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THEMATIC CASE STUDY

Stocktaking: Peace and Justice

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Executive Summary

Although in force only recently, Rome Statute has changed many of the assumptions of earlier peace versus justice debates, at least for States Parties. Although there will at times be short-term tensions between negotiators and prosecutors, if one seeks to obtain sustainable peace then peace and justice are mutually reinforcing.

The Statute has lent significant momentum to the trend against amnesties, which is greatly encouraging, but not yet universally followed. Mediators should avoid amnesties for Rome Statute crimes, in particular blanket amnesties. Instead, they should promote negotiating parties' knowledge of the relevant legal and normative frameworks, and seek creative solutions.

There are early indications that the issuing of arrest warrants may strengthen motivations to negotiate. There are also signs that the existence or threat of arrest warrants can spur parties to examine a broader array of justice measures than might otherwise have been the case, as with the Juba negotiations and the recent African Union High Level Panel report on Darfur. Short term fears of backlash against arrest warrants should not deter long-term accountability efforts.

At the same time, recent years have also seen important efforts to consult the views of victims and affected populations. Such views are highly complex and far from uniform: they should, however be incorporated into ongoing negotiations at the earliest opportunity. Such views may involve unfeasible expectations of the ICC's ability to deter future crimes: instead, the Court should be judged on its ability to deliver justice in the cases before it. In the past eight years, in many situations the primary focus is not on whether to enforce justice, but how: that is a singular achievement in which the Rome Statute has played a significant part.

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Introduction

The negotiators of the Rome Statute were cognizant that there could be tensions between the duties of an international court and efforts to stop conflict, hence the considerable debate that led to the adoption of Article 16. However, real-life experience of these tensions was limited. Notably, the debates in Rome preceded the Kosovo crisis, when the International Criminal Tribunal for the former Yugoslavia (ICTY) indicted Slobodan Milošević during the midst of an ongoing conflict. Thus, there has been little in terms of either statutory guidance or practical experience to inform the difficult issues that face the international community in general, and the International Criminal Court (ICC), particularly its Prosecutor, when there is tension between the ICC properly exercising its responsibilities in accordance with the Rome Statute and the efforts of peace negotiators.

It is important to emphasize that while there are at times significant tensions between the ICC's responsibilities to do justice and negotiators' duty to make peace, these tensions are

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indeed short-term. In the long term, it is clear that peace and justice are mutually reinforcing concepts, linked to human rights and development. As the United Nations Secretary-General's seminal Rule of Law report says, "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."[1] This conclusion is no doubt driven by the evidence that where mass crimes are not addressed, where the truth is not told, in short where there is no transitional justice, the embers of those conflicts remain, and it is often only a matter of time before they are rekindled. Thus, justice must not be bargained away.

It is therefore clear that the ICC can only help to strengthen the interdependence of peace and justice. In the short period since its coming into force, however, a number of tensions and challenges have emerged between carrying out the imperatives of the Rome Statute and parallel efforts to stop violence. In order to examine and put into perspective these tensions, this paper addresses issues that have arisen in practice in the following areas:[2]

- Granting amnesties or alternatives
- Impact of arrest warrants on ongoing negotiations
- Impact of the Rome Statute on justice provisions in proposed solutions to conflict
- Taking the views of victims and affected populations into account

Meaning of "Peace" and "Justice"

In order to have a starting point for a consideration of the interplay between issues of justice and efforts to end mass violence, it is necessary to have an understanding of what is meant by "peace" and "justice." The Nuremberg Declaration, an intergovernmental document dealing with peace and justice, provides authoritative and comprehensive definitions:[3]

> "Peace" is understood as meaning sustainable peace. Sustainable peace goes beyond the signing of an agreement. . . It 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.
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> "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 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.

Granting Amnesties or Alternatives

One of the methods used by negotiators historically is the granting of amnesties or exile to perpetrators of what are now Rome Statute crimes,[4] as a putative quid pro quo for stopping violence or consenting to agreements that provided for the same. These steps often were taken without consulting victims of the crimes, except where they were part of the negotiating parties. Even before the Rome Statute came into force, such amnesties were not permissible under several treaties, for instance the Geneva Conventions, that have nearly universal adherence and impose obligations to prosecute or extradite perpetrators.[5] These duties are now recognized as customary international law.[6]

The trend against such amnesties has gained significant momentum since the Rome Statute went into effect, strengthening the norm in customary international law that Rome Statute

crimes cannot be subject to amnesties. This norm is also reflected in the rulings of regional human rights courts.[7] Moreover, the UN adopted the position that Statute crimes are ineligible for amnesties in 1999.[8] There have also been efforts in Liberia, Democatic Republic of Congo (DRC), Nepal, and Kenya to exclude Rome Statute crimes from their respective amnesty discussions and laws.[9] On the other hand, it is notable that the 2007 Ugandan Juba Agreement on Accountability and Reconciliation and the report of the 2009 African Union (AU) High-Level Panel on Darfur did not include amnesties, but suggested a range of transitional justice measures, including hybrid or domestic criminal justice.[10] Even in Colombia, which has a long history of attempting to use amnesties to demobilize guerrillas and paramilitaries,[11] there now appears to be broad agreement in public discourse that amnesties and pardons no longer are in accordance with Colombia's international obligations. Parties to the negotiations between the Colombian government and senior paramilitary leaders in 2002 that eventually resulted in the Justice and Peace Law said the perceived threat of the ICC intervening was a factor in the discussions.[12] This trend is encouraging, but has not been universally followed. In Afghanistan—a State Party to the Rome Statute—a blanket amnesty law came into force in late 2009.[13]

Nonetheless, both law and practice therefore indicate that mediators should avoid amnesties for Rome Statute crimes, in particular blanket amnesties. They should apply creative solutions and promote negotiating parties' knowledge of the normative framework that applies. The Nuremberg Declaration takes the position that as a minimum application of this principle, those bearing the greatest responsibility are not eligible for amnesties for Statute crimes and that states are responsible for protecting their people from these crimes.

Thus, the Rome Statue has helped crystallize an emerging normative framework regarding amnesties. Under this framework, measures such as the "amnesty for truth" granted for "politically motivated offences" by the South African Truth and Reconciliation Commission would appear to no longer be available for Rome Statute crimes.[14] On the other hand, Article 17 of the Rome Statute refers to the duty of states to genuinely investigate or prosecute (if they seek to challenge admissibility), but it is silent on the issue of punishment. Punishment tends to take different forms in different societies. A few states have explored alternatives to amnesty, however, such as reduced sentences in exchange for guilty pleas. For example, Colombia's Justice and Peace Law offers reduced sentences of five to eight years in exchange for disclosure of involvement in serious crimes.[15] In some situations, full criminal trials followed by creative sentencing options could be considered as long as they do not amount to "shielding the person concerned from criminal responsibility for crimes within the jurisdiction of the Court."[16]

As the above discussion shows, the Rome Statute and ICC practice have supported the trend that amnesties can no longer be freely handed out to perpetrators and that this practice is not generally available to peace mediators. Thus, the days of modern-day Jean-Claude "Baby Doc" Duvaliers fleeing their crimes to luxurious lives abroad appear, rightfully, to be waning. At the same time, it must be recognized that, for the peace negotiators, this may further complicate their work since amnesties and exiles are a tool that have previously been employed. However, on balance, the fight against impunity and the long-term benefits to peace and security of bringing those most responsible for the most heinous of crimes to justice outweigh the short-term benefits that might accrue by recourse to these practices.

Impact of Arrest Warrants on Ongoing Negotiations

With the advent of international prosecutors, there is now a major new presence in many conflict negotiations. While international prosecutors have significantly different roles and responsibilities than peace mediators, their very presence may complicate negotiations.

The duties and responsibilities of the ICC Prosecutor may cause him or her to seek an arrest warrant, taking into account the gravity of the crimes and the other criteria established by the ICC Statute. In exercising this responsibility, the Prosecutor does have discretion and leeway, particularly regarding timing. Some of these decisions are strategic, such as the timing of a request, so as to make an arrest more likely, perhaps through the use of a sealed indictment. Another appropriate matter that legitimately can affect a prosecutor's timing of such a request is the safety and security of civilians, particularly victims. While the latter is not reflected in the Rome Statute, it is an appropriate consideration of the Prosecutor to take into account in the exercise of his or her discretion. These are matters on *how* to exercise the mandate, rather than *whether* to do so.

It is obviously important for both prosecutors and mediators to understand the other's role and responsibility. International prosecutors generally have political and diplomatic advisers—even if informally—and clearly need to have an understanding of developments on the ground. Prosecutorial claims that they "simply follow the evidence" or know nothing about the political situation are shibboleths. On the other hand, when prosecutors become political actors, the consequences can be disastrous. At the ICTY, "balance" between indictments among members of different ethnic groups led to a number of weak cases that ultimately backfired, with acquittals or short sentences leading to criticism and disappointment among victims.

The relationship between an international prosecutor and an international mediator will, in most cases, be a virtual one because they will have little, if any, direct contact. However, it can be wise to have some channel of communication through third parties or others, so there is awareness that steps taken by the other might affect timing or cause danger.

In terms of the ICC's actual practice, it is perhaps too early to draw clear conclusions about the impact arrest warrants have had on current peace processes, but indications are that arrest warrants may give impetus to negotiations if only in parties' attempts to attack or quash the arrest warrants themselves. In Uganda, some believe that warrants served to bring the Lord's Resistance Army (LRA) to the negotiating table and caused it to mostly stop fighting.[17] LRA leaders certainly sought to use the talks to undermine the ICC arrest warrants, but a more complex variety of factors probably motivated the group to participate. Similarly, debate will continue over the role arrest warrants played in the breakdown of the Juba peace process. It is much easier to point to the positive effect the Rome Statute had on the agreement's contents (and subsequent developments on the ground) than to draw final conclusions on the warrants's impact on the talks.[18]

The peace and justice debate reached its apotheosis in the case of Sudan, on which opinions differ widely about the impact the arrest warrant against President Omar Hassan al-Bashir has had on mediation efforts in Darfur, particularly when discussing willingness of the government of Sudan and rebel groups to participate in the Doha peace process.[19] The ICC's involvement clearly affected the parties' calculations and might have created the conditions that made the February 2009 reconvening of the talks possible.[20] International mediation managed to draw the Justice and Equality Movement (JEM) and a majority of the Sudan Liberation Movement (SLM) factions into a reinvigorated peace process in early 2010.[21] Nonetheless, the motives of both parties remain questionable, and the success of the Doha process seems increasingly in doubt. Furthermore, the Doha process has not included justice: in this respect it is in tension with the recommendations of the AU High-Level Panel on Darfur. Al-Bashir's arrest warrant gives leverage to the panel's recommendations, which include a range of measures to promote peace and justice in Darfur.

As these cases show, one of the most challenging tests to date has been the backlash that sometimes has occurred when arrest warrants were issued. Such a backlash may have consequences for victims, intermediaries, or affected populations, whose interests need to be taken into account. In Sudan, the government expelled leading humanitarian agencies in Darfur and harassed human rights groups after al-Bashir's warrant was issued. However, in the face of such crude tactics, perpetrators should not be allowed to hold peace processes hostage over demands for impunity or amnesty, which are not legally permissible in any event. The international community must stand firm to support the long-term fight against impunity when faced with such short-term blackmail, while taking into account the interests of victims.[22]

Impact of the Rome Statute on Justice Provisions in Proposed Solutions to Conflict

Recent experience indicates that the threat of arrest warrants or ICC intervention may, in certain instances, help broker wide-ranging peace agreements or proposed solutions to conflict that include comprehensive measures for justice.[23] Mediators can use the leverage of the Court's actions, whether as part of preliminary examination or in issuing arrest warrants, to improve the content of agreements or peace processes and obtain better justice provisions.

During the Juba peace talks between the Ugandan government and the LRA, the ICC Prosecutor was clear that withdrawing the arrest warrants was not legally possible. Negotiations therefore focused on national approaches to dealing with the LRA as a means of challenging the admissibility of the group's case before the Court on the basis of the complementarity principle. An agreement was concluded between the parties that contained measures such as national criminal proceedings, truth-seeking, reparations, special provisions for women and children, and traditional justice mechanisms.[24] Although the final Juba agreement was not signed,[25] some of the measures negotiated have nonetheless moved toward implementation, including the establishment of a War Crimes Division of the High Court of Uganda and discussions on a National Reconciliation Commission. In general, the debate on justice in Uganda has been enhanced by these developments and possibilities for accountability have been improved.

In another welcome development, the AU High-Level Panel report on Darfur, issued in October 2009, took a progressive, comprehensive approach to justice. The panel did not challenge the ICC's independent jurisdiction in the Darfur situation but held the Sudanese government responsible for providing justice to its citizens. The report stated, "As a result of the failings of the State in dealing with the grave situation in Darfur, faith in the criminal justice system has been severely eroded. To restore confidence and prevent impunity, a root and branch change will be required."[26] The panel addressed the issue of root causes of the conflict and suggested measures for justice and reconciliation, including the establishment of a hybrid tribunal, a truth commission, and a reparations program for victims. Its recommendations are now AU policy.

If domestic criminal justice is offered as an alternative to the ICC, it should only be supported if it is a credible effort that meets the complementarity threshold laid out in the ICC Statute and as applied by the Court.[27]

Taking the Interests of Victims and Affected Populations into Account

The interests of victims are essential to resolving tensions that arise in the context of peace and justice. The cause of victims is rarely represented effectively at the negotiating table.

On occasion, negotiating parties may argue that victims prefer peace, reconciliation, and reintegrating perpetrators to "hard options," such as criminal justice. Research shows that victims' views on peace and justice are highly complex and tend to be far from uniform. They also change over time; in the heat of conflict most victims may have a preference for peace or conflict resolution efforts, yet once the violence stops, they are likely to seek justice. It is clear that many victims tend to want peace with a maximum delivery of justice options. Justice and victim-centered approaches should be given the same level of attention and resources as security sector reform, disarmament, demobilization and reintegration, and other stabilization measures.[28]

Beyond the different views of victims, it is important to consider the broader views of affected populations. Public consultations were held as part of the Juba peace process and as part of the work of the AU High-Level Panel on Darfur. These direct consultations of affected populations, as well as direct references to their rights in peace agreements or similar documents, present a step forward in negotiating practice. Appropriate ways should be found to incorporate the views of these populations as well as victims into ongoing negotiations at the earliest opportunity.

Many people affected by conflict may hope that the ICC will have a deterrent effect on future crimes. For instance, victims' communities in Kenya have high hopes that the opening of an investigation will help prevent violence in the 2012 elections.[29] Others have commented that crimes continue to be committed, for instance by the LRA in Uganda or Bosco Ntaganda in DRC. The deterrence argument therefore is a complex one that should not be oversold. Most experts in national criminal justice systems take the view that it is not punishment as such, but the likelihood that there will be a punishment that serves as a deterrent to committing crime (and even this assertion is contested).

Against this standard, the ICC's deterrent effect could only be accurately assessed if the Court can count on unwavering support of States in the enforcement of arrest warrants and other decisions. Even then, it is better to judge the ICC's success on delivering justice rather than on being able to deter further crimes. All this points to the need for the ICC to target its outreach to addressing what may be unrealistic expectations on behalf of the public in general and of the victims in particular.

Conclusion

The Rome Statute and the ICC form part of a new legal order. In the long term, this order will assist in eliminating conflict and reinforcing the rule of law according to broad definitions of both peace and justice. As part of this legal order, there is increased recognition among states that amnesties for Rome Statute crimes are no longer permissible and that mediators should do what is in their power to avoid them. Immediate tensions may exist between peace and justice—particularly in ongoing negotiations—but should be handled creatively, within the contours of the law. Consulting victims is important, but unrealistic expectations about the deterrent effect of the Court should be discouraged. While balancing peace and justice remains a major challenge, some recent experiences indicate that there is room for creative, progressive solutions.

Endnotes

1. *The Rule of Law and Transitional Justice in Conflict and Post-conflict Societies*, Report of the Secretary-General, Aug. 24, 2004, UND Doc. S/2004/616, para. 21.

2. Articles 16 (on Security Council deferrals) and 53 (on the interests of justice), neither of which have been used in the first seven years of the Court's existence, will not be discussed in this paper.

3. Nuremberg Declaration on Peace and Justice, "Definitions."

4. Amnesties have been defined in a recent UN document as legal measures that have the effect of "(a) Prospectively barring criminal prosecution and, in some cases, civil actions against certain individuals or categories of individuals in respect of specific criminal conduct committed before the amnesty's adoption; or (b) Retroactively nullifying legal liability previously established. Amnesties do not prevent legal liability for conduct that has not yet taken place, which would be an invitation to violate the law." OHCHR, *Rule-of-Law Tools for Post-Conflict States, Amnesties*, HR/PUB/09/1 (2009), 41. Rome Statute crimes for the purposes of this paper do not include aggression.

5. These include the 1949 Geneva Conventions, the *Convention on the Prevention and Punishment of the Crime of Genocide* (1951), and the *Convention against Torture and Other Cruel, Inhuman, or Degrading Treatment or Punishment* (1984). In addition, Art. IV of the *Convention on the Non-Applicability of Statutes of Limitations to War Crimes and Crimes Against Humanity* (1983) specifically bars State Parties from enacting legislation that provides for statutory or other limitations to the prosecution and punishment for crimes against humanity and war crimes and requires them to abolish any such measures that have been put in place.

6. It is worth noting that the Genocide Convention does not contain an obligation to extradite. Nor does an explicit obligation to prosecute or extradite exist in respect of Common Art. 3 of the Geneva Conventions, although customary international law may give rise to a duty to prosecute such violations, as well as crimes against humanity.

7. The case law of the Inter-American Court of Human Rights has been particularly influential on the issue of amnesties. Recently, there is also jurisprudence that amnesties are prohibited under the *African Charter on Human and Peoples' Rights*.

8. For a comprehensive discussion on the UN position, see OHCHR, *Rule-of-Law Tools for Post-Conflict States, Amnesties*, HR/PUB/09/1 (2009).

9. This is not to say that de facto impunity does not prevail in these situations.

10. The AU High-Level Panel for Darfur suggested a hybrid tribunal for crimes committed in Darfur.

11. Slevin, Peter, "Colombian President Defends Amnesty for Paramilitary Troops," *Washington Post*, Oct. 1, 2003.

12. See Reed, Michael, and Amanda Lyons, "Colombia: Impact of the Rome Statute and the International Criminal Court," ICTJ, May 2010.

13. See the Afghan Independent Human Rights Commission "Discussion paper on the legality of amnesties," ICTJ, Feb. 21, 2010. Blanket amnesties "exempt broad categories of serious human rights offenders from prosecution and /or civil liability without the beneficiaries having to satisfy preconditions, including those aimed at ensuring full disclosure of what they know about the crimes covered by the amnesty, on an individual basis," *Rule-of-Law Tools for Post-Conflict States, Amnesties*, 41. Blanket amnesties have not been judicially tested and appear to be unlikely to withstand international judicial scrutiny.

14. Nuremberg Declaration, Section 2.

15. "Colombia: Impact of the Rome Statute and the International Criminal Court."

16. Rome Statute, Art. 17. 2 (a), 20.

17. See *The Impact of the ICC on victims and affected communities*, Uganda Victims Foundation, Feb. 15-17, 2010, which is based on a UVF/REDRESS workshop held in Lira, Uganda, See also *The Impact of the Rome Statute System on Victims and Affected Communities*, REDRESS/Victims Rights Working Group, March 22, 2010.

THE ROME STATUTE REVIEW CONFERENCE

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The Review Conference of the Rome Statute provides a unique opportunity to evaluate the progress of the International Criminal Court and the challenges that it faces. ICTJ brings a wealth of expertise in situation countries to the discussions of complementarity, peace and justice, and the impact of the ICC on the status of victims. ICTJ has developed a briefing paper series for the conference available at **www.ictj.org.**

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18. Otim, Michael, and Marieke Wierda, "Uganda: Impact of the Rome Statute and the International Criminal Court," ICTJ, May 2010.

19. For more details, see Baldo, Suliman, "Sudan: Impact of the Rome Statute and the International Criminal Court," ICTJ, May 2010.

20. The ruling National Congress Party (NCP), led by President al-Bashir, also put considerable pressure on its southern partner in the Government of National Unity, the Sudan People's Liberation Movement (SPLM), to tone down its support of the ICC investigation.

21. See the framework agreement between Sudan and the JEM at http://blogs.ssrc.org/sudan/wp-content/uploads/2010/02/Doha-Accord.pdf. The Liberation and Justice Movement (LJM) is a newly established umbrella group under which the main SLM factions agreed to regroup in order to join the peace process.

22. Arrest warrants should not be flouted, as is the case with Congolese Gen. Bosco Ntaganda. See Adjami, Mirna, and Guy Mushiata, "Democratic Republic of Congo: Impact of the Rome Statute and the International Criminal Court," ICTJ, May 2010.

23. "Uganda: Impact of the Rome Statute and the International Criminal Court."

24. The Juba Agreement on Accountability and Reconciliation was signed in June 2007, and its annexure was signed in February 2008.

25. The final agreement at Juba was supposed to bring into force all earlier signed agreements between the parties.

26. See *Report of the AU High-Level Panel on Darfur*, PSC/AHG/2(CCVII), October 2009.

27. Wierda, Marieke, "Stocktaking: Complementarity," ICTJ, May 2010.

28. Nuremberg Declaration, Section 2.7.

29. Mue, Njonjo, and Christine Alai, "Kenya: Impact of the Rome Statute and the International Criminal Court," ICTJ, May 2010.

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