

Pursuing Justice in Ongoing Conflict: A Discussion of Current Practice

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

1 Introduction

Prior to the 1990s, it would have been unthinkable to pursue justice claims during an ongoing conflict. Wars are often attended by particularly severe forms of criminality, including the perpetration of war crimes, massive or systematic violations

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

But the past 10 years have seen a dramatic new development in the pursuit of justice in times of ongoing armed conflict, with the emergence of international jurisdictions. The first tribunal to be established in a situation of ongoing conflict was the International Criminal Tribunal for the former Yugoslavia (ICTY). Subsequent international jurisdictions established during conflicts have included the Special Court for Sierra Leone (SCSL) and, particularly, the International Criminal Court (ICC). The ICC has issued arrest warrants in at least three ongoing conflicts, including in Uganda, the Democratic Republic of the Congo (DRC), and the Sudan.¹

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

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

This paper sets out to explore current practices in the pursuit of justice within situations of active hostilities before a peace agreement – drawing on recent experiences in Afghanistan, Colombia, the DRC, Sierra Leone and Liberia, Sudan, Uganda, and the former Yugoslavia. The paper deals specifically with the exercise of criminal justice during a conflict, although some of the techniques aimed at preserving future justice options also have obvious utility for other transitional justice mechanisms, such as truth commissions and reparations.²

¹ This analysis does not deal with the case of Iraq and the work of the Iraqi High Tribunal. The ICTJ has contributed extensively to monitoring the trials of Saddam Hussein and other senior Ba'athists in Iraq, but we consider the circumstances of those trials so unique in terms of problems of security, legitimacy and politicization, that its lessons are also not easily applied elsewhere to date. Neither does the paper deal with the recent establishment of the Special Tribunal for Lebanon which is similarly unique and which may be premature to include in this analysis.

² For a thorough account of the legal framework see Kai Ambos, "The legal framework of Transitional Justice", elsewhere in this volume.