the 2007 Nuremberg Declaration and more critically the core ideas that were included in said document. This forum has highlighted the significance of critically examining the assumptions, arguments and assessments made in the fields of peace and justice. Secondly, it is critical to recognize the complexity of all the cases, issues and notions that are being dealt with on a daily basis. Throughout these two days we have discussed different concepts of peace, justice, development, victim participation and reconciliation, and it seems that increasingly these notions are being contested and redefined thus highlighting the need for further dialogue and engagement. Thirdly, it is necessary to think outside the box - during the conference this has been formulated as an appeal when thinking about the future of peace and justice discussions, namely to really consider what is possible, what could be possible and what should be possible, whilst simultaneously bearing in mind the idea of sustainability. Once again, this is best addressed by coming together across geographical, disciplinary or sectoral divides and by engaging in meaningful dialogue. If the Nuremberg Academy has made a contribution to this via this Forum then we are pleased with this result.

Finally, I would like to take a moment to show appreciation for the many institutions and individuals involved in making this conference a success. I thank each and every one of you for your participation and especially our high-level experts for their generosity in sharing their time, expertise and insights. I would like to thank the ICC President, Silvia Fernández de Gurmendi, for taking the time to travel to Nuremberg and providing an inspiring keynote address. Sincere thanks go to the distinguished speakers and moderators for leading us through intense and interesting discussions and all of the participants for their excellent contributions and thought-provoking questions. Of course, I would like to thank Dr. Navi Pillay as the President of the Advisory Council and indeed all the esteemed and distinguished members of the Advisory Council and Foundation Board for your continuous support and engagement.

To organize a conference of this magnitude requires tireless efforts, dedication and a lot of work from the very early days of creating a program and brainstorming ideas, reaching out to the experts and handling the logistics. Once again, I would like to thank the ICTJ in this respect, and to give all the credit that is due to this fruitful collaboration, particularly recognizing David Tolbert and his dedicated staff. I would also like to thank the Memorium Nuremberg Trials and the High Regional Court of Nuremberg for the good working relationship and allowing us to be here in this very courtroom, which adds gravitas to all of our discussions. Inside the International Nuremberg Principles Academy, firstly I would like to recognize Klaus Rackwitz, the Director, and also Christian Much, the Interim Director during summer 2017, for the tremendous work over the last months when much of this Forum was put into action and the conceptualization of this program took shape. Last but not least I would like to thank the terrific Nuremberg Academy staff for their enthusiasm and tireless efforts in the last few days, weeks and months.

On a final note, the Nuremberg Forum is the International Nuremberg Principles Academy's largest event each year, and I am pleased to announce that we will gather here anew for the Nuremberg Forum 2018 in one year from now and discuss the ICC and the 20th anniversary of the Rome Statute. I hope to see you all in Nuremberg again soon.



Annexes

Program of the Nuremberg Forum 2017

Day 1: 20 October

Morning Session

9.00–9.20 **Opening Remarks**

Guido Hildner, Director of Public International Law at the Federal Foreign Office
Navanethem Pillay, President of the Nuremberg Academy's Advisory Council;
formerly United Nations High Commissioner for Human Rights, International Criminal
Tribunal for Rwanda and International Criminal Court
Christian Schmidt, Federal Minister of Food and Agriculture

9.20–9.50 **Key Note Address**

Silvia Fernández de Gurmendi, President of the International Criminal Court

9.50–10.15 **Coffee Break**

10.15–11.30 **Panel 1: The Nuremberg Declaration on Peace and Justice Today**

Speakers:

Navanethem Pillay (Nuremberg Academy's Advisory Council; formerly United Nations
High Commissioner for Human Rights, International Criminal Tribunal for Rwanda and
International Criminal Court)

David Scheffer (Northwestern University, Center for International Human Rights)

David Tolbert (International Center for Transitional Justice)

Moderator: **Christian Much** (retired German diplomat; former Interim Director of the
Nuremberg Academy)

11.30–13.00 **Panel 2: Justice, Prevention and the Fight Against Impunity**

Speakers:

Chandra Sriram (University of East London): The relationship between transitional justice
and security

Viviane Dittrich (Nuremberg Academy): The relationship between peace-building and justice

Susanne Buckley-Zistel (University of Marburg): The acceptance of the Nuremberg Principles
in non-western societies

Moderator: **Christoph Safferling** (University of Erlangen-Nuremberg)

13.00–14.00 **Lunch**

Afternoon Session

14.00–15.30 **Panel 3: Forgotten Voices: Catering to the Needs of Victims**

Speakers:

Anita Ušacka (formerly International Criminal Court): The fight for accountability and fight
against impunity for international crimes

Sarah Kasande (International Center for Transitional Justice): The role of victims in the
international system of criminal justice

Fiona McKay (Open Society Justice Initiative): Changes in victims' rights in the last 10 years

Moderator: **Philipp Ambach** (International Criminal Court)

15.30–16.00 **Coffee Break**

16.00–17.30 **Panel 4: Reconciliation**

Speakers:

Betty Murungi (formerly Kenya Truth, Justice and Reconciliation Commission): The role of
truth in reconciliation

Alison Smith (No Peace Without Justice): Demobilization, disarmament and reintegration
in the African context

Velma Šarić (Post-Conflict Research Center): Reconciliation amidst competing conflict narratives

Moderator: **Elena Baylis** (University of Pittsburgh)

Day 2: 21 October

Morning Session

9.00–10.30 **Panel 5: Development in the Service of Transitional Justice**

Speakers:

Marieke Wierda (Ministry of Foreign Affairs, The Netherlands): Stabilization, development and transitional justice

Christopher Mahony (Centre for International Law Research and Policy): The international agenda for enabling justice, rule of law and the satisfaction of basic needs through development programs

Samuel Emonet (Justice Rapid Response): Assistance to ailing national judiciaries

Moderator: **Eduardo Toledo** (Nuremberg Academy)

10.30–12.00 **Panel 6: Political Impediments to the Fight Against Impunity**

Speakers:

Serge Brammertz (United Nations Mechanism for International Criminal Tribunals): The politics of international justice

Maria Camila Moreno (International Center for Transitional Justice): Transitional justice in divided societies

Athalia Molokomme (Botswana Permanent Mission to the UN in Geneva): The Rome Statute and regional politics

Moderator: **Martin Klingst** (DIE ZEIT)

12.00–13.00 **Lunch Break**

Afternoon Session

13.00–16.30 **Panel 7 and 8: Peace and Justice**

13.00–14.30 **Lessons Learned**

Speakers:

Richard Dicker (Human Rights Watch): Analyzing and managing the justice-peace interface

Nicola Palmer (King's College London): Rwanda

Gerald Gahima (formerly War Crimes Chamber of the Court of Bosnia and Herzegovina; former Prosecutor General of Rwanda): Bosnia and Herzegovina

Michael Hartmann (formerly United Nations Assistance Mission to Afghanistan): Afghanistan

Moderator: **Mark Kersten** (Wayamo Foundation)

14.30–15.00 **Coffee Break**

15.00–16.30 **Current Challenges**

Speakers:

Nelson Camilo Sánchez León (Dejusticia): Colombia

Patryk Labuda (Graduate Institute Geneva): Central African Republic

Radwan Ziadeh (The Arab Center Washington D.C.): Syria

Kelly Case (Inclusive Security): South Sudan

Moderator: **William Pace** (Coalition for the International Criminal Court)

16.30–17.00 **Closing Remarks**

Navanethem Pillay, President of the Nuremberg Academy's Advisory Council; formerly United Nations High Commissioner for Human Rights, International Criminal Tribunal for Rwanda and International Criminal Court

Zeid Ra'ad Al Hussein, United Nations High Commissioner for Human Rights (video message)

Klaus Rackwitz, Director of the Nuremberg Academy



Biographies of Contributors

Dr. Philipp Ambach

International Criminal Court

Dr. Philipp Ambach is Chief of the Victims Participation and Reparations Section in the Registry of the International Criminal Court (ICC). Prior to that, he worked for more than six years in the Presidency of the ICC as the President's Special Assistant. During that time, and with special leave from the Judiciary, he also participated as a Legal Officer in the reorganisation of the ICC Registry as one of the two team leaders (2015). Before that, Dr. Ambach worked for four years as an associate legal officer in the Appeals Chamber of the ICTY, ICTR, as well as in the Registry of the ICTY. After finishing his Master's degree in law at the Humboldt-University of Berlin (Germany) and subsequent employment at the Regional Court of Düsseldorf, Dr. Ambach was accepted at the Cologne Public Prosecutor's Office as prosecutor. He holds a Ph.D. in international criminal law of Free University of Berlin. Dr. Ambach has published a number of contributions on various topics in the area of international criminal as well as humanitarian law. He regularly lectures on ICL/IHL topics at various institutes.

Professor Elena Baylis

University of Pittsburgh

Professor Elena Baylis is an expert in post-conflict justice. Her scholarship focuses on the intersections between international criminal law and rule of law initiatives, the role of transnational networks, and the interactions between international, national, and sub-national institutions and communities. Her recent research concerns donor support for funding transitional justice and the relationships between hybrid courts and national justice systems. She has conducted field research and worked on legal education/rule of law initiatives in several post-conflict states, including Kosovo, Ethiopia, and the Democratic Republic of Congo. Professor Baylis is Project Expert for the Hybrid Justice Project, co-sponsored by the Rockefeller Foundation, the Wayamo Foundation and the London School of Economics' Institute of Global Affairs. She is also Vice Chair for Rule of Law, for the American Bar Association International Law Section, and Secretary/Treasurer for the International Criminal Law Interest Group of the American Society of International Law. Her research has been commissioned by the International Center for Transitional Justice and the U.S. Institute of Peace. Before joining the University of Pittsburgh, Professor Baylis taught at Mekelle University Law Faculty in Ethiopia as Visiting Assistant Professor from the University of Alabama Law School. She also practiced civil litigation and advised clients on foreign policy matters with Shea & Gardner in Washington, D.C. and clerked for Judge Mariana Pfalezer of the U.S. District Court for the Central District of California. Professor Baylis is a graduate of Yale Law School, where she was awarded the Raphael Lemkin Prize for the best paper on international human rights. She earned her B.A. summa cum laude from the University of Oregon Honors College.

Dr. Serge Brammertz

International Criminal Tribunal for the former Yugoslavia; United Nations Mechanism for International Criminal Tribunals

Dr. Serge Brammertz has served for more than a decade in senior positions charged with investigating and prosecuting grave international crimes. On 28 November 2007, Dr. Brammertz was appointed by the United Nations Security Council to serve as Chief Prosecutor of the International Criminal Tribunal for the former Yugoslavia. Dr. Brammertz was subsequently appointed by the Security Council to serve concurrently as Chief Prosecutor of the Mechanism for International Criminal Tribunals in 2016. From January 2006 to December 2007, he was Commissioner of the United Nations International Independent Investigation Commission into the assassination of former Lebanese Prime Minister Rafik Hariri. Previously, he was the first Deputy Prosecutor of the International Criminal Court. Prior to his international appointments, Dr. Brammertz was first a national magistrate then the head of the Federal Prosecution of the Kingdom of Belgium. Dr. Brammertz is currently a member of the Executive Committee of the International Association of Prosecutors, and previously served as Chairman of the European Judicial Network. He has published and lectured widely.

Professor Susanne Buckley-Zistel

University of Marburg

Susanne Buckley-Zistel is Professor of Peace and Conflict Studies and Director of the Center for Conflict Studies, Philipps University Marburg in Germany. Her research focuses on issues pertaining to violence, gender and transitional justice. Amongst other publications she has co-edited the volumes *Gender in Transitional Justice* (Palgrave), *Transitional Justice Theories* (Routledge), *Memorials in Times of Transition* (Intersentia) and *Gender, Violence, Refugees* (Berghahn). She has also co-edited the volume *After Nuremberg. Exploring Multiple Dimensions of the Acceptance of International Criminal Justice* of the International Nuremberg Principles Academy.

Ms. Kelly Case

Inclusive Security

As Deputy Director of Africa Programs, Kelly Case leads Inclusive Security's work in South Sudan and Sudan with the goal of advancing the engagement of women in peace processes between and within the two countries. In this role, Ms. Case is responsible for building the capacity of the Taskforce on the Engagement of Women, a strategically selected group of 20 leaders from both countries working together to advocate for women's inclusion in bilateral and national peace processes. She also leads the Institute's advocacy efforts with key policymakers working in both countries –including the US Administration and the African Union—to ensure policies reflect women's priorities. Previously, Ms. Case worked for the American Red Cross's Investigative Fraud Unit where she pursued cases of waste and abuse in the aftermath of Hurricane Katrina. She subsequently became Special Assistant to the president of humanitarian services, also at Red Cross. Ms. Case has worked in Palestine with Palestinian and Israeli youth on programs that promoted reconciliation and in the Great Lakes region of Africa on sustainable development and equal access to education. She holds a master's degree in conflict analysis and resolution from George Mason University and a bachelor's degree in psychology and art history from Lafayette College.

Mr. Richard Dicker

Human Rights Watch

Richard Dicker, Director of Human Rights Watch's international justice program since it was founded in 2001, has worked at Human Rights Watch since 1990. He began working on international justice issues in 1994 when Human Rights Watch attempted to interest states in bringing a case before the International Court of Justice alleging the government of Iraq had violated its obligations under the Convention to Prevent and Punish Genocide for gassing the Kurdish population in 1988. Starting in 1995, Mr. Dicker led the Human Rights Watch multi-year campaign to establish the International Criminal Court (ICC). As a prominent civil society representative, he was deeply involved in all of the ICC Preparatory Committee sessions as well as the Rome Diplomatic Conference. He continues to follow issues of importance at the ICC. Starting in 2002, he monitored the Slobodan Milosevic trial at the ICTY and made several trips to Iraq before and at the start of Saddam Hussein's trial at the Iraqi High Tribunal. He has spent the past few years leading advocacy efforts urging the creation of effective national accountability mechanisms and seeking to bolster universal jurisdiction prosecutions. Mr. Dicker has overseen Human Rights Watch's work where the important objectives of justice and peace are entwined. Mr. Dicker is a frequent author of articles that have appeared in *Foreign Policy*, *The Guardian*, *The Economist*, *The International Herald Tribune*, and *Jurist*. Mr. Dicker teaches on international criminal tribunals and courts at UCLA and Columbia law schools. A former civil rights attorney in New York, Mr. Dicker graduated from New York University Law School and received his LL.M. from Columbia University.

Dr. Viviane Dittrich

Nuremberg Academy

Dr. Viviane Dittrich is Deputy Director of the International Nuremberg Principles Academy. She has significant experience in multidisciplinary research, higher education, and international and national institutions. Her research interests lie at the intersections of politics and international law, focusing on international organizations, international criminal law and the politics of memory. She has broad teaching and research experience



and has published on the notion of legacy and the process of legacy building at the international criminal tribunals. Drawing on extensive field research, her work comparatively investigates the ICTY, ICTR, SCSL, ECCC, ICC and IMT (Nuremberg). Dr. Dittrich is a Visiting Fellow at the Centre for International Studies at the London School of Economics and Political Science (LSE), and an Honorary Research Associate at Royal Holloway, University of London. Previously she has been a Visiting Researcher at iCourts (Centre of Excellence for International Courts), Faculty of Law, University of Copenhagen. After studies in France, England and the United States (Wellesley College) she received an M.Sc. in International Relations from the LSE and a Master's degree from Sciences Po Paris. She holds a Ph.D. from the LSE.

Mr. Samuel Emonet

Justice Rapid Response

Samuel Emonet is a Swiss lawyer by profession with an LL.M. in European Law from the University of Bremen, Germany. In October 2000, he joined the Protection Department of the International Committee of the Red Cross (ICRC) where he worked for more than 15 years in long-term field missions in Afghanistan, Rwanda, Iraq, Georgia, Lebanon and Mali. In parallel, he took part in emergency deployments at the onset of the crisis in Georgia (2008), Kyrgyzstan (2010) and Libya (2011) to setup the ICRC's early humanitarian response. He joined Justice Rapid Response (JRR) as Director of Operations in May 2016. He oversees the activities of the organization, including the rapid deployment of criminal justice professionals from the JRR roster to support the international community in their investigation of core human rights violations.

President Silvia Fernández de Gurmendi

International Criminal Court

Prior to joining the International Criminal Court, Judge Fernández de Gurmendi was the Director General for Human Rights at the Ministry of Foreign Affairs of Argentina, where she acted as a representative of her country in cases before the Inter-American Commission of Human Rights and the Inter-American Court of Justice. She also represented Argentina before other human rights bodies and advised on transitional justice issues related to the prevention of genocide and other international crimes. She played a leadership role in the creation and setting up of the International Criminal Court as President of the Working Group on Criminal Procedure and Vice-President of the Committee of the Whole at the Rome Conference. She was also instrumental in the negotiations of the complementary instruments of the Rome Statute as chair of the Working Group on Rules of Procedure and Evidence and the Working Group on Aggression. Judge Fernández de Gurmendi's academic experience includes professorships of international criminal law at the Universities of Buenos Aires and Palermo and as an assistant professor of international law at the University of Buenos Aires. She has published a number of national and international publications related to the ICC including, amongst others, the role of the Prosecutor, criminal procedure and the definition of victims. She holds a Law Degree from the University of Córdoba, Argentina, a Master's in Public Law from the University of Limoges, France, and a Ph.D. in Law from the University of Buenos Aires, Argentina. In 2007, along with other practitioners, diplomats and academics, she was one of the co-authors of the "Nuremberg Declaration on Peace and Justice".

Dr. Gerald Gahima

Formerly War Crimes Chamber of the Court of Bosnia and Herzegovina; former Prosecutor General of Rwanda

Dr. Gerald Gahima's professional and academic background provides an exceptional blend of expert knowledge and practitioner experience on issues relating to justice sector reform and access to justice, human rights, transitional justice and post-conflict reconstruction. Dr. Gahima has had a distinguished career in private legal practice, public service and international development. Since his leaving of private practice, he held several senior level positions in government, including Deputy Minister of Justice and Public Service, Attorney General and Deputy Chief Justice, at a critical time in Rwanda's recent history. Through this time, he gained exceptional experience of leading the rebuilding of Rwanda's public service and justice system from the ground. He was instrumental in the formulation and implementation of

policies on civil service reform, the promotion of the rule of law and accountability for the genocide. Dr. Gahima has further had the unique experience of organizing and supervising domestic prosecutions of genocide and other serious international crimes (in total over 135,000 genocide suspects and the prosecution of more than 5000 genocide cases during his tenure as Rwanda's Attorney General). Since leaving the government service in Rwanda, Dr. Gahima was involved in the establishment and served as a judge of the War Crimes Chamber of the State Court of Bosnia and Herzegovina. He also worked for the Australian Agency for International Development in their Asia Pacific programs and did consulting work with several donors bodies, including the United Nations and the World Bank on these and other issues. Dr. Gahima continues to work as a practitioner, and as a scholar and frequently lectures on matters relating to transitional justice and post-conflict reconstruction.

Mr. Michael Hartmann

Formerly United Nations Assistance Mission to Afghanistan

Michael E. Hartmann, Director of UNAMA's Rule of Law in Afghanistan from 2013 to June 2017, is now US Institute of Peace's grantee writing a Special Report on the Anti-Corruption Justice Center. He led UNAMA advocacy resulting in the 2017 Penal Code's incorporation of all Rome Statute crimes. He was Advisor to the Attorney General of Afghanistan for US State/INLBureau-JSSP, and UNODC's Criminal Justice Programme Manager, in 2005–2010. International prosecution work in national courts included Senior Crown Prosecutor/war crimes coordinator, Australia's Solomon Islands RAMSI mission 1.4 years (2012–13), and UNMIK international prosecutor for Kosovo (2000–2005), investigating/prosecuting genocide, war crimes, terrorism, corruption, rape and ethnic hate crimes trials, and appeals before the Kosovo Supreme Court. In Bosnia, he was a team leader, UNMIBH's Judicial System Assessment Programme, country representative for UNODC's anticorruption project (1998–2000), and in 1997 advised the Ministry of Justice drafting group on Criminal Procedure and Penal Code revision as part of an expert team with the Council of Europe. In 2003, he was Senior Fellow in residence at the US Institute of Peace, and in 1996 Senior Fulbright Scholar, Law, in Pakistan. Mr. Hartmann was Assistant District Attorney in San Francisco, prosecuting sexual assault and murder (1983–1998).

Dr. Guido Hildner

Federal Foreign Office, Germany

Dr. Guido Hildner is Director of Public International Law at the Federal Foreign Office in Berlin. Prior to taking up this position, Dr. Hildner held a number of positions in the German Diplomatic Service. Over the years, he has worked at the Federal Foreign Office, both in Bonn and Berlin, and abroad in Embassies in Sri Lanka, Lebanon, Russia, at the Mission to the United Nations in New York and at the Delegation to NATO in Brussels. From 2003 to 2006 he worked for the International Criminal Court in The Hague.

Ms. Sarah Kasande

International Center for Transitional Justice (Uganda)

Sarah Kihika Kasande is Head of Office of the Uganda program of the International Center for Transitional Justice (ICTJ). She is an Advocate of Courts of Judicature in Uganda and has extensive experience and training in gender and the law, international law, transitional justice and constitutional law. She has over nine years of experience working in the field of human rights and transitional justice. She has provided technical support to state and non-state actors in the areas of international criminal justice, transitional justice and gender justice. She has worked closely with the Justice Law and Order Sector in Uganda to support the development of the National Transitional Justice Policy. She also works closely with the International Crimes Division of the High Court of Uganda to support the establishment of frameworks that will ensure the effective investigation, the prosecution of international crimes and the protection of victims' rights. Prior to joining the ICTJ, Ms. Kasande served as Senior Program Officer with the Uganda Association of Women Lawyers (FIDA Uganda), where she worked to promote access to justice for vulnerable women and children.



Dr. Mark Kersten

Wayamo Foundation

Dr. Mark Kersten is a fellow based at the Munk School of Global Affairs, University of Toronto, and Deputy Director of the Wayamo Foundation. His research and work focus on: the effects of judicial interventions by the International Criminal Court on conflict, peace and justice processes; capacity-building and domestic accountability for international crimes; and the nexus between mass atrocities and transnational organized crimes. In 2011, Dr. Kersten founded the blog Justice in Conflict, which regularly publishes articles on the challenges of pursuing transitional justice in the context of ongoing violent political conflicts. He has taught courses on genocide studies, the politics of international law, diplomacy, and conflict and peace studies at the London School of Economics, SOAS, and the Trudeau Centre for Peace, Conflict, and Justice. In 2016, Oxford University Press published Dr. Kersten's book *Justice in Conflict – The Effects of the International Criminal Court's Interventions on Ending Wars and Building Peace*. Dr. Kersten has previously been Research Associate at the Refugee Law Project in Uganda, and Researcher at Justice Africa and Lawyers for Justice in Libya in London.

Mr. Martin Klingst

DIE ZEIT

Martin Klingst is Senior Political Correspondent with DIE ZEIT in Berlin. Before, he served as his paper's bureau chief in Washington D.C. (2007–2014) and as DIE ZEIT's Senior Political Editor in Hamburg (1998–2007). Mr. Klingst studied law in Freiburg, Geneva and Hamburg and worked for the Institute of International Affairs at the University of Hamburg. In 2006, he was a fellow at the Center for European Studies at Harvard University, where he lectured on the German reform process, terrorism and civil rights, and Europe's engagement in the Middle East. Before assuming his position with DIE ZEIT in 1996, Mr. Klingst worked as a journalist for the North German Public Broadcasting Corporation NDR and the weekly paper *Deutsches Allgemeines Sonntagsblatt*. He wrote on domestic topics as well as on international affairs and human rights issues. He covered the Balkan wars, the Israel-Palestine conflict and the refugee crisis in 2015 and 2016. In 2013, he was honored with the George F. Kennan editorial award. In 2016, his book *Menschenrechte* (Human Rights) was published by Reclam.

Mr. Patryk Labuda

Graduate Institute Geneva

Patryk I. Labuda is a Ph.D. Candidate at the Graduate Institute of International and Development Studies in Geneva and Teaching Assistant at the Geneva Academy of International Humanitarian Law and Human Rights. Before returning to academia, Mr. Labuda worked in the Democratic Republic of Congo, Sudan and South Sudan. Mr. Labuda's research lies at the intersection of international criminal law, transitional justice, peacekeeping and legal history. In addition to his Ph.D., which examines the relationship between international criminal tribunals and domestic judicial reform, he is studying the ongoing transitional justice processes in the Central African Republic and South Sudan.

Dr. Christopher Mahony

Centre for International Law Research and Policy

Dr. Christopher Brian Mahony is Research Fellow at the Centre for International Law Research and Policy. He is also Strategic Policy Advisor at the UNDP (where he was formerly Rule of Law, Justice, Security and Human Rights Advisor), Visiting Research Fellow at Georgetown University Law Center and Political Economy Advisor at the Independent Evaluation Group at the World Bank. He was admitted to the bar of the High Court of New Zealand in 2006 where he appeared for the Crown in criminal and refugee matters. In 2003, he drafted the recommendations on governance and corruption for the Sierra Leone Truth and Reconciliation Commission and co-authored the "*Historical antecedents to the conflict*" chapter. In 2008, he directed the design of Sierra Leone's witness protection programme. From 2012 to 2013, he was Deputy Director of the New Zealand Centre for Human Rights Law, Policy and Practice, Faculty of Law, Auckland University. He holds Bachelor of Commerce (B.Com.) and of Laws (LL.B.) degrees from the University of Otago, and a Master's in African Studies (M.Sc.) and a D.Phil. in Politics from the University of Oxford.

Ms. Fiona McKay

Open Society Justice Initiative

Fiona McKay is a British lawyer currently working with the International Justice programme of the Open Society Justice Initiative, based in London. Until 2015 she was Chief of the Victims Participation and Reparations Section at the International Criminal Court in The Hague. Prior to that Ms. McKay worked for a number of human rights organizations, specializing in seeking legal remedies for victims of human rights violations.

Dr. Athaliah Molokomme

Botswana Permanent Mission to the UN in Geneva

Dr. Athaliah Molokomme obtained her Bachelor of Laws degree from the University of Botswana and Swaziland in 1981, and a Master's in Law from Yale Law School, USA in 1983. She obtained a Ph.D. in Law at Leiden University, the Netherlands, in 1991. She has taught law at the University of Botswana for more than 15 years, and researched and published extensively in the fields of family law, women and law, customary law and employment law. Dr. Molokomme has served on several boards, commissions and professional organisations at national, regional and international levels, and is a founding member of several human rights organizations. From July 1998, she was Founding Head of the Gender Unit at the Secretariat of the Southern African Development Community (SADC), until May 2003 when she was appointed Judge of the High Court of Botswana. In October 2005, she was appointed to the position of Attorney General of the Republic of Botswana, whose main constitutional task is Principal Legal Advisor to the Government of Botswana. In this role, she also represented the Government in various national, regional and international bodies. Dr. Molokomme qualified as an international arbitrator in 2016 and is now Fellow of the Chartered Institute of Arbitrators in London. Since May 2017, H.E. Ms. Molokomme has been the Permanent Representative of Botswana to the United Nations office in Geneva and Ambassador to Switzerland.

Mrs. Maria Camila Moreno

International Center for Transitional Justice (Colombia)

Maria Camila Moreno is a Colombian anthropologist, specializing in land use planning at the University of Havana. She has worked with ethnic communities on issues related to collective rights. Since 1999, she worked in the formulation, implementation and evaluation of human rights public policies with emphasis on vulnerable populations. She has been invited to participate as a lecturer and speaker at national and international seminars on internal displacement, human rights and transitional justice. Mrs. Moreno has experience working in public institutions, such as the Presidency, the Ombudsman Office and the General Prosecutor Office and in international agencies such as the Inter-American Institute for Human Rights, the Swedish International Development Agency, UNHCR and UNDP. She has also worked as a researcher on internal displacement and public policy, DDR (disarmament, demobilization and reintegration), human rights and prisons, access to justice in Colombia, political participation of indigenous people and transitional justice. Since July 2011, she is Head of Office in Colombia of International Center for Transitional Justice (ICTJ). ICTJ in Colombia has been involved in the negotiation between FARC and the Colombian Government, providing technical assistance and advice to both parties to the negotiation table, especially about the transitional justice issues.

Mr. Christian Much

Retired, former German Diplomat; former Interim Director of the Nuremberg Academy

Christian Much is a retired German diplomat and jurist. He studied law and anthropology in Hamburg and Freiburg. After passing the Second Juridical State Examination he worked as a lawyer in Paris before embarking on a diplomatic career at the Federal Foreign Office. In his diplomatic career, he was posted to the Middle East, Hungary and Central America as well as at the headquarters of the Federal Foreign Office, between 1982 and 1992. Between 1992 and 2008, he worked twice at the Permanent Mission of Germany to the United Nations in New York and in Geneva as well as in the Federal Foreign Office in Berlin where his



main focus laid on United Nations' topics. From 2005 to 2008, he was Head of Section for Global Issues and Governance at the Federal Foreign Office. In this capacity, he conceived and organized the international conference "Building a Future on Peace and Justice" (Nuremberg, June 2007). From 2008 to 2010, he was the Head of the Embassy's Cultural Department in Rome. From 2010 to 2013 he was Consul General in Naples, before he took up his duties as German Ambassador to Libya from 2013 to 2016. Christian Much retired in 2016. From May to September 2017, he exercised the role of Interim Director of the Nuremberg Academy during the absence of Klaus Rackwitz.

Mrs. Betty Murungi

Formerly Kenya Truth, Justice and Reconciliation Commission

Betty Kaari Murungi is a lawyer with nearly thirty years of broad experience in the practice of law at the national, regional and international levels; and ten years experience in the management and governance of non-governmental and non-profit organisations. Mrs. Murungi was educated at the University of Nairobi and the Kenya School of Law. In 2005, she spent a year as Visiting Fellow at the Harvard Law School's Human Rights Program researching local transitional justice mechanisms. Mrs. Murungi has been an integral player in emerging jurisprudence of international criminal law and international humanitarian law as pertains to gender crimes; experience in transitional justice processes, women's human rights, constitutionalism, governance and social justice philanthropy. She co-founded the Urgent Action Fund-Africa. She served as Vice Chairperson and Commissioner to the Kenya Truth Justice and Reconciliation Commission and as the Africa representative on the Board of Directors of the Trust Fund for Victims at the International Criminal Court (2009–2013). Among other awards, Mrs. Murungi was honored by the President of Kenya with the national award of Moran of the Burning Spear for her distinguished service to the country in the field of Human Rights. She is also a recipient of the International Peace Advocate Award by Cardozo Law School New York.

Mr. William Pace

Coalition for the International Criminal Court

William Pace is Executive Director of the World Federalist Movement-Institute for Global Policy. He has served as Convenor of the Coalition for an International Criminal Court since its founding in 1995 and is a co-founder and steering committee member of the International Coalition for the responsibility to Protect. He has been engaged in international justice, rule of law, environmental law, and human rights for the past 30 years. He previously served as Secretary-General of the Hague Appeal for Peace, Director of the Center for the Development of International Law, among other positions. He is President of the Board of the Center for United Nations Reform Education. He is the recipient of the William J. Butler Human Rights Medal from the Urban Morgan Institute for Human Rights. Mr. Pace has authored numerous articles and reports on international justice, international affairs and UN issues, multilateral treaty processes, and civil society participation in international decision-making.

Dr. Nicola Palmer

King's College London

Dr. Nicola Palmer is Senior Lecturer in criminal law at King's College London. She is the author of *Courts in Conflict: Interpreting the Layers of Justice in Post-Genocide Rwanda* (OUP, 2015) and recently guest edited a special issue of the Canadian Journal of Law and Society on the methods used to formulate, implement and assess transitional justice processes. Dr. Palmer was previously the Global Justice Research Fellow at St Anne's College, Oxford and convenor of the Oxford Transitional Justice Research (OTJR) network. She received her DPhil in law from the University of Oxford in 2011. Prior to this, she worked at the United Nations International Criminal Tribunal for Rwanda, following her undergraduate in law and economics at Rhodes University, South Africa. Her broad research interests are in international criminal law, transitional justice, central African studies and legal anthropology.

Dr. Navanethem Pillay

President of the Advisory Council of the Nuremberg Academy; formerly United Nations High Commissioner for Human Rights, International Criminal Tribunal for Rwanda and International Criminal Court

South African jurist Dr. Navi Pillay served as High Commissioner for Human Rights at the United Nations from 2008 to 2014. Aside from that, she has championed many human rights issues with which she herself had direct experience, having grown up as a member of the non-white majority under the Apartheid regime in South Africa. After studying law in Natal, she worked on behalf of the victims of racial segregation as a criminal defense lawyer and as an activist for the anti-Apartheid movement. Later, Dr. Pillay earned a master's degree under a graduate program at Harvard Law School. In 1988, she became the first non-white South African to be awarded the degree of Doctor of Juridical Science at Harvard Law School. In 1995, after the end of Apartheid, Dr. Pillay was appointed to the Supreme Court of South Africa as a limited term judge. In the same year, she was appointed as a judge to the International Court for Rwanda, where she served for a total of eight years, including four years as President. Later she served at the International Criminal Court in The Hague for five years. Dr. Pillay plays an active role in numerous human rights organizations. Among other roles, she is the co-founder of "Equality Now", an international women's rights organization. She is also President of the Advisory Council of the International Nuremberg Principles Academy.

Prince Zeid Ra'ad Al Hussein

United Nations High Commissioner for Human Rights (video message)

Zeid Ra'ad Al Hussein assumed his functions as United Nations High Commissioner for Human Rights on 1 September 2014, after being selected by the UN Secretary-General and approved by the General Assembly. He is the sixth High Commissioner to have been appointed since the Office of the UN High Commissioner for Human Rights was established in 1993. A veteran multilateral diplomat, Zeid Ra'ad Al Hussein was previously Jordan's Permanent Representative to the UN in New York, a post he held twice (from 2000 to 2007 and again from 2010 to 2014). In between, he served as Jordan's Ambassador to the United States of America (2007–2010). In January 2014, he was President of the UN Security Council. Zeid Ra'ad Al Hussein has considerable experience in the areas of international criminal justice, international law, UN peacekeeping, post-conflict peace-building, international development and counter-nuclear terrorism. He played a central role in the establishment of the International Criminal Court (ICC), chairing the complex negotiations over the elements of individual offences amounting to genocide, crimes against humanity and war crimes, and in September 2002, he was elected as the first President of the Assembly of States Parties to the Rome Statute of the ICC. Subsequently, in 2009–10, he chaired the closing stages of the intricate negotiations over the crime of aggression – identified by the International Military Tribunal at Nuremberg as that "supreme international crime" which were successfully concluded, with a consensus agreement, in Kampala in June 2010. Zeid Ra'ad Al Hussein represented Jordan before the International Court of Justice in 2004 and 2009, and also represented his country on the issue of Nuclear Security following the 2010 Washington Summit, which initiated a concerted international effort to blunt the threat of nuclear terrorism. He also has extensive knowledge of peacekeeping. He served as Political Affairs Officer in UNPROFOR, in the former Yugoslavia, from 1994 to 1996. In 2004, following allegations of widespread abuse by UN peacekeepers, Kofi Annan appointed him as Advisor to the Secretary-General on Sexual Exploitation and Abuse. His report, produced in 2005, provided, for the first time, a comprehensive strategy for the elimination of Sexual Exploitation and Abuse in UN Peacekeeping Operations. Zeid Ra'ad Al Hussein holds a Bachelor of Arts from Johns Hopkins University and a Doctorate in Philosophy from Cambridge University.

Mr. Klaus Rackwitz

Director of the Nuremberg Academy

Klaus Rackwitz, a German jurist, studied law at the University of Cologne, and upon graduation was appointed as a judge in 1990 where he presided over criminal and civil cases at courts of first instance and at courts of appeal. He was one of the first judges in Germany heading a task force which was established to improve the use of computers in judicial work of judges and prosecutors. From 1996 until 2002, he worked at and later headed the Division for information technology in the Ministry of Justice of North Rhine-Westphalia. Mr. Rackwitz's experience in modern technology for courts led to his engagement in the Advance Team of the International



Criminal Court in The Hague in 2002; subsequently from January 2003 until September 2011, he served as Senior Administrative Manager of the Office of the Prosecutor of the ICC, responsible for all administrative and support matters (information management, evidence handling and storage, language services etc). From 2011 until September 2016, he served as Administrative Director of Eurojust, the European Union's Judicial Cooperation Unit, which supports the EU Member States in the fight against serious cross-border crimes like terrorism, cybercrime, trafficking of human beings and other serious crimes. As the legal representative of the organization, he was in charge of all managerial and administrative matters supporting the casework of the National Members. He has previously worked in the field of IT law and has lectured for several years on civil law, commercial law and IT law at the Universities of Cologne and Düsseldorf and the Technical Academy of Wuppertal. Since March 2013, he is a member of the Supervisory Board of HiiL (The Hague Institute for the Innovation of Law), an advisory and research institute for the justice sector. Since 2016, Mr. Rackwitz is Director of the International Nuremberg Principles Academy.

Professor Christoph Safferling

University of Erlangen-Nuremberg

Christoph Safferling (Dr. jur., LL.M.) is Professor of Criminal Law, Criminal Law Procedure, International Criminal Law and Public International Law at the Friedrich-Alexander University Erlangen-Nuremberg, Germany. He is Director of the International Criminal Law Research Unit at the University. Moreover, he is the Whitney R. Harris International Law Fellow of the Robert H. Jackson Center in Jamestown, N.Y. Since 2012, he is member of the Independent Academic Commission at the Federal Ministry of Justice for the Critical Study of the National Socialist Past. He has been the speaker of the Founding Commission of the International Nuremberg Principles Academy from 2010–2012. His main fields of research are: contemporary legal history, international criminal law and the subjective elements of the crime. He has published several articles and books in the field of criminal law, international law and human rights law, inter alia, *International Criminal Procedure* in 2012 and *The Nuremberg Trials: International Criminal Law since 1945* in 2006. Professor Safferling is co-editor of the German Law Journal and the *Revista Internazionale di Diritto Penale*. He studied Law in Munich and London and received his doctoral degree at the University of Munich in 1999.

Dr. Nelson Camilo Sánchez León

Dejusticia

Dr. Nelson Camilo Sanchez León is a Colombian lawyer and legal scholar who teaches at the National University of Colombia and is a member of Dejusticia, the Center of Studies in Law, Justice and Society, based in Bogotá. He received an LL.M. from Harvard Law School and obtained his Ph.D. from Universidad Nacional, Bogotá. His research interests include human rights in the inter-American system, transitional justice, the social and legal condition of the internally displaced population in Colombia and the Colombian peace process. He has published many essays and papers on those subjects, including recently “Could the Colombian Peace Accord Trigger an ICC Investigation on Colombia?,” “Justicia para la paz” (Justice for Peace), and “Corporate Accountability, Reparations, and Distributive Justice in Post-Conflict Societies.”

Ms. Velma Šarić

Post-Conflict Research Center

Velma Šarić is a researcher, journalist, peacebuilding expert and human rights defender from Sarajevo, Bosnia and Herzegovina. Ms. Šarić is the Founder and President of the Post-Conflict Research Center, the Founder and Editor-in-Chief of *Balkan Diskurs*, and Project Manager of the War Art Reporting and Memory (WARM) Foundation, Sarajevo Branch. As a researcher and producer she has worked on numerous publications and films about the 1992–1995 Bosnian war, including *Uspomene 677*, *In the Land of Blood and Honey* by Angelina Jolie, and *I Came to Testify* and *War Redefined* from the PBS series *Women, War & Peace*. Ms. Šarić has held fellowships at both Columbia University in New York and the Robert Bosch Foundation. As part of her fellowship with the Robert Bosch Foundation, she attended the Alliance for Historical Dialogue and Accountability Fellowship Program. In 2014, Ms. Šarić and the Post-Conflict Research Center were awarded the Intercultural Innovation Award by United Nations Secretary-General Ban Ki Moon, United Nations Alliance of Civilizations (UNAOC) and the BMW Group. In 2016, Ms. Šarić attended the Vital Voices' Global Ambassadors Program in London and is currently the only Bosnian to be a part of the VV100 – a Vital Voices group of 100 most engaged and visionary women of the Vital Voices Global Leadership Network.

Professor David Scheffer

Northwestern University, Center for International Human Rights

David Scheffer is the Mayer Brown/Robert A. Helman Professor of Law and Director of the Center for International Human Rights at Northwestern University Pritzker School of Law. He was the US Ambassador at Large for War Crimes Issues (1997–2001) and the UN Secretary-General’s Special Expert for United Nations Assistance to the Khmer Rouge Trials (2012–2017). He led the US delegation to the UN talks establishing the International Criminal Court during the 1990s. Professor Scheffer authored the award-winning book *All the Missing Souls: A Personal History of the War Crimes Tribunals* (2012). He received the Berlin Prize in 2013 and was named one of Foreign Policy Magazine’s “Top Global Thinkers” in 2011.

Mr. Christian Schmidt

Federal Ministry of Food and Agriculture, Germany

Christian Schmidt was German Federal Minister of Food and Agriculture. From December 2013 to February 2014, Mr. Schmidt was Parliamentary State Secretary to the Federal Minister for Economic Cooperation and Development. From 2005 until 2013, he worked as Parliamentary State Secretary to the Federal Minister of Defence. Mr. Schmidt has been a member of the German Bundestag since 1990. He studied law in Erlangen, Germany and in Lausanne, Switzerland (first and second state examination in law).

Ms. Alison Smith

No Peace Without Justice

Alison Smith is Legal Counsel and Director of the International Criminal Justice Program for No Peace Without Justice, having formerly worked as Country Director in Sierra Leone for the same organization. In addition, she served as Chief Legal Adviser to the Vice President of Sierra Leone on the Special Court and international humanitarian law. She has acted as international legal adviser to a number of clients including the Tibetan Government in Exile, Kosovar politicians and has worked with No Peace Without Justice and UNICEF on the production of a book on international criminal law and children. Since 2000, she has worked as Legal Adviser to the Government of Thailand during the United Nations Preparatory Commissions for the establishment of an International Criminal Court and during the first sessions of the Assembly of States Parties. Ms. Smith worked in Kosovo as an international legal officer for the International Crisis Group’s Humanitarian Law Documentation Project, which gathered statements from victims and witnesses of violations of international humanitarian law in Kosovo. Prior to that, she was a researcher at the Kennedy School of Government’s Carr Centre for Human Rights Policy at Harvard University. From March to June 2013, she was on temporary special leave of absence, as acting Head of Office and Senior Legal Adviser to the Special Court for Sierra Leone, to assist with the completion and wrap-up of its work. Ms. Smith is an Australian barrister and holds a Master’s Degree in International Law from the Australian National University.

Professor Chandra Sriram

University of East London

Chandra Lekha Sriram was Professor of International Law and International Relations at the University of East London, where she was the Founder and Director of the Centre on Human Rights in Conflict (www.uel.ac.uk/chrc/). She was the author of numerous books and articles on transitional justice, international criminal law, and conflict resolution and peacebuilding. She was the editor, most recently, of *Transitional Justice in the Middle East and North Africa* (Oxford University Press and Hurst Publishing, 2017) and coauthor of *War, Conflict and Human Rights: Theory and Practice 3d ed.* (Routledge, 2017). She recently completed a project as Principal Investigator on an Economic and Social Research Council-funded research project on *The Impact of Transitional Justice Mechanisms on Democratic Institution-Building* (www.tjdi.org), which included research in Sierra Leone, Uganda, Chile, Brazil, Germany, Hungary, Japan and South Korea. She was directing a project funded by the Folke Bernadotte Academy on rule of law and accountability, gender, and land and property in Colombia.



Mr. David Tolbert

International Center for Transitional Justice

David Tolbert was President of International Center for Transitional Justice (ICTJ). Previously, he served as Registrar (Assistant Secretary-General) at the Special Tribunal for Lebanon and prior to that he was Assistant Secretary-General and Special Expert on United Nations Assistance to the Khmer Rouge Trials. From 2004 to 2008, Mr. Tolbert served as Deputy Chief Prosecutor of the International Criminal Tribunal for the former Yugoslavia (ICTY). He had previously been Deputy Registrar of the ICTY and at an earlier time served at the ICTY as Chef de Cabinet to President Gabrielle Kirk McDonald and Senior Legal Advisor Registry, serving a total of nine years at the ICTY. From 2000 to 2003, Mr. Tolbert held the position of Executive Director of the American Bar Association's Central European and Eurasian Law Initiative, which operates rule-of-law development programs throughout Eastern Europe and the former Soviet Union. He also held the position of Chief of the General Legal Division of the United Nations Relief Works Agency in Vienna and Gaza. Mr. Tolbert frequently lectures and makes public appearances on international justice issues. He also represented the ICTY in the discussion leading up to the creation of the ICC and the Rome Conference and served as an expert to the ICC Preparatory Committee Inter-Sessional meetings.

Mr. Eduardo Toledo

Nuremberg Academy

Eduardo Bernabé Toledo is currently working as Senior Legal Officer International Criminal Law at the International Nuremberg Principles Academy. He specializes in international and European criminal law and his areas of expertise include business, human rights and corporate liability. In 2015–2016, he contributed to the project created by the Corporate Accountability Working Group of the International Network for Economic, Social and Cultural Rights (New York) alongside the International Federation of Human Rights (Paris), documenting “Ten key proposals for the Treaty” focusing on corporate liability. In 2013–2014, he collaborated with the Unión de Afectados por las operaciones de Texaco – Ecuador, Xumek, Argentina. and the Transnational Institute, Netherlands and presented a communication before the International Criminal Court to denounce the operations of the Texaco Oil Company (today Chevron Corp.) and its persons in charge. Mr. Toledo's previous work experience includes provision of legal advice regarding litigations at both international and national level. He is about to defend his Ph.D. at the Université Paris I Panthéon-Sorbonne, focusing on the forms of liability within Article 25 of the Rome Statute. He also lectures at the Master's Program of Criminal Law and Criminal Sciences at the Universidad Nacional de Cuyo, Argentina and acts as a referee for the *International Journal of Human Rights and Businesses* at the Centre of Human Rights and Business of the Federal University of Juiz de Fora, Brazil.

Mrs. Anita Ušacka

Formerly International Criminal Court

Anita Ušacka was the first elected Judge of the International Criminal Court in 2003 and was the only judge elected from the Eastern European group of State Parties. In 2006, she was re-elected for a nine-year term, where she was assigned to the Trial Division. From 2007 to 2009, she was temporarily attached to the Pre-Trial Division in which she served as a Judge of Pre-Trial Chamber I, the first of the ICC to issue a warrant of arrest for a sitting head of state, in the case of *Prosecutor v. Omar Al Bashir*. In 2009, Judge Ušacka was assigned to the Appeals Division where she served for six years. On 1 April 2011, Judge Ušacka became President of the Appeals Division for a one-year term. Prior to her election to the International Criminal Court, Mrs. Ušacka was elected as a judge of the Latvian Constitutional Court, where she served upon its creation in 1996 until 2003. In 2002, she had been appointed full professor at the Department of Constitutional Law of Latvia University, where she has been academically affiliated since 1975. In 2006, Mrs. Ušacka obtained an Honorary Doctors of Laws degree from the Lewis & Clark Law School, in Portland, Oregon, US. In 2015, she was awarded the distinction of Honorary Professor in Law of the Universidad San Ignacio de Loyola, Peru. In that same year, in recognition of her distinguished career as an international lawyer, she was also awarded a diploma of the Inter-American Academy of International and Comparative Law as an Academic and Member of Honor in Lima, Peru.

Andras Vamos-Goldman

International relations and legal professional, and social entrepreneur

Andras Vamos-Goldman is currently teaching international law at New York University's Center for Global Affairs. Previously, he helped to found and led Justice Rapid Response (JRR), an intergovernmental facility improving the credibility of accountability for genocide, war crimes, crimes against humanity and serious human rights violations through professionalizing investigations. As Executive Director of JRR, he helped to create and build a facility that is ensuring that criminal justice professionals from around the world, specifically trained in international investigations, are readily deployable at the request of the international community. Mr. Vamos-Goldman is a former Canadian diplomat, whose career included assignments to the East African countries of Kenya, Uganda and Somalia; Washington DC; the United Nations in New York (where he served as both Political Coordinator and as Legal Adviser); as well as Deputy High Commissioner to South Africa. He has also practiced private international law with the law firm of Stikeman Elliot and as Law and Policy Adviser to the CEO of the University of British Columbia's Liu Institute for Global Initiative. Mr. Vamos-Goldman's involvement with international criminal justice goes back to the late 1990s. He was instrumental in the establishment of the Sierra Leone Special Court, becoming the founding Chair of its Management Committee. He also served on the Bureau of the International Criminal Court's Preparatory Committee, representing its Chair, Ambassador Philippe Kirsch. Mr. Vamos-Goldman has a BA and LLB from Dalhousie University in Halifax, Nova Scotia, Canada and an LLM in international and comparative law from Georgetown University in Washington DC. He is a member of both the Law Society of Ontario, Canada, as well as the New York Bar.

Ms. Marieke Wierda

Ministry of Foreign Affairs, The Netherlands

Marieke Wierda is a Dutch lawyer, born and raised in Yemen and educated in the UK and the US, and specialized in transitional justice. In her current capacity as Rule of Law Coordinator for the Dutch Ministry of Foreign Affairs, she is involved in discussions about hybrid tribunals in CAR and South Sudan. Ms. Wierda has 20 years experience in transitional justice, starting with the International Criminal Tribunal for the former Yugoslavia (1997–2000), and then joining the International Center for Transitional Justice where she worked for a decade (2001–2011). She worked extensively on transitional justice in Sierra Leone, Uganda, Lebanon and Afghanistan. From 2007, she was appointed Criminal Justice Director and was based in Beirut (2007–2009) and Kabul (2009–2010). In 2011, she was an advisor to a UN Panel of Experts appointed by the Secretary General to advise on accountability for the final phases of the conflict in Sri Lanka. In October 2011, after the Revolution in Libya, she joined the United Nations Support Mission (UNSMIL) as Transitional Justice Advisor. She is the author of many book chapters and articles on international criminal law and transitional justice, including a book on International Criminal Evidence, co-authored with Judge Richard May. Currently, she is working on her Ph.D. with Dr. Carsten Stahn, on the Impact of the International Criminal Court in situation countries, including Uganda, Libya, Afghanistan and Colombia.

Dr. Radwan Ziadeh

The Arab Center Washington D.C.

Dr. Radwan Ziadeh is Senior Analyst at the Arab Center – Washington D.C. He is also the Founder and Director of the Damascus Center for Human Rights Studies in Syria (www.dchrs.org); and Co-founder and Executive Director of the Syrian Center for Political and Strategic Studies in Washington, D.C. Since the Syrian uprising, which started in March 15, 2011, he was involved in documenting the ongoing human rights violations in Syria and testified at the UN Human Rights Council in Geneva twice and in front of the Tom Lantos Human Rights Commission in the U.S Congress. He was named “Best Political Scientist Researcher in the Arab World” by Jordan’s Abdulhameed Shoman Foundation in 2004. In 2009, he was awarded the Middle East Studies Association (MESA) Academic Freedom award in Boston. In 2010, he accepted the Democracy Courage Tributes award on behalf of the human rights movement in Syria, given by the World Movement for Democracy in Jakarta, Indonesia. He wrote more than twenty books in English and Arabic, his most recent book is *Syria's Role in a Changing Middle East: The Syrian-Israeli Peace Talks* (2016) from I.B.Tauris.



2007 Nuremberg Declaration on Peace and Justice

United Nations General Assembly

A/62/885, 19 June 2008

Sixty-second session, Agenda items 34 and 86

Comprehensive review of the whole question of peacekeeping operations in all their aspects

The rule of law at the national and international levels

Letter dated 13 June 2008 from the Permanent Representatives of Finland, Germany and Jordan to the United Nations addressed to the Secretary-General

In a joint letter dated 3 December 2007 (A/62/580), issued on 12 December 2007, we informed you of the outcome of the International Conference entitled “Building a Future on Peace and Justice”, organized by the Hashemite Kingdom of Jordan, Finland and the Federal Republic of Germany, in Nuremberg, Germany, from 25 to 27 June 2007. In that letter, we mentioned that the Conference had aimed at producing concrete recommendations on how to deal with possible tensions between peace and justice. We also announced that, to that end, the Conference organizers would draft a political document to be called the Nuremberg Declaration on Peace and Justice.

It gives us great pleasure to transmit herewith the Nuremberg Declaration on Peace and Justice (see annex). It was elaborated by a group of international experts designated by the Conference organizers and working under the auspices of Óscar Arias, President of Costa Rica. We have approved the text upon consultations with interested practitioners and civil society organizations.

The Declaration contains definitions, principles and recommendations on issues of peace, justice and impunity, and making peace and dealing with the past, as well as promoting development. Although it is not a legal document, it aspires to “guide those involved at the local, national and international levels in all phases of conflict transformation, including mediation, post-conflict peacebuilding, development, and the promotion of transitional justice and the rule of law” and thus to influence the future practice of making and building “just and lasting peace”. It is therefore our sincerest hope that this document may also be useful to the United Nations and its States Members.

We would therefore be grateful if you could circulate the present letter together with its annex as a document of the General Assembly, under agenda items 34 and 86.

Kirsti Lintonen

Permanent Representative of Finland

Thomas Matussek

Permanent Representative of the Federal Republic of Germany

Mohammed F. Al-Allaf

Permanent Representative of the Hashemite Kingdom of Jordan

Annex to the letter dated 13 June 2008 from the Permanent Representatives of Finland, Germany and Jordan to the United Nations addressed to the Secretary-General

Nuremberg Declaration on Peace and Justice

I. Preamble

We, the Governments of Finland, Germany and the Hashemite Kingdom of Jordan, acting in our capacity as co-organizers of the International Conference “Building a Future on Peace and Justice”, held in Nuremberg, Germany, from 25 to 27 June 2007,^a

Having pledged, with the consent of Conference participants, to translate the essential findings of the Conference into a document to be called the “Nuremberg Declaration on Peace and Justice”,

Acknowledging that peace, justice, human rights and development are at the heart of the international community, that they are interlinked and mutually reinforcing and that they need to be addressed in accordance with the Charter of the United Nations, the Universal Declaration of Human Rights^b and other standards of human rights and international humanitarian law, including, where applicable, the Rome Statute of the International Criminal Court,^c

Aware of, and encouraged by, the advances of the worldwide movement to fight impunity, and reaffirming in this context that the most serious crimes of concern to the international community as a whole must not go unpunished,

Motivated by the desire to contribute to the prevention and non-recurrence of armed conflict,

Recognizing that peace and stability are more likely to prevail when the root causes of conflict are addressed in a manner that affected societies perceive as legitimate, non-discriminatory and just, and when societies deal constructively with their past,

Stressing that the advancement of peace and justice is a long-term endeavour, requiring a comprehensive and inclusive approach that is sensitive to political, cultural and gender aspects,

Propose that the present Declaration guide those involved at the local, national and international levels in all phases of conflict transformation, including mediation, post-conflict peacebuilding, development, and the promotion of transitional justice and the rule of law.

II. Definitions

In this Declaration,

1. “Peace” is understood as meaning sustainable peace.

Sustainable peace goes beyond the signing of an agreement. While the cessation of hostilities, restoration of public security and meeting basic needs are urgent and legitimate expectations of people who have been traumatized by armed conflict, sustainable peace requires a long-term approach that addresses the structural causes of conflict, and promotes sustainable development, rule of law and governance, and respect for human rights, making the recurrence of violent conflict less likely.

a From 25 to 27 June 2007, more than 300 policymakers and practitioners gathered in Nuremberg, Germany, to attend the International Conference “Building a Future on Peace and Justice”, organized by the Governments of Finland, Germany and Jordan in cooperation with the Crisis Management Initiative (CMI), Helsinki; the International Center for Transitional Justice (ICTJ), New York; the Friedrich-Ebert-Stiftung (FES), Berlin; the Centre for the Study of Violence and Reconciliation (CSVr), Johannesburg, South Africa; the Working Group on Development and Peace (FriEnt), Bonn, Germany; the Centre for Peacebuilding (KOFF) — swisspeace, Bern; and the Georg-August University, Goettingen, Germany. At the conclusion of the Conference, its participants agreed that the Conference organizers would elaborate a declaration. It was drafted, under the auspices of Óscar Arias, President of Costa Rica, by a group of international experts designated by the Conference organizers and was the subject of consultations, before its publication in June 2008, with practitioners and civil society organizations.

b General Assembly resolution 217 A (III).

c United Nations, Treaty Series, vol. 2187, No. 38544.



2. **“Justice”** is understood as meaning accountability and fairness in the protection and vindication of rights, and the prevention and redress of wrongs.

Justice must be administered by institutions and mechanisms that enjoy legitimacy, comply with the rule of law and are consistent with international human rights standards. Justice combines elements of criminal justice, truth-seeking, reparations and institutional reform as well as the fair distribution of, and access to, public goods, and equity within society at large.

Justice may be delivered by local, national and international actors.

III. Principles

1. **Complementarity of peace and justice**

Peace and justice, if properly pursued, promote and sustain one another. The question can never be whether to pursue justice, but rather when and how.

Addressing the security and the social and economic needs of affected populations creates a favourable environment for the pursuit of peace and justice and often corresponds to the most urgent expectations of post-conflict societies. But meeting these needs is neither a precondition nor a substitute for the pursuit of justice and other efforts to deal with the past.

2. **Ending impunity**

The most serious crimes of concern to the international community, notably genocide, war crimes, and crimes against humanity, must not go unpunished and their effective prosecution must be ensured. The emergence of this principle as a norm under international law has changed the parameters for the pursuit of peace.

As a minimal application of this principle, amnesties must not be granted to those bearing the greatest responsibility for genocide, crimes against humanity and serious violations of international humanitarian law.

Each State has the primary responsibility to protect its population from these crimes. This responsibility entails the prevention, investigation and prosecution of such crimes.

3. **A victim-centred approach**

Victims are central to peacebuilding, justice and reconciliation and should play an active role in such processes. Their concerns should enjoy a high priority.

4. **Legitimacy**

The legitimacy of strategies for pursuing peace and justice is crucial and closely linked to local ownership and compliance with the international normative framework. These strategies need to be informed by local circumstances and expectations.

5. **Reconciliation**

Rebuilding relationships between formerly antagonistic groups and strengthening the capacity of societies to transform themselves and their animosities contribute to the search for peace. Reconciliation requires the restoration of trust in equitable public institutions and respect for equal rights. It entails dialogue on conflicting versions of the past and addressing justice, accountability and the interests of victims.

IV. Recommendations

1. **Making peace**

- 1.1 While recognizing the imperative to stop the fighting and end the suffering, negotiations must build the foundation for both peace and justice.

- 1.2 Mediators bear a responsibility to contribute creatively to the immediate ending of violence and hostilities while promoting sustainable solutions. Their commitment to the core principles of the international legal order has to be beyond doubt. They should promote knowledge among the parties about the normative framework, including international human rights standards and humanitarian law, and available options for its implementation, so that the parties can make informed choices. They should be attentive to developmental needs, so that those needs are addressed from the outset.

- 1.3 Consultations with a broad range of actors, in particular victims, civil society, and women, need to be held as soon as possible.
- 1.4 While public security and governance demands are critical in the immediate post-conflict period, the consolidation and maintenance of peace need to be bolstered by a sense that grievances are being redressed through accountability, the establishment of legitimate State structures, and the elimination of the root causes of conflict.
- 1.5 Parties to a conflict should agree on measures that contribute to dismantling the causes of impunity and violence, such as disbanding non-State armed groups, repealing emergency laws, and vetting officials implicated in human rights abuses, and on modalities for implementing such measures.

2. Dealing with the past

- 2.1 Dealing with the past is essential to a society's present and future. While there is no standard model for dealing with the past, there are a range of proved measures that can assist a society in this endeavour. They should be both comprehensive and inclusive, engaging all relevant actors.
- 2.2 These measures should help a society to transform itself through governance, structural and institutional reforms, particularly in the fields of justice, human rights, education and the security sector, and should promote a culture of peace and non-violence.
- 2.3 Outreach and consultation are crucial elements of legitimacy and ownership of transitional justice measures. All those involved need to understand fully the potential and limitations of available options.
- 2.4 Transitional justice strategies should integrate criminal justice, truth-seeking, reparations and institutional reform. The relationship between these various elements and the socio-economic dimension of justice should be given early consideration. It should take into account the principle of complementarity between national and international mechanisms.
- 2.5 Traditional and community justice measures, when operating within the bounds of international human rights standards, can play an important role.
- 2.6 Amnesties, other than for those bearing the greatest responsibility for genocide, crimes against humanity and war crimes, may be permissible in a specific context and may even be required for the release, demobilization and reintegration of conflict-related prisoners and detainees.
- 2.7 Justice and victim-centred approaches should be given the same level of attention and resources as security sector reform, disarmament, demobilization and reintegration, and other stabilization measures.
- 2.8 Particular attention should be given to the increased representation and the full and active involvement of women in transitional justice strategies. Appropriate measures should be taken to protect the dignity and privacy of victims and witnesses, in particular when the crimes involve sexual or gender violence. Post-conflict legal orders should rectify legal and social discrimination based on gender.
- 2.9 Reparations programmes should include restitution, compensation and rehabilitation, and should entail public recognition of victims as citizens, thus contributing to the restoration of trust in civic institutions and to social solidarity.
- 2.10 An effective transitional justice strategy will contribute to reconciliation. Reconciliation may include symbolic measures such as asking for forgiveness, removing compromised symbols, and searching for common identities.

3. Promoting development

- 3.1 Conflict often results from a lack of social justice. Addressing root causes of conflict and supporting access to public goods and services, economic resources and opportunities in a non-discriminatory and equitable manner are a critical part of peacebuilding and development programmes. Special attention should be given to those most affected by the conflict.
- 3.2 Supporting institutional reform processes, which allow for socio-economic development, participation in decision-making, the rule of law and respect for human rights are also important development goals.
- 3.3 Transitional justice mechanisms and development efforts have specific and distinct roles, which should complement each other and be integrated into comprehensive peacebuilding strategies.
- 3.4 National and international development actors should be sensitive in dealing with the past when designing post-conflict development strategies and take into account relevant recommendations of accountability mechanisms.



The International Nuremberg Principles Academy

The International Nuremberg Principles Academy (Nuremberg Academy) is a non-profit foundation dedicated to the promotion of international criminal law and human rights. It was established by the Federal Republic of Germany, the Free State of Bavaria and the City of Nuremberg in 2014. The Nuremberg Academy is located in Nuremberg, the birthplace of modern international criminal law, where the Nuremberg Trials against the major war criminals were held by the International Military Tribunal (IMT) from 1945 to 1949. For the first time in history, an international tribunal was authorized to hold leading representatives of a state personally accountable for crimes under international law.

The foundation carries forward the legacy of the Nuremberg Trials and the “Nuremberg Principles”, principles of international law recognized in the Charter of the Nuremberg Tribunal and in the judgment of the Tribunal and formulated by the International Law Commission of the United Nations General Assembly in 1950. Conscious of this historic heritage, the Nuremberg Academy supports the fight against impunity for universally recognized international core crimes: genocide, crimes against humanity, war crimes and the crime of aggression. Dedicated to supporting the worldwide enforcement of international criminal law, the Nuremberg Academy promotes the Nuremberg Principles and the rule of law with a vision of sustainable peace through justice, furthering knowledge, and building capacities of those involved in the judicial process in relation to these crimes.



International Nuremberg Principles Academy
Egidienplatz 23
90403 Nuremberg, Germany
Tel +49 (0)911 231-10379
Fax +49 (0)911 231-14020
info@nurembergacademy.org
www.nurembergacademy.org



www.nurembergacademy.org

#NueForum