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# Making Justice Work: Accountability and Complementarity between Courts

Mónica Martínez

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June 2008

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# Introduction

The move to end impunity for widespread or systematic human rights violations has led to the establishment of international and internationalised criminal tribunals, as well as to an increase in cases adjudicated by domestic jurisdictions.

"Transitional justice comprises the full range of judicial and non-judicial processes and mechanisms associated with societies' attempts to come to terms with a legacy of large-scale past abuses in order to ensure accountability, serve justice and achieve reconciliation."[1] The main transitional justice approaches work through national judicial systems, internationalised hybrid courts, *ad hoc* international criminal tribunals, national and international truth commissions, reparation mechanisms for victims, institutional reform, reintegration programmes for ex-combatants and promoting reconciliation and social reconstruction.

The conflicts in the former Yugoslavia and Rwanda led to the establishment of two *ad hoc* international criminal tribunals through resolutions of the United Nations Security Council – the International Criminal Tribunal for the former Yugoslavia (UN-ICTY) and the International Criminal Tribunal for Rwanda (UN-ICTR). Although their achievements are undeniable, the Tribunals have been criticised for excessive bureaucracy, inefficiency and for the length of trials, which has also raised the question of "selective justice". Prosecutions can also take place within a third jurisdiction under the principle of "universal jurisdiction". While trials held under universal jurisdiction may sometimes be the only possible way of ensuring accountability, they suffer the same weaknesses as purely international trials, i.e. distance from the victims and, consequently, limited impact on restoring trust in the rule of law within the nation where the crimes were committed. Hybrid courts could also be established in the country where the crimes were committed, to increase the impact on victims and to foster domestic judicial capacity. Choosing among these different modalities depends on domestic capacity and political will. Governments often lack the political will to prosecute their own citizens or high-level officials, as was the case in the former Yugoslavia. Alternatively, national institutions may have collapsed, as in the case of Rwanda. Another option for the international community is to provide assistance to support domestic trials.

The establishment of a permanent international criminal jurisdiction, the International Criminal Court (ICC), to try persons charged with genocide or other crimes of similar gravity, is a decisive step forward in the fight against impunity and the struggle for justice and human rights in the world today.

Truth commissions are another increasingly common tool for countries emerging from civil war or authoritarian rule. Usually used in the immediate post-transition period, commissions are temporary, non-judicial investigative bodies that offer some form of accountability for the past. While such commissions do not replace the need for prosecutions, they have been of interest in situations where prosecutions for massive crimes would have been impossible, or unlikely, because of either a lack of capacity of the judicial system or a *de facto* or *de jure* amnesty.

When used effectively, truth commissions can build trust in public institutions, restore the dignity of victims, restore democratic values, deter further violations, ensure respect for individual and collective rights and consolidate the rule of law. Emphasising the importance of developing the long-term capacity of the judicial system when implementing a truth commission, the Office of the High Commissioner for Human Rights advises that: "Complementing domestic capacity with international capacity may allow prosecutions to proceed more effectively and expeditiously, but the deployment of such capacity

[1] Report of the United Nations Secretary-General at the Security Council: *The Rule of Law and Transitional Justice in Conflict and Post-Conflict Societies*,2004, p.4.

should be carefully planned, with the aim in mind of leaving a legacy".[2]

This paper focuses on differences and synergies between national, international and third states' prosecutions. It underlines the importance of striking the right balance between compliance with international fair trial standards and the respect for national laws and traditions, with the ultimate goal of ensuring sustainable peace and reconciliation. Priority should be given to domestic jurisdictions' capacity building, fostering proximity and compliance with victims' rights. Accountability should be ensured through international assistance in the case of a state that is unwilling to prosecute serious violations of human rights.

Additional details on the main international and internationalised criminal courts, tribunals and chambers are provided in Annex I. Annex II briefly underlines the main features in the provision of international assistance through all types of judicial intervention, be they international, hybrid or national, or by third country jurisdictions.

[2] *Rule of Law tools for post-conflict states: Prosecution initiatives and truth commissions*, Office of the High Commissioner for Human Rights, 2006.

# Establishment of the International Criminal Court and the proliferation of special chambers, hybrid courts and *ad hoc* tribunals

Alongside the establishment of the ICC, there have been other initiatives to promote justice and end impunity for serious violations of human rights in post conflict states. These include the *ad hoc* international criminal tribunals, established by the United Nations Security Council under Chapter VII of the United Nations Charter (UN-ICTY and UN-ICTY); hybrid internationalised courts - Sierra Leone, Kosovo, East Timor, Cambodia, *inter alia*; and special war crimes chambers – Bosnia and Herzegovina.

A new culture of human rights and accountability, in which there can be no impunity for crimes such as genocide, war crimes, crimes against humanity and grave breaches of the Geneva Conventions, has gradually taken root. Furthermore, the link between an established system of individual criminal responsibility and the maintenance of international peace and security has been confirmed.[3] Justice reform and the rapid reestablishment of the rule of law to prevent the emergence of organised crime and terrorist elements are seen as a critical component in building sustainable peace.

The United Nations Security Council should ultimately take responsibility when political or institutional

[3] Ralph Zacklin, *The Failings of Ad Hoc International Tribunals,* Journal of International Criminal Justice, 2004

contexts make it unfeasible for the countries directly involved to address impunity.[4] Therefore, it must continue to pursue this commitment to international justice through a diverse set of judicial and non-judicial mechanisms.

National courts are often the most convenient when it comes to simplifying the process of gathering evidence and calling witnesses, though their degree of impartiality may be questionable.[5] *Ad hoc* tribunals, while expensive and potentially time-consuming, have a greater degree of jurisdiction over foreign nationals and are independent from the State. Given the advantages and disadvantages of each model, it is clear that there is no single appropriate response since the approach must be made context-specific.

## Internationalised hybrid courts

One of the most interesting developments in the area of international criminal law that emerged at the end of the 1990s, following the cumulative experiences of Nuremberg and Tokyo Tribunals, the UN-ICTY, the UN-ICTR and the ICC, has been that of internationalised hybrid criminal bodies.[6]

Political and global events have indeed acted as catalysts to encourage the establishment of international forums, a reflection of the growing influence of international law. Internationalised hybrid courts can assist in stabilising a domestic legal system following conflict, while ensuring the continued representation of national interests even if the state is no longer functioning. They can also assist in preventing the imposition of justice exclusively from the outside. A key feature of these courts is their flexibility to respond to particular situations as they arise on a case by case basis.

As in the case of other kinds of international judicial bodies, internationalised hybrid courts are composed of independent judges, work on the basis of predetermined rules of procedure and evidence, and render binding decisions. These courts are subject to the same principles governing the work of all national and international judiciaries, such as due process, impartiality, integrity and independence.

As with the ICC, UN-ICTY and UN-ICTR, the goal is to prosecute those individuals charged with serious violations of international criminal law, i.e. war crimes, crimes against humanity and genocide. In so doing, the aim is to discourage future violations and help re-establish the rule of law.

Internationalised hybrid courts have limited jurisdiction. They are created to address particular situations for a limited period of time, as the result of specific political and historical circumstances. Finally, like all other international criminal bodies, they rely on international cooperation and judicial assistance by states and international organizations in order to carry out their mission.

In all cases, these courts incorporate both international and national features. While they are rooted within domestic judicial systems, the internationalised Courts are composed of both international and local staff and they apply a mixture of international and national substantive and procedural criminal law. The international component is designed to ensure fair trials in compliance with applicable international criminal and human rights law standards. It could be argued that national courts applying exclusively national laws -such as the specialised Gacaca Courts in Rwanda- can move faster because the procedural guarantees they offer are weaker than those found in international law. However, the Gacaca courts system, established as a participative, popular form of retributive justice, has been criticised for being biased,

[4] The United Nations Security Council recently established a Special International Tribunal to prosecute the person charged with the assassination of former Lebanese Prime Minister Rafik Hariri in Lebanon. Lebanese authorities have asked for a trial with an "international character" in order to give the Tribunal full independence and impartiality, avoiding any influence or pressure from Lebanon's politics.

[5] A Special Tribunal was set up in Iraq in 2003 to prosecute those accused of committing serious crimes from 1968 to 2003. The international community was concerned about the capacity of the Iraqi judicial system to ensure fair trials, following so many years of corruption and oppression.

[6] See *Project on International Criminal Courts and Tribunals*,www.pict-pcti.org

for lacking in transparency and for the prevalence of corruption among their judges and court officials.

Some experts hold that internationalised hybrid courts offer significant advantages when compared with other exclusively international criminal bodies that are not built upon existing national judicial systems and, in particular, the ICC. Although it depends very much on the capacity and readiness of the relevant domestic judiciary, the existing national court infrastructure and legal system can, in most cases, be used as a basis for hybrid courts.[7] This signals a respect for national laws and traditions while generating a sense that justice is not being imposed from outside. Ideally, they should therefore foster reconciliation and sustainable rule of law reform. The involvement of local judges and staff ensures that the language and whereabouts of the accused is are known to the court. Additionally, in the longer term, the promotion of international standards within the local judiciary strengthens the national court system, ensuring sustainability.

However, practical problems do arise due to a lack of co-operation between national and international components; difficulties in engaging the co-operation of states that are not party to the agreement which established the court, particularly in arresting alleged perpetrators and producing evidence - a critical issue in order to prevent the accused from escaping the tribunals' jurisdiction by fleeing to another country;[8] and difficulties in establishing a body of substantive and procedural criminal law that does not conflict with applicable national laws while complying with international standards.[9]

There is also concern regarding the independence and impartiality of the judiciary in internationalised courts.[10] The effectiveness of the courts' work depends to a great extent on the expertise of the judges and legal staff in the areas of international criminal and human rights law, including a balance of civil and common law approaches. National judges and court officials should be familiar with international law and how it may conflict with their domestic legal instruments. Therefore, specialised training should be provided, if and when required. It is also important to strike the right balance between compliance with relevant international standards while respecting the local laws and traditions. Since the perception of equitable justice is a key factor in the credibility of internationalised courts, appointment and dismissal procedures should be transparent, safeguarding against appointments for improper motives and discrimination.[11]

Equitable provision of resources for the defence - in the case of the indigent accused – and prosecution is essential as well. Adequate funding helps to ensure that good quality legal representation and sufficient material resources are available.

As for the relevant substantive law, a body of international criminal law applicable to all international and internationalised tribunals has not yet been established.[12] The relationship between national and international legal provisions must be formalised, as international and internationalised courts could come to contradictory decisions based on the same legal provisions. Likewise, definitions of offences under the jurisdiction of internationalised tribunals have yet to be standardised. A wider scope

[7] The degree of international involvement differs depending on the capacity of national officials and the development of the judicial system. In some cases, basic legal training for legal and judicial staff and redrafting of national laws is required, beginning almost from scratch. In other cases, assistance should only focus on reviewing applicable laws and procedures in accordance with relevant international standards.

[8] Liberia's former President, Charles Taylor, attempted to evade the jurisdiction of the Sierra Leone Special Court by fleeing to Nigeria.

[9] In the *Cambodian Extraordinary Chambers,* contradictions between Cambodian and international legal instruments have arisen.

[10] It is worth referring to the recent events in Pakistan, where the current President, Pervez Musharraf, undermined the independence and integrity of the Pakistani judiciary by dismissing the country's Chief of Justice and using force against lawyers and other civil society actors demonstrating against the declaration of a state of emergency. See also *Basic Principles on the Independence of the Judiciary*, adopted by the Seventh United Nations Congress on the Prevention of Crime and the Treatment of Offenders, as endorsed by General Assembly resolutions 40/32 of 29 November 1985 and 40/146 of 13 December 1985.

[11] *ICTJ Prosecutions Case Studies Series,* April 2006,www.ictj.org

[12] The US Institute for Peace, the Irish Human Rights Institute, the Office of the UN High Commissioner for Human Rights, and the UN Office on Drugs and Crime have an initiative to establish "Model Codes" in order to create a coherent body of criminal laws in post conflict settings, www.usip.org

of protection could be ensured by a greater degree of cross-applicability between national and international law.

Conflicts regarding the standards governing the courts' jurisdiction should also be addressed, and procedural law, including rules of evidence, should be standardised as far as possible. Ultimately, sharing know-how and expertise between and across national and internationalised tribunals, with a view to establishing best practices and lessons learned, should be further encouraged.

## Strengthening domestic judicial systems so that they comply with relevant international standards

Through its core commitment to complementarity, the Rome Statute establishing the ICC affirms the primacy of national governments in combating impunity. As a result, far from displacing domestic courts, the establishment of a permanent International Criminal Court has reaffirmed the responsibility of states to ensure justice for serious international crimes committed in their territory. In this context, the international community has a critical role to play in fostering global mechanisms of co-operation with states to assist them in strengthening their domestic capacity to combat all aspects of impunity.

Besides general advice, expertise and training support, it is unclear at the moment what role the ICC should play in this regard. This question is somewhat controversial in view of the risk of a potential conflict of interest arising out of the Court's complementary jurisdiction and supervisory role over national criminal systems to address impunity with regard to serious violations of international criminal and human rights law.

In any event, the importance of establishing the rule of law and criminal law reform to post-conflict reconstruction and the re-establishment of peace and security has been widely acknowledged.[13] However, given that state authorities themselves are often implicated in the perpetration of international crimes and that national systems may lack effective, responsive and fair criminal laws, it may be impossible to rely exclusively on national judicial systems to conduct domestic prosecutions.

National criminal laws should comply with basic international human rights norms and standards. In addition, they must be responsive to the current post-conflict reality and tackle the immediate threats to security. In the majority of post-conflict states, the pre-existing laws do not meet those minimum standards. They may also lack the necessary legal provisions and tools required to investigate and prosecute serious international crimes.

There are different reasons underlying the deficiencies and gaps in post-conflict criminal legal frameworks. The national authorities may have failed to adequately review and update national laws, particularly with regard to the prosecution of new criminal offences with a transnational element such as organised crime, terrorism, human trafficking etc. that often proliferate in a post-conflict setting.[14] The regime in power during the conflict may also have used the law as a vehicle of oppression, introducing arbitrary and unfair laws. At the very least, compliance with minimum international standards should be ensured through adequate post-conflict criminal law reforms, a very complex and challenging task, requiring sufficient time, resources and expertise.[15]

[13] Patrick Gavigan, *Final Report of the Rule of Law and Civil Affairs Section*, United Nations Mission in Burundi, June 2006.

[14] Ibidem., note 12 above, on the initiative to set up "Model Criminal Codes" in order to coherently prosecute such offences.

[15] *Report of the Panel on United Nations Peace Operations, 2000,* and *Report of the United Nations Secretary General on the Rule of Law and Transitional Justice in Conflict and Post-Conflict Societies,* 2004.

As mentioned previously, there is no single response to serious violations of human rights. Legal reform in post-conflict situations will depend upon the context in the particular state, determined by whether the laws just need to be updated or whether the authorities have opted to introduce a completely new body of criminal laws.[16]

Reform activities aimed at updating the law may include redrafting pre-existing laws to ensure compliance with international standards or with regard to the prosecution of serious international crimes. When post-conflict states choose to establish an internationalised hybrid court or special chamber to handle serious criminal offences, this requires either adapting applicable criminal laws and procedures to the jurisdiction of the new established judicial mechanism, or drafting new ones.[17]

For this reason, in December 2006, the United Nations Office for Drugs and Crime and the Organisation for Security and Cooperation in Europe launched guidelines to help countries make their criminal justice systems more effective as an essential element for the maintenance of stable and democratic societies. Professional police forces, competent investigators, prosecutors, defence lawyers, a fair judiciary and adequate prison systems are needed to prevent conflict.

The so-called *Criminal Justice Assessment Toolkit*,[18] covering policing, access to justice, prison and alternatives to incarceration, juvenile justice and the treatment of victims and witnesses, has been designed to help practitioners reform their own criminal justice systems, bringing them into line with international standards. It will also enable advisers from the United Nations and other bodies to conduct assessments of the justice systems in individual countries and identify areas for appropriate technical assistance.

The capacity of states to ensure justice for crimes committed in their own territory has also been enhanced by their obligations as parties to the Rome Statute. Ratification of the Statute implies that states have to implement both their complementarity obligations, so that they can investigate and prosecute crimes under international law, and their cooperation obligations with the ICC, so that the Court will be able to investigate and prosecute cases. Thus, by enacting and implementing legislation, states reinforce their domestic judicial capacity to prosecute serious international crimes. Implementing legislation may also foster greater harmonisation between domestic laws. For instance, the observance by many states of the "dual criminality" rule in extradition practice may enhance cooperation in prosecuting alleged perpetrators.

The European Union and some non-EU States, including Canada, have also facilitated the adoption of implementing laws by sponsoring programmes aimed at promoting adherence to and the implementation of the Rome Statute. The International Committee of the Red Cross and international NGOs have also made valuable contributions in this area. Moreover, supervisory bodies established under the International Covenant on Civil and Political Rights, in force since 23 March 1976, and the Convention against Torture, in force since 26 June 1987, have reaffirmed the obligation of states parties to investigate and prosecute serious violations of human rights under international law.[19]

Another significant development relates to the principle of *non bis in idem*, which generally prohibits a second trial of defendants for the same offence. Although human rights treaties generally bar a second prosecution

[16] Following independence and, in particular, after the civil war, Tajikistan undertook a series of reforms such as the introduction of a moratorium of the death penalty, the adoption of new civil and criminal codes and the ratification of all major international human rights treaties. In order to ensure a sustainable and peaceful development, the country should further strengthen human rights enforcement and guarantee an independent judiciary through training and education programmes for judges, lawyers and prosecutors.

[17] Colette Rausch, *Combating Serious Crimes in Post Conflict Societies, a Handbook for Policymakers and Practitioners,Chapter VII, International Engagement*, United States Institute of Peace Press, 2006.

[18] www.unodc.org/unodc/criminal_justice_assessment_toolkit.html

[19] In 1998, the UN-ICTY observed that a domestic amnesty covering crimes such as torture whose prohibition has the status of *jus cogens* "would not be accorded international legal recognition", *Prosecutor v. Furundzija case,* par. 155, Judgement of 10 December 1998. Several domestic courts have reached similar conclusions: Spain – Augusto Pinochet and Chilean amnesty law of 1978, and France – Mauritanian amnesty law in 1993.

only by the same state that conducted the first trial, many extradition treaties allow a state to refuse an extradition request if a court in the requested state has rendered a final judgement in respect of the same offence for which the suspect's extradition is sought.[20]

The Statutes of the UN-ICTY and UN-ICTR take a similar approach, but allow a defendant to be tried before the relevant tribunal for an act for which he or she has already been prosecuted in a national court if the "national court proceedings were not impartial or independent, were designed to shield the accused from international criminal responsibility, or the case was not diligently prosecuted". The Rome Statute includes a similar provision, also followed in some national laws.

In view of the complexity and continuously evolving nature of international criminal law, national judges and prosecutors must stay up-to-date with new developments. Prosecutors may also need specialised technical training in the management and conduct of an effective investigation.[21]

The establishment of an international pool of well trained experts to assist the host country authorities where necessary in training local police, defence lawyers, prosecutors, judges and court staff would help address the need for technical training.[22] Experts could contribute to local capacity building and professional development, facilitate in country legal reforms, and strengthen consultation among local actors while re-building domestic judicial capacity.[23]

[20]André Klip and Harmen Van Der Wilt, *Netherlands and Non Bis in Idem,* Revue Internationale de droit pénale, vol. 73, 2002, pp. 3-4. It includes examples in Dutch case law of extradition requests being refused on the basis of *non bis in idem.*

[21] *A Chance for Justice? War Crime Prosecutions in Bosnia's Serb Republic*, Human Rights Watch, March 2006.

In addition to the role of the Special War Crimes Chamber in Sarajevo as a crucial instrument for justice in Bosnia and Herzegovina, many war crimes prosecutions take place in the lower courts of Bosnia's two entities, Republika Srpska and the Bosnian Federation, which also play a vital role in delivering justice.

[22]For example, the roster of Deployable Civil Experts within the Stabilisation Unit of the Department for International Development -DFID-, United Kingdom.

[23] A number of states, including Timor-Leste, Serbia and Montenegro, Ethiopia and Bosnia Herzegovina, have established specialised prosecutor's offices, police investigative units, judges and/or courts that focus on serious violations of human rights.

## Other initiatives by the international community

Cooperation and coordination between the United Nations, other international, regional and non-governmental organisations and the private sector will be fostered. Given the Security Council's leadership role in the maintenance of international peace and security, perhaps such a coordination mechanism could be driven by the United Nations.[24] In cases of suspected grave human rights violations, independent international inquiries should be allowed to assist in determining responsibilities and fostering accountability. The UN Human Rights Council should play an important role in ensuring compliance with international fair trial guarantees.

In this regard, the EU has taken steps towards the establishment of a European network of contact points to provide mutual assistance in the investigation of crimes such as genocide, crimes against humanity and war crimes. Other EU initiatives include assisting in re-establishing the rule of law through military, police and civilian operations within the framework of its European Security and Defence Policy.[25] The Council of Europe has also undertaken different initiatives such as the European Commission for the Efficiency of Justice, to improve the efficiency and the functioning of member states' justice systems in guaranteeing access to justice.[26]

[24]Office of the UN High Commissioner for Human Rights, *Rule of Law Tools for Post Conflict States,* 2006; and Scott N. Carlson, Esq., *Legal and Judicial Rule of Law Work in Multi-Dimensional Peacekeeping Operations: Lessons Learned Study*, March 2006.

[25] EUJUST THEMIS was designed to support the Georgian authorities in addressing urgent challenges in the criminal justice system and developing a co-ordinated overall approach to the reform process. The ongoing integrated rule of law mission in Iraq -EUJUST LEX-trains representative groups from the judiciary, the police and the penitentiary in the fields of management and criminal investigation in order to promote an integrated criminal justice system in Iraq.

[26] The EU initiative to foster a rapid exchange of information available in national criminal registers through "E-Justice" mechanisms is also worth mentioning.

# Institutional reform and vetting

Reforming institutions contributes to the establishment of a functioning justice system and the prevention of future human rights abuses. One important aspect of institutional reform is vetting, which excludes persons lacking integrity from those institutes.[27]

Building fair and efficient public institutions is a central task in countries transitioning from authoritarianism or conflict to democracy and peace. Public institutions that perpetuated a conflict or served an authoritarian regime must be transformed into institutions that support democratic transition, sustain peace and preserve the rule of law. Institutional reform should enable public institutions, in particular in the security and justice sectors, to provide criminal accountability for past abuses.

Effective and sustainable institutional reform is a complex and challenging task which may include the creation of monitoring, compliance and disciplinary procedures, the reform or establishment of legal frameworks, and the development or revision of ethical guidelines and codes of conduct. The precise scope of those measures will depend on the country's specific circumstances.

A comprehensive approach to institutional reform is critical to ensure its effectiveness and sustainability and an essential aspect of this is the reform of institutions' personnel. A lack of integrity among personnel is often the cause of malfunctioning and abuse.

Vetting involves assessing an employee's integrity, i.e. his/her adherence to international standards of human rights and professional conduct, to determine his/her suitability for public employment in order to re-establish civic trust and re-legitimise public institutions.

Under circumstances of limited or delayed criminal prosecutions, excluding human rights abusers from public service also has a punitive effect by removing their public authority and excluding them from other privileges and benefits. "Excluding abusers should, however, not be used as a pretext for not pursuing criminal prosecutions"[28] and ensuring full accountability. Transitional justice initiatives, in particular prosecutions, truth-telling commissions, reparations and institutional reform, should complement each other.

Vetting processes should therefore be integrated into broader personnel reform programmes which take into account the specific challenges of integrity screening in post-conflict or post-authoritarian contexts.[29]

As to the mandate and legal framework for personnel reform, peace agreements or United Nations resolutions mandating peace enforcement measures under Chapter VII of the UN Charter often define the roles and responsibilities of the parties and describe the tasks to be accomplished during the transition. Personnel reform provisions may either be included in any of these peace agreements or resolutions, or in a separate agreement.

In order to avoid uncertainty, personnel reform programmes should be implemented as soon as the political and operational circumstances permit it, after thorough consideration of the views of the major stakeholders involved. Needless to say, personnel reform legislation should comply with constitutional and international standards, and be clear and precise in order to establish legal certainty and avoid ambiguity and political interference.

[27] Louis Joinet, *Report on the Impunity of Perpetrators of Human Rights Violations* -E/CN.4/Sub.2/1997/20/Rev.1-, and *Set of Principles for the Protection and Promotion of Human Rights through Action to Combat Impunity*, principle 35 -E/CN.4/2005/102/Add.1.

[28] www.ssrc.org/blog/pdfs/vetting

[29] E/CN.4/2005/102, par. 68, and E/CN.4/2005/102/Add.1, principle 1.

The military, law enforcement, intelligence services, the judiciary and other critical public institutions directly responsible for maintaining stability and fundamental security, and protecting basic human rights in order to re-establish the rule of law, should be prioritised for vetting.

Finally, transparency about reform programmes, achieved through consultations with civil society, and in particular victim groups, will assist in building confidence in the impartiality and effectiveness of the process, while ensuring that it responds to actual needs.[30]

## States' universal jurisdiction

Extradition gives national justice systems a global reach. Universal jurisdiction is the power of a national court to try serious international crimes, even if neither the suspect nor the victim are nationals of the country where the court is located, and the crime took place outside that country.

In recent years, we have seen major developments in the role of foreign courts in combating impunity. For instance, some states enacted legislation in the 90s to ensure that they did not become safe havens for individuals responsible for crimes committed in the former Yugoslavia and Rwanda and who would not be likely to be prosecuted before the UN-ICTY or the UN-ICTR. In other states, the presence of alleged perpetrators provided the occasion to apply existing laws.

Thus, the establishment and operation of international tribunals and, in particular, of a permanent complementary criminal jurisdiction, has further encouraged domestic legal reforms to enable national judiciaries to play their own part in bringing alleged perpetrators of international crimes to justice. Another catalyst was the arrest of former Chilean President, Augusto Pinochet, by British authorities acting at the request of a Spanish magistrate in October 1998.[31] Additionally, victims of human rights abuses initiated criminal proceedings in several countries whose laws provide for extraterritorial jurisdiction for international crimes.[32] Notably, some states have cooperated in the exercise of jurisdiction over their nationals by other states.[33] There have also been important developments regarding cooperation by third countries.

National courts in several countries have also considered whether an offence must have a particular link to the state before universal jurisdiction can be exercised. A related issue is whether courts that can exercise extraterritorial jurisdiction should defer to another state with a greater link to the crime in question and, if so, which state should bear the burden of establishing any relevant preconditions for exercising jurisdiction.

Further examination of national courts' existing case law in enforcing international law through

[30] Office of the United Nations High Commissioner for Human Rights, *Rule of Law Tools for Post-Conflict States, Vetting*, 2006.

[31] Spanish Organic Law 6/1985 regulates Spanish universal jurisdiction over genocide and any offence that Spain is obliged to prosecute under international treaties, including the Convention against Torture and the Geneva Conventions and their first additional protocol. Crimes against humanity have been criminalised under the Spanish Criminal Code since 2004.

[32] Recent cases successfully prosecuted in Europe include two Afghan military officers, Adolfo Scilingo and Habibullah Jalalzoy, convicted in the Netherlands of war crimes committed in Afghanistan; an Argentine officer, Adolfo Scilingo, convicted by a Spanish court of crimes against humanity committed in Argentina; two Argentine judges wanting Spain to send Isabel Perón, the country's former president, home to face a war crimes trial; Peru pressing Chile to extradite its former president, Alberto Fujimori, on human rights and corruption charges; and Rwandan citizens convicted before Belgium or Canadian courts of participating in the Rwandan 1994 genocide.

[33] The Government of Chad has cooperated with a Belgian magistrate's investigation of Chad's former President, Hissène Habré, who is now facing trial before a special war-crimes court set up by the Senegalese government upon request by the African Union. Belgium enacted universal jurisdiction legislation over war crimes in 1993, and over crimes against humanity and genocide in 1999. Since 2001, prosecutions based on universal jurisdiction and leading to a conviction include the "Butare Four" case and "The Two Brothers" case, both involving crimes committed in Rwanda during the 1994 genocide.

extraterritorial jurisdiction is also desirable. This should include developing and assessing best practices and lessons learned with a view to identifying standardised principles and practices concerning the appropriate exercise of universal jurisdiction. Amongst other relevant procedural and substantive issues, jurisdictional challenges such as immunity or subsidiary, national and international cooperation, the role of victims and witnesses and the conduct of fair investigations and trials, should be addressed. [34]

States should ensure that their domestic laws allow them to fully implement their obligations under treaties such as the Convention against Torture, the Geneva Conventions of 12 August 1949, and their Additional Protocol I of 1977. While several treaty provisions[35] require state parties to cooperate in the investigation of international crimes, practical mechanisms for information sharing are largely nonexistent.[36]

States should also ensure effective compliance with these obligations. In this regard, there has been a significant gap in the practice of some states that have deported or denied entry to foreign nationals for whom there were serious reasons to believe they had committed serious crimes under international law, but have not acted to ensure that these individuals are subject to criminal proceedings in an appropriate forum.

Cases involving universal jurisdiction present special demands on police, prosecutors, defence counsel and courts. Investigators and prosecutors may lack familiarity with both the historical and political context of the alleged crime, as well as the applicable international law. Witnesses may be dispersed across several countries, or the state in which the crime was committed may decline to cooperate with investigative requests. For similar reasons, a defendant may also face considerable problems in gaining access to witnesses or evidence that exculpates him or her, which may jeopardise his/her right to a fair trial.[37]

Support by the international community remains essential to ensuring accountability. In this regard, as mentioned before, the EU Council's decision to create a "Network of contact points regarding persons responsible for genocide, crimes against humanity and war crimes" ("the Network") in 2002 marked a first step in increasing cooperation in the investigation and prosecution of international crimes. The Network was intended to improve cooperation and the exchange of information among national practitioners prosecuting international crimes. Moreover, an increase in universal jurisdiction prosecutions prompted Interpol in 2004 and 2005 to organise expert meetings on genocide, war crimes and crimes against humanity in order to improve coordination and information sharing among law enforcement, judicial, academic, and non-governmental organisations involved in this field.

## The ICC's limitations: The threshold for international judicial intervention

The ICC has a limited reach under its Statute since its jurisdiction is complementary to domestic judicial systems. Therefore, states have primacy to initiate a prosecution and the Court can only intervene in cases where national governments are unable and/or unwilling to investigate or prosecute. The ICC may only prosecute crimes committed after its establishment on 1 July 2002 and, other than cases in which the Security Council refers the matter to the Court, it only

[34] Several non-governmental initiatives have produced principles concerning the exercise of universal jurisdiction such as Amnesty International 14 Principles on the Effective Exercise of Universal Jurisdiction.

[35] Article 88 of the First Additional Protocol to the Geneva Conventions of 1977, and article 9 of the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment of 1987.

[36] Human Rights Watch, *Universal Jurisdiction in Europe: The State of the Art*, June 2006.

[37] Ibidem note 50.

has jurisdiction over nationals of countries which have ratified its Statute.[38]

In this context, the threshold for international judicial intervention needs to be further defined in order to fight impunity and foster accountability. Many different approaches can be taken, from a very legalistic one requiring strict compliance with human rights standards and consequent reforms to domestic systems, to more liberal approaches. To a great extent, the latter tolerate local justice efforts at the risk of ICC's intervention with a view to promoting lasting peace and reconciliation.[39]

Ultimately, it could be debated whether or not international assistance and judicial intervention are justified by the need to ensure accountability for serious crimes and to reassure victims that justice is being done. This may be somehow related to the so-called "responsibility to protect" from a purely judicial point of view, i.e. the necessity to tackle and deter the commission of serious violations of human rights.

As mentioned above, the cooperation of states remains crucial, not only to meet the expectations of victims, but also to promote, in the case of the ICC, complementarity between the Court and domestic criminal jurisdictions. In any event, the ICC is seen as a major actor in fostering accountability, but its universality must be ensured through states either prosecuting cases by themselves, or referring accused persons to the Court's jurisdiction. "The unfulfilled warrants spotlight[ed] a key challenge for the ICC, namely that broader support and cooperation was crucial in the arrest and surrender of suspects, as well as in protecting victims and witnesses. While the primary responsibility for providing such cooperation rested with states party to the Rome Statute, non-state parties and international organisations, especially the United Nations, were in a position to provide valuable assistance. [...] Without arrests, there can be no trials [and] without trials victims will again be denied justice and potential perpetrators will be encouraged to commit new crimes with impunity".[40]

## The collision between peace and justice

In connection with the above, there has long been a debate about the best way to deal with gross violations of human rights and, in particular, whether an international search for justice actually hurts or helps the pursuit of peace; or to put it another way, what is more important, to punish the perpetrators and ensure accountability or to put an end to violence? It is generally accepted that, under international law, amnesties can never apply to gross violations of human rights and humanitarian law.

"In its work, the Security Council seeks a middle ground between the needs for peace and justice, with there being a consensus that one cannot exist without the other. [...] That is why our focus on the rule of law calls for early interventions, so as to prevent situations where demands for justice become a subject for negotiations."[41]

[38] Sudan's President refuses to accept the ICC's jurisdiction over any crimes committed in Darfur. He believes his country is willing and able to prosecute its own suspects to internationally acceptable standards. Judge Richard Goldstone, former chief prosecutor at the UN-ICTY and UN-ICTR, emphasises that, given that, in this case, the ICC derives its jurisdiction from the Security Council, its decision is binding on all member states including Sudan. Consequently, if Sudan continues to violate the relevant Security Council resolution, it will be up to the Security Council to take appropriate steps to compel it to comply.

[39] Uganda has announced the planning of a national tribunal to try Uganda's Lord's Resistance Army (LRA) war criminals, as an alternative to the ICC. If created, the national courts will try suspects accused of lesser crimes, and the ICC will try the top leaders.

[40] "Earlier in 2007, ICC judges confirmed war crimes charges against Thomas Lubanga, an alleged Congolese warlord. A Trial Chamber is currently dealing with preliminary procedures before the trial is to begin early next year. In a related case, another alleged militia leader, Germain Katanga, was surrendered in October 2007 to the Court by the Democratic Republic of the Congo. Pre-trial proceedings would take place in the coming months. On the situation in the Sudan's Western Darfur region, Chamber judges had issued warrants for the arrest of two suspects but neither warrant had been executed. Turning to the situation in Uganda, five arrest warrants had been issued for members of the LRA in 2005, including for the arrest of its leader, Joseph Kony. None of the warrants had been executed".

United Nations General Assembly, Press Release GA/10652, *ICC President's Report to UN General Assembly stressing the need for cooperation in suspects' arrest and surrender*. November 2007.

[41] Statement by Deputy Secretary-General Asha-Rose Migiro, underscoring the central role played by the rule of law in the work of the United Nations. She defined the rule of law as "a principle of governance

Even though states are responsible for enforcing their own criminal justice system under the principle of national sovereignty, they are often unwilling or unable to prosecute such serious crimes, either because those responsible are still in power, or because they have taken refuge in other countries and are therefore out of reach. Hence, they turn to international justice or to the exercise of extraterritorial universal jurisdiction.

Ending impunity for perpetrators of serious crimes is one of the principal evolutions in the culture of international community and law over the past decade. This means that justice and accountability should never be sacrificed by granting amnesty to end violence and secure peace.[42] Instead, peace and justice should be complementary demands that are exercised in tandem with one another. For example, in April 2007, Ivorian President Laurent Gbagbo granted amnesty to soldiers and civilians living in the country and abroad who had committed crimes against the state during the civil war of 2002-2003. However, war crimes and economic crimes are excluded and the victims of the crimes it covers will be compensated.[43]

In cases where there are ongoing conflicts, that principle may be harder to apply and it has been argued that undue focus on human rights and accountability jeopardises the possibility of peace negotiations.[44] In addition to other transitional justice mechanisms, such as truth and reconciliation commissions, trials are also vital to satisfy victims' rights and deter the commission of further crimes.

Whether the deterrence factor really works, however, may be contested. Despite the Nuremberg and Tokyo Tribunals, genocide has continued. The creation of the UN-ICTY failed to prevent the massacres in Srebrenica and Kosovo. The indictment of Mr. Kony by the ICC has not stopped the Ugandan killings. Furthermore, since the deferral of the atrocities in Darfur to the ICC, the violence there has worsened. Deterrence only works when there is a reasonable chance that the allegedly responsible will be prosecuted. Unlike national courts, international criminal judicial bodies have no direct powers of enforcement and cannot execute arrest warrants or compel witnesses to appear in court. Therefore, the proper functioning of ICC, as with the UN-ICTY and the UN-ICTR, depends on full and effective state cooperation, from the opening of an investigation to the enforcement of a sentence.

Blanket amnesties are generally counter-productive, except when used as a temporary measure to bring warring parties to the negotiating table. In Sierra Leone, the amnesty negotiated as part of the 1999 *Lomé peace agreement* with the rebels did not prevent the resumption of atrocities and was therefore annulled. In northern Uganda, the government amnesty has failed to get Mr. Kony and his collaborators to lay down their arms.[45]

Experience shows that peace agreements can also be reached without amnesty concessions. The absence of any amnesty provision in the *Dayton peace agreement*

in which all persons, institutions and entities, public and private – including the state itself – are accountable to laws that are publicly promulgated, equally enforced and independently adjudicated, and which are consistent with international human rights norms", 2 November 2007.

[42] The implementation of the "Peace and Justice Law"(PJL) in Colombia, aimed at demobilising paramilitaries, can either take a decisive step towards ending 40 years of armed conflict and achieve peace and reconciliation, or cause more violence and be a serious threat to democracy. The PJL constitutes an experimental transitional justice mechanism. If rigorously applied in accordance with relevant international standards, it may prove to be an effective way of achieving justice, truth and reparations. There are concerns that the Law allows partial impunity in view of the gravity of the crimes at stake and the short length of the sentences to be imposed. The Law has also been criticised for not fully guarantying victims' rights. These concerns should be addressed through a transparent government strategy that prioritises a rigorous prosecution system.

[43] International Center for Transitional Justice and the Human Rights Center at the University of California, Berkeley, *Forgotten Voices: A Population-Based Survey on Attitudes about Peace and Justice in Northern Uganda*, July 2005.

[44] Daniel Wallis, *New World Court faces unexpected trials in Uganda*, Reuters, 25 July 2005. It discusses the impact of ICC's investigations in the Ugandan peace process and notably on the interpretation of Article 53 of the Rome Statute, which provides that investigations can be suspended if the Prosecutor believes it to be in the interest of justice; International Crisis Group, *Northern Ugandan Peace Process: The Need to Maintain Momemtum*, 14 September 2007.

[45] International Criminal Transitional Justice, *Forgotten Voices: A Population-Based Survey of Attitudes About Peace and Justice in Northern Uganda*, December 2005; Daniel Wallis, *Analysis: New world court faces unexpected trials in Uganda*, Reuters, 25 July 2005.

on Bosnia and Herzegovina did not stop Mr. Milosevic from signing. Nor did it prevent Afghanistan's warring parties from reaching a peace agreement in Bonn. Furthermore, amnesties that have been introduced in the past are beginning to be reversed, as in Chile and Argentina in 2003.[46]

In fact, to repeat what was said previously, each country must find its own way of dealing with past atrocities. Sometimes, it may take a whole generation for a society to be ready to learn the truth, as in Germany after the Second World War. In such cases, reconciliation and punitive justice are both necessary. Sometimes, as in South Africa, it is better to start with truth and reconciliation, and prosecute later. In other cases, such as Iraq, prosecution comes first, and truth and reconciliation may follow when or if the violence ends. Sierra Leone is so far the only country that has set up a truth and reconciliation commission and a war crimes hybrid court consecutively.[47]

In any event, any successful peace accord must get the balance right between peace and justice.[48] The South African truth and reconciliation commission model, with its amnesties for the perpetrators of even serious crimes, is widely admired, but in other cases sustainable peace will not be possible without retributive justice, trials and punishment.

Confessions or guilty pleas may also help to foster justice, peace and reconciliation. One of the main controversies around guilty pleas is the lengths of the sentences handed down to those who confess their crimes. Victims are actually hurt when war criminals get very light sentences after guilty pleas.[49] In general, unwillingness to face the past and accept the truth about the war is definitely another obstacle to peace and reconciliation.[50]

Importantly, the activities of criminal courts should be visible to people in the regions they deal with, as transparency is an essential feature of democracy and the rule of law. While focusing on the demanding task of rendering fair and impartial justice in difficult circumstances, tribunals also need to find ways to engage communities through effective outreach programmes so that those most affected by mass violence come to understand the criminal justice process. It is worth mentioning in this regard the experience of the Gacaca court system, established as a form of participative, popular retributive justice in Rwanda. However, concerns have been raised around the fairness of the trials since the legislation used by Gacaca did not comply with international standards and most Gacaca judges had no legal or human rights background.

# Comprehensive measures and integrated approaches to building lasting peace

## Retributive versus restorative justice

The promotion of the rule of law clearly demands more than just successful trials. The most successful prosecutions may only address one small part of the problem when there have been widespread violations of

[46] Chile's Supreme Court removed most of the obstacles to try the dictatorship's crimes. Augusto Pinochet was facing trial on several charges when he died in December 2006. In 2005, Argentina's Supreme Court annulled the "full-stop" and "due obedience" laws as being unconstitutional, paving the way for the prosecution of Junta's crimes.

[47] In the summer of 2007, United Nations officials boycotted the truth and friendship commission set up jointly by Indonesia and Timor-Leste in 2005 for recommending amnesty for crimes against humanity and other gross violations of human rights.

[48] Gareth Evans, International Crisis Group, keynote address, *Conflict or Co-existence?,* to Forum 2000 Conference, *Our Global Co-existence: Challenges and Hopes for the 21st Century,* October 2005.

[49] Nancy Amoury Combs, *Guilty Pleas in International Criminal Law: Constructing a Restorative Justice Approach,* 2007.

[50] Many Serbs continue to hold up Karadzic and Mladic as heroes for their roles in the Bosnian war, despite the enormous quantities of evidence suggesting their responsibility for war crimes.

international law. For example, Charles Taylor, Liberia's ex-president and warlord, was tried in The Hague rather than in Sierra Leone, preventing the case from having the greatest impact possible in terms of deeply rooting the rule of law in the African region.[51]

Depending on the situation, non-judicial mechanisms, including truth-seeking commissions, reparations for victims, and effective demobilisation disarmament and reintegration (DDR) programs, may also be used to supplement prosecutorial processes in order to more effectively address impunity gaps and build confidence in justice systems and the rule of law.[52]

Victims' reparations should be seen as a critical dimension of transitional justice, and the only one that is most specifically focused on victims' rights and rectifying the harm they have suffered, both moral and material. Even though reparation programmes should be developed on a case by case basis, the challenges any programme faces are similar: to clearly define the conceptual framework and objectives, address financial issues, respond fairly to massive numbers of victims and a range of violations, attend to gender and other disparities and reestablish the dignity of the victims by relating reparations to truth-seeking, accountability, and institutional reform.[53] The ICC is the first international criminal court with the power to order victims' reparations, including restitution, indemnification and rehabilitation. The Court has the option of granting individual or collective reparations for a whole group of victims, a community, or both.[54]

[51] Graeme Sympson, International Center for Transitional Justice, statement on the Security Council Debate *Strengthening International Law: The Rule of Law and the Maintenance of International Peace and Security,* 20 June 2006.

[52] The Security Council stressed that "Reforming the security sector in post-conflict environments is critical to the consolidation of peace and stability, promoting poverty reduction, rule of law and good governance, expanding legitimate state authority and preventing countries from relapsing into conflict" while also acknowledging "The need to compile a report with *concrete recommendations* on how to improve the effectiveness and coordination of all United Nations system entities that support security sector reform", S/PRST/2007/3.

[53] International Center for Transitional Justice, "Reparation Sources", www.ictj.org

[54] www.icc-cpi.int/victims

## Security sector reform

Special attention should be given to the role of security sector reform as a vital transitional justice mechanism. As mentioned above, the rebuilding or transformation of trusted and legitimate law enforcement and military institutions, bound by internationally accepted human rights norms and standards, is critical for the re-establishment of the rule of law, especially in societies where these institutions have been politically biased, or have been actively involved in human rights violations, leading to the loss of civic trust and legitimacy.[55]

## Reconstruction and economic recovery

In addition to the political and security dimensions of rebuilding a state, social and economic reconstruction are crucial for a successful transformation from conflict to sustainable peace.

While personal security may always be the first priority, rule of law and justice issues, economic development and the effective implementation of vetting processes and anti-corruption measures deserve to be accorded higher priority than usual.[56] Such a multi-faceted, integrated approach is crucial to balancing the sometimes competing claims of peacemaking and justice concerns. In addition, popular perceptions of injustice must be tackled by addressing the underlying causes of the conflict in order to ultimately achieve lasting peace.

[55] Ibidem., Section 3 above "Vetting and Institutional Reform".

[56] Ibidem., note 64 above.

# Conclusion and recommendations

Addressing abuses and violence, rebuilding confidence and restoring the values of tolerance, trust and accountability, are among the most difficult tasks that any country can face. Conflicting priorities have to be balanced, often in a tense security situation that underscores the fragility of the transition from conflict to peace. International law requires that there be no impunity for those who commit war crimes, crimes against humanity and genocide, but not every offender has to be punished in order to achieve respect for the rule of law.

Transitional justice is generally understood to mean trials, with fact-finding commissions and reconciliation initiatives being seen as "soft options" or a second best when "real justice" is not possible (emphasis added). Truth, reconciliation and justice should, however, be considered mutually reinforcing. Civil society, and victims in particular, have the right to know the truth and, eventually, to be compensated, without eliminating the possibility of holding criminals responsible. Victims should thus be engaged as part of the process in order to achieve reconciliation and lasting peace.[57]

International justice is itself going through a sort of transitional period. The ICC should definitely be seen as a symbol of justice throughout the world, but it is also necessary to consider how it should be complemented by judicial processes at other levels, be they exclusively domestic, exclusively international or a hybrid of the two.

[57] "The right to have victims' voices heard [...] is also central to the ICC's goal of having a solid impact on peace and transition in the countries in which it is involved. [...] For the first time in the history of prosecuting war crimes, victims from conflicts such as the Congo can apply for permission to be involved in the judicial process in ways other than testifying as witnesses. Significantly, they will be granted the right to question defendants and participate in the early stages of investigations. This new way of prosecuting alleged war crimes perpetrators was borne out of a sense of frustration that victims have been too far removed from events at bodies like the International Criminal Tribunal for Rwanda [...]", Institute for War and Peace Reporting - African Reports: *ICC: Victims to have a greater voice,* August 2006.

In any event, the international community should continue to recognise and support the vital role of domestic courts in delivering justice, as an essential element to deter further atrocities and ultimately consolidate sustainable peace and achieve reconciliation. Effective and efficient co-operation and co-ordination throughout the process of promoting the rule of law and human rights should be established at all levels — international, regional, national and local.

## Recommendations

i) Comprehensive and systematic judicial and non-judicial approaches should be encouraged in order to address impunity gaps more effectively and victims should be involved to build civic trust in justice and rule of law reforms. Non-judicial mechanisms may include truth commissions, reparations and DDR programs.

ii) Existing national and international cooperation and coordination mechanisms to ensure accountability should be strengthened through timely and effective interaction, exchanges and support, where required, notably with regard to the exercise of universal jurisdiction by individual states, international criminal jurisdiction by the ICC, or the establishment and functioning of international and hybrid tribunals. Relevant intergovernmental and international organisations, including, *inter alia,* the UN and the EU, should continue playing an active role in this regard.

iii) Existing tools to apply minimum International Criminal and Human Rights Law standards should be developed further and made available to national governments through training and staff exchanges in order to ensure effective war crimes prosecutions and full compliance with fair trial guarantees and due process.

iv) Ensuring a secure environment through justice and accountability in post-conflict settings remains the priority, in particular in the case of gross violations of human rights and humanitarian law. However, in

view of possible collisions between peace and justice, creative approaches and solutions should be explored in the negotiation and implementation of peace agreements and the Memorandum of Understanding (MOU). This approach should take precedence over the concession of amnesties to end conflicts.

v) Thus far, from international experience to date, it appears that hybrid tribunals may have several advantages over *ad hoc* international tribunals in terms of cost, since they are located *in situ*, and also in terms of having greater potential impact on the domestic legal system with regard to legacy and the victims. Complementing domestic capacity with international capacity may allow prosecutions to proceed more effectively and expeditiously. In all such cases, in order to avoid any appearance of foreign imposition, a consultation process should take place from the outset to engage domestic actors beyond government representatives, such as local bar associations and civil society.

# Annex I

## The UN-ICTY and UN-ICTR

Established as enforcement measures under Chapter VII of the United Nations Charter, the duration of the UN-ICTY and the UN-ICTR is linked to the restoration and maintenance of international peace and security in the territories of the former Yugoslavia and Rwanda, respectively. Once the Security Council decides that peace and security have been re-established, they will be dissolved in accordance with their relevant completion strategies.

Their establishment by a Security Council resolution implies that all UN member States are bound to cooperate with them. Unlike the Nuremberg and Tokyo Tribunals, neither the UN-ICTY nor the UN-ICTR have the capacity to bring an accused to trial on their own.[58]

Since these are criminal courts, the parties to the judicial process are always individuals, including the accused, and the Prosecutor. Upon final conviction, criminal sanctions apply up to life imprisonment. Even though the Tribunals' jurisdiction is concurrent with that of national courts, they have primacy over the latter and may therefore request that the national courts defer competence.

As pioneering international criminal jurisdictions, the *ad hoc* Tribunals faced many challenges, both at the procedural and substantive levels. These challenges were addressed with a great deal of creativity and this process contributed to the development of international criminal law. The Tribunals have also assisted with the training of national judges and prosecutors with a view to ensuring sustainability within the domestic criminal systems.

## Examples of internationalised hybrid courts

**The Special Court for Sierra Leone (SLSC):** Set up jointly by the Government of Sierra Leone and the United Nations, the SLSC is mandated to try those with the greatest responsiblity for serious violations of International Humanitarian Law and Sierra Leonean law committed in the territory of Sierra Leone since 30 November 1996. One interesting feature of the SLSC is the possible inclusion of a provision on the restitution of property and financial assets used for the commission of crimes to the rightful owner in the sentencing judgement. In cases where the previous owner cannot be found, the assets go towards victims' reparations.

A Truth and Reconciliation Commission (TRC) was also established in Sierra Leone to address the causes

58 www.pict-pcti.org, *Project on International Courts and Tribunal,* New York University and University of London.

and consequences of the conflict and foster reconciliation and sustainable peace. Both the SCSL and the TRC are intended to work towards the same goal and prevent the recurrence of conflict. While the SCSL is an international judicial institution, despite having national components, the TRC is exclusively based on Sierra Leonean Law. Both institutions are independent from the body or bodies that established them. They may share relevant information in the interest of justice with due regard to confidentiality.[59]

**The Cambodian Extraordinary Chambers** were established by agreement between the Cambodian government and the United Nations in 2003 to try those responsible for the most serious crimes committed during the Khmer Rouge regime. It is a national court with international participation to compensate for the weakness of the Cambodian legal system, since the crimes are international in nature. International participation is designed to ensure compliance with international standards. Having finalised its internal Rules of Procedure and Evidence, the Court became fully operational in the summer of 2007. Currently, various accused are awaiting trial.[60]

**The Special War Crimes Chamber in Bosnia Herzegovina:** the proper functioning of the justice system in Bosnia during and immediately after the conflict was notably jeopardised by the loss of skilled staff, the bias of judges and prosecutors, as well as ineffective witness protection mechanisms. In this context, in early 2005, the War Crimes Chamber (WCC) was established within the State Court to enable effective war crimes prosecutions in order to render justice expeditiously and thus advance the process of reconciliation in a timely way. The WCC exercises jurisdiction over the most serious violations of International Humanitarian Law, while the cantonal and district courts handle other low profile war crimes cases. The WCC also deals with cases referred to it by the UN-ICTY under the referral mechanism established in the *ad hoc* Tribunal's Statute. "Winding up the work of the ICTY in a reasoned and timely fashion will itself contribute to the progress of reconstruction in the region [...]The War Crimes Chamber will ensure that the prosecution of war criminals takes place in Bosnia and Herzegovina in an efficient and fair manner, and in accordance with internationally recognised standards of due process."[61] The goal is to progressively phase out the international component, building on the existing expertise of local professionals to ensure a sustainable domestic capacity after international involvement has ceased.

## The ICC

Established upon the adoption of the Rome Statute in July 1998, in force since 1 July 2002, the ICC, permanent in nature and with a potentially universal reach, has the power to try individuals accused of the most serious international crimes. Its jurisdiction is intended to complement that of national courts when the later are unwilling or unable to carry out the investigation or prosecution of a person accused of the crimes outlined in the Rome Statute.

The Assembly of State Parties supervises the work of the ICC, except in those situations that are referred to the Court by the Security Council. The Assembly also addresses failures of states to cooperate with the Court. The Security Council, like states party to the Rome Statute, may refer cases to the Court under Chapter VII of the UN Charter in situations that, in the Council's view, threaten international peace or security.[62]

By balancing retributive and restorative justice, the ICC will not only bring criminals to justice, but will also provide victims with the opportunity to be heard and to obtain, where appropriate, some form of reparation for their suffering.

[59] Office of the Attorney General and Ministry of Justice, Special Court Task Force, "Briefing Paper on Relationship between the Special Court and the Truth and Reconciliation Commission" Legal Analysis and Policy Considerations of the Government of Sierra Leone for the Special Court Planning Mission, January 2002.

[60] www.eccc.gov.kh

[61] Theodor Meron, former President of the UN-ICTY, Statement to the United Nations Security Council, 9 October 2003.

[62] The United Nations Security Council referred the situation in Darfur, Sudan, to the ICC in May 2005.

# Annex 2

## Judicial Intervention[63]

Prosecutions may take place within national, international and third jurisdictions, the later under the principle of universal jurisdiction. Given the lack of proximity to victims that both international and third nation jurisdictions have, such trials are likely to have a rather limited impact on restoring trust in the rule of law in the country where the crime was committed. It is possible that the same will happen with the ICC. Consequently, as a general rule, trials should take place in the country where the crimes occurred.

"In some situations the international community and domestic authorities may cooperate in bringing to trial accused persons by sharing the burden. This scenario may be envisaged particularly when the ICC gets involved." Like the international and internationalised criminal courts and tribunals, the ICC will only investigate and prosecute those responsible for the most serious of international crimes. In order to ensure full accountability and, ultimately, sustainable peace, national jurisdictions should therefore be capable and willing to try low profile perpetrators.

"[...] It may be difficult to ascertain sometimes whether there exists a genuine political will to prosecute. The entire criminal process shall then be analysed, rather than simply the final judgement, in order to make such a judgement. This is precisely what the ICC will be required to do in determining whether States are *unwilling* [...]"

International assistance may take the form of direct assistance to a domestic process and be channelled through different organs. For instance, the EU has deployed several rule of law missions focusing on training domestic staff to build up local capacity and ensure fair trials in compliance with international standards.

With regard to timing, it should be taken into account that the existence of an ongoing conflict has a direct impact on efforts to carry out investigations and collect evidence in a timely fashion, and this may jeopardise the accused's right to a fair and speedy trial. It may therefore be advisable to concentrate first on the re-establishment of security and order before moving on to investigate and prosecute *international crimes*. As mentioned before, a comprehensive approach should be taken to avoid the potential for further conflict by, for instance, enforcing peace through unreformed security forces. Investment in justice through rule of law reform to ensure accountability with regard to ordinary crimes and the prevention of human rights abuses remains, in any case, essential for longer term peace.[64] Consequently, effective prosecutions require not only an up and running legal and judicial system, but also functioning law enforcement institutions (police) and correctional systems (detention facilities and prisons).

Another pertinent question is whether international assistance should take the form of support for the domestic legal system as a whole, or whether serious crimes should be tried by a "special" court, panel or chamber. The later, as a well defined project, may make it easier to mobilize resources and support. Even though placed outside the ordinary domestic court structure, it should be designed, through adequate outreach and training mechanisms, to bring about lasting change in the legal system as a whole.

There may also be other problematic issues such as dealing with the disparities that arise in applying international standards to domestic systems, including due process and imprisonment conditions. Witness protection can also become a sensitive issue in poor countries where compensation for lost earnings,

[63] Office of the United Nations High Commissioner for Human Rights, *Rule of Law Tools for Post-Conflict Status, Prosecution Initiatives*, 2006.

[64] Department for International Development -DFID-, United Kingdom, *Development Dilemmas: Challenges of Working in Conflict and Post Conflict Situations in South Asia*, March 2007.

relocation etc. could be seen as incentives to testify, thus jeopardising fair trial guarantees.

In any event, continuous monitoring and evaluation by international policymakers of processes that come entirely under domestic control and might be sensitive issues, such as due process rights and witness protection, should be encouraged.

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The rising number of conflicts that have taken place around the world in the last half century, along with the generalised violations of human rights that have gone with them, has given rise to the creation of international penal tribunals and a rise in the number of cases heard under national jurisprudence systems.

Since the beginning of the 1990s, a new culture of accountability and defence of human rights is being established, leaving less space for impunity in cases of crimes like genocide, war crimes, crimes against humanity and serious infractions of the Geneva Conventions. This international will reaffirms the link between international systems of accountability and the maintenance of peace and security.

This Working Paper focuses on the differences and synergies that exist between the different national, international, and third state processes that have developed thus far. It emphasises the importance of an appropriate equilibrium between international standards of justice and rigour in penal processes and respect for national legislation and traditional justice systems, the end result of which should be to guarantee reconciliation and a sustainable peace process.

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