Annex V(b)

Stocktaking of international criminal justice

Peace and justice

Moderator's Summary*

A. Introduction

At its sixth plenary meeting, held on 2 June 2010, the Review Conference conducted a stocktaking exercise on the issue of Peace and justice on the basis of the template that had been adopted by the Assembly of States Parties at its resumed eighth session,[1] its updated version,[2] the background papers,[3] as well as other additional contributions received.[4]

The programme of work, prepared by the co-focal points, Argentina, the Democratic Republic of the Congo and Switzerland, consisted in an introduction by the moderator, Mr. Kenneth Roth; interventions by the four panelists, Mr. David Tolbert, Mr. James LeMoyne, Mr. Barney Afako and Mr. Youk Chhang; an interactive segment between the panelists and participants in the panel; and a summary of the moderator.

B. Introduction by the moderator: Mr. Kenneth Roth, Executive Director of Human Rights Watch

1. Mr. Roth began the discussions by stressing that there was no impunity anymore for the most serious crimes and that this fact had changed the world as we knew it. The panel would examine the consequences of this new world of justice and the role played by the establishment of the International Criminal Court ("the Court").

2. In introducing the topic, the moderator affirmed that justice is an important end in its own right. Mr. Roth also pointed out that there were already quite a few examples of the interaction between peace and justice. From these examples, it was possible to extract some preliminary lessons learned:

(a) In the short term

(i) The dire consequences that had been predicted would occur from pursuing justice had fortunately not materialized.

(ii) Indicting war criminals had helped move forward peace processes by marginalizing detrimental actors.

(iii) In contrast, incorporating those with records of past abuses into governments in an effort to secure peace often had had unanticipated negative long-term effects.

(iv) Amnesties (implicit or explicit) also often did not lead to the hoped-for peace. Instead, in several cases, they had sent a dangerous message that abuses would be tolerated and therefore had encouraged more violence.

(b) In the long term

(i) Failing to address crimes could result in renewed cycles of violence even years later. Political leaders may seek to manipulate suspicions and mistrust that result from past impunity.

* Previously issued as RC/ST/PJ/1/Rev.1.

[1] *Official Records ... Resumed eighth session ... 2010* (ICC-ASP/8/20/Add.1), part II, ICC-ASP/8/Res.9, annex II.

[2] RC/ST/PJ/INF.1.

[3] RC/ST/PJ/INF.2, RC/ST/PJ/INF.3, RC/ST/PJ/INF.4, and RC/ST/PJ/INF.5.

[4]. RC/ST/PJ/M.1, RC/ST/PJ/M.2, RC/ST/PJ/M.3, RC/ST/PJ/M.4, RC/ST/PJ/M.5, RC/ST/PJ/M.6, RC/ST/PJ/M.7, and *Nuremberg Declaration on peace and justice* (Finland, Germany and Jordan), UN doc. A/62/885, 19 June 2008.

(ii) On the other hand, international justice may have the benefit of encouraging national prosecutions and instigate legal reforms at the national level.

3. In finalizing his introduction, Mr. Roth nevertheless cautioned that were also a few examples that contradicted these lessons learned.

C. Panelists

1. Mr. David Tolbert, President of the International Center for Transitional Justice

4. As his first remark, Mr. Tolbert emphasized that, some years ago, the topic of peace and justice would have been addressed as "peace versus justice'' instead of "peace and justice'' as it is done today. That said, there were a number of real tensions and issues that needed to be addressed.

5. In the first place, Mr. Tolbert pointed out that amnesties for crimes under the Statute were now definitively off the table. Although acknowledging that long-term benefits of pursuing justice far outweighed any possible short-term benefits of amnesties, the short-term impact, on ongoing negotiations, of pursuing indictments would have to be considered.

6. In this connection, he stressed that the role of the Prosecutor needed to be properly understood. In Mr. Tolbert's view, the Prosecutor must have an understanding of the situation in the ground, not in the sense of allowing political considerations to influence the decision as such to issue indictments or initiate investigations, but regarding their timing. In short, while a Prosecutor who plays politics is not desirable, he or she must have a good understanding of the political issues at stake. In the case of the Court, Mr. Tolbert pointed out, the Prosecutor has applied an additional criterion, which is not in the Statute, focusing on those most responsible for the crimes. In order to avoid the danger of politicization, this criterion must be applied to all cases, in a clear, transparent and public way.

7. Finally, Mr. Tolbert explained that, in addition to international criminal justice, there are other non-judicial mechanisms that can also be used in order to create a viable post-conflict society, bearing in mind that, in order to do so, the past needs always to be dealt with. These other mechanisms, such as truth and reconciliation commissions, reparations (not limited to compensation), and fundamental reforms, including in the security sector, could be a fundamental complement to the use of criminal justice for those responsible of the most serious crimes. In Mr. Tolbert's view, traditional justice can be also a supplement to criminal justice but its effectiveness needs to be evaluated in every particular case.

2. Mr. James LeMoyne, Mediator, former Special Adviser for Colombia to the United Nations Secretary-General

8. Mr. LeMoyne explained that justice is but one of the many items on the agenda of a given peace negotiation process. Mr. LeMoyne expressed the view that peace processes that take justice into account are more sustainable and lasting than those that do not, although there were also some examples where peace processes had been successful without addressing justice.

9. Referring to the challenges facing mediators, Mr. LeMoyne explained that the most rapid way of pursuing human rights was to end wars and, he added, that should always be the first priority on a mediator's agenda. In this regard, if mediators would be allowed to have a degree of flexibility on how to approach justice issues, in particular regarding timing, that would help their work considerably. Nevertheless, this flexibility should not be extended to the most serious crimes under the Rome Statute.

10. In this connection, Mr. LeMoyne stressed that it is very important that the parties involved in peace processes understand the fact that amnesty for the most serious crimes is no longer an option, that a new world has come into place. This, of course, makes peace processes more difficult although every case is different and so are also the persons involved. Eventually, when things go well, the dynamics of the process itself will change the position of the negotiating parties over time but, in order for that to happen, it is

essential, in Mr. LeMoyne's view, that mediators are able to build an environment in which the different actors may express themselves in a very frank and open way.

11. Based on his own personal experience on an ongoing peace process, Mr. LeMoyne expressed doubts as to what extent the idea of a new era of international justice had penetrated the minds of potential perpetrators and the public in general, beyond the international justice community. In any case, he made the point that the advent of international criminal justice was a development as revolutionary as the end of slavery or the recognition of women's rights. As we were only in the early days of this process, Mr. LeMoyne concluded, a long way lay ahead of us.

3. Mr. Barney Afako, Legal Adviser to the Chief mediator on the Ugandan peace process negotiations

12. Mr. Afako began his remarks by stating that, in his view, there was an undeniable dilemma between peace and justice, which would persist for as long as there would be ongoing conflicts. He explained that it is the pressure to act in the interest of their population that make governments go to the negotiating table in cases such as Northern Uganda's. Amongst other things, policymakers have to confront and address the consequences of conflicts, such as displaced populations, poverty and HIV.

13. The experience in Uganda demonstrated that communities affected by war advocated a flexible approach to the issue, although there was not a single answer as to the question of victims' views in the Northern Ugandan conflict. When the discourse about access to justice began in 1999 in Northern Uganda, the option of granting amnesty to the Lord's Resistance Army was viewed by the war-affected population as a necessary signal to insurgents that negotiations to end the conflict were undertaken in a serious manner.

14. With the involvement of the Court, Mr. Afako explained, there was jubilation within the affected communities at the prospect of the arrest of the LRA leaders and high expectations that the conflict would end soon and children soldiers would be demobilized. These hopes were dampened once it was understood that the Court itself did not have the capacity to enforce its arrest warrants and that this was a matter for States. Affected communities went back to confronting the peace and justice dilemma.

15. On the question whether the Court's indictments had pushed the LRA to come to the negotiating table, Mr. Afako observed that the Juba talks had not been the first instance where the LRA had been participating in negotiations only to withdraw at a later stage. Although he could not be categorical about it, in his view, the Court's arrest warrants had played a key role in the LRA leadership's decision not to sign the Juba agreement. However, the negotiations had taken place in the new context where the international community, through the Rome Statute, had chosen a legal regime that required prosecutions for the most serious crimes and this could complicate peace negotiations. The Ugandan people and the international community would have to live with the consequences of that decision.

16. Mr. Afako pointed out that, in parallel to the Juba agreement which envisaged national justice processes and thus the coming into play of the complementarity principle, an informal track had been pursued aimed at persuading the LRA leadership that this would address their concerns regarding the Court's indictments. But these efforts had been cut short as patience had waned with the entire process. In any case, this second track, in Mr. Afako's view is an open one with the possibility for the Ugandan Government to act on the basis of the Juba text at any time. A Special Division of the High Court to deal with the most serious crimes remained in place as a legacy of the Juba text.

4. Mr. Youk Chhang, Director of the NGO Documentation Center of Cambodia

17. Mr. Chhang explained that he came to the Review Conference to bring the point of view of a victim of the Cambodian genocide that had taken the lives of 2 million people in what was otherwise a most beautiful country.

18. Mr. Chhang stressed the fact that victims wanted justice, no matter how much time had elapsed since mass atrocities had been perpetrated. The case of Cambodia, where it had

taken thirty years to set up a mechanism to prosecute perpetrators was telling. Mr. Chhang also stressed that the establishment of the Extraordinary Chambers in the Courts of Cambodia ("the ECCC") constituted a long-awaited response to the demands for justice from the victims, who had never forgotten what they had endured, even if their voices had not been heard for a long time. Victims needed recognition and the trials restored the sense of humanity.

19. In Mr. Chhang's opinion, justice was principally about the future. Justice was essential for broken societies to move forward and played a crucial preventive role. In this context, it was also important to address the issue of how history was reflected in school-books, investing in the education of the younger population, thus promoting its understanding of human rights principles, and the Cambodian genocide.

20. The process of collecting evidence, in which Mr. Chhang had been actively involved, began when the situation in the country had not fully stabilized, thus presenting political security and networking challenges. Moreover, victims were initially reluctant to come forward because genocide as always been a political act. However, over a 15-year period more than a million documents and film had been collected, 20,000 mass-graves had been mapped and excavated, 196 prison facilities had been located, and interviews concerning 10,000 perpetrators had been conducted.

21. Mr. Chhang emphasized also that he did not want the ECCC to devote its efforts to outreach or other non judicial matters, become an NGO or a history department. He wanted a real Court that acted as a Court. What people in Cambodia expected was final judgments. In this connection, Mr. Chhang recalled that people in Cambodian villages were confused when they received contradictory information from visits by different institutions or organs, such as the United Nations, prosecutors and NGOs conducting outreach activities.

D. Interactive segment between the panelists and participants

22. During the segment of the panel devoted to interaction between the panelists and participants, numerous States Parties, non-States Parties, international organizations and non-governmental organizations commented on the different issues raised by the moderator and the panelists.

23. In response to points raised in the discussion, Mr. Afako, observed that the debate should continue in a holistic way and not be narrowed down to the question of pursuing criminal charges. As Mr. Tolbert also noted, other mechanisms were available. However, the principle that there was no amnesty for crimes under the Rome Statute should apply to all transitional justice mechanisms.

24. Mr. LeMoyne made the point that more conversations or interaction between the Court, mediators and other legal practitioners would help to bring about a better understanding of how a more durable peace could be attained through justice.

25. Replying to questions regarding victims, Mr Afako stated that, in negotiating peace processes, taking into account the views of victims was critical. Both he and Mr. LeMoyne pointed out that, in their experience, victims wanted peace in the beginning and, once peace was obtained, they demanded justice. Mr. Chhang observed that while no sentence could satisfy victims who had lost everything, the truth resulting from a justice process provided hope for the future. Mr. LeMoyne stressed the importance of education in the context of peace processes, both in terms of stating the historical facts as well as the non-violent means available for conflict resolution.

26. Mr. LeMoyne believed that the two main threats for the Court would be open defiance of arrest warrants and the possible perception that situations investigated by the Court had the effect of prolonging wars instead of stopping them.

27. The point was made that a broader definition of peace should be applied. According to this view, peace would not only mean the cessation of hostilities but also addressing the consequences of war, such as disease and poverty, which do not allow peace to take root.

28. Mr. Tolbert observed that justice could also promote dialogue among communities and debate, more generally, as for instance in the case of Cambodia, where the first trial of the ECCC had had a huge impact.

E. Summary of the moderator

29. Summarizing the discussion, Mr. Roth stressed that these were the early days of the International Criminal Court and that the Court needed the support of all. Although in the early stages of its existence, the establishment of the Court had indeed brought about a paradigm shift; there was now a positive relation between peace and justice. Nevertheless, there were also tensions between the two that had to be acknowledged and addressed. In the past, this had been done, in a very unbalanced way, through amnesty laws, with varying degrees of effectiveness. Now, it was acknowledged, amnesty was no longer an option for the most serious crimes under the Rome Statute.

30. Sequencing which was one option being put forward by several to resolve possible tensions between peace and justice, had been successful in some cases but had resulted, in others, in *de facto* amnesties. Distinct from sequencing, it was noted that, within its discretion, the Prosecutor could affect the timing of the issuance of arrest warrants. Article 16 of the Statute provided an option for the United Nations Security Council to defer investigation or prosecution in the interest of maintaining international peace and security.

31. The debate had pointed to some of the new challenges resulting from the Court's existence. Mediators had to find ways to convince parties to come to the negotiating table against the backdrop of actual or possible indictments.

32. Regarding the effects of international justice, it could indeed result in marginalizing those who fomented war and encouraged justice efforts at the national level, but the potential deterrent effect of justice would only come into play if justice were perceived to be the norm rather than an exceptional measure. There was also a dilemma about whether justice did not sometimes prolong war in the short term. On the other side, it was clear that in the long run, justice prevented wars.

33. It was generally agreed that non-judicial mechanisms, very useful in themselves, should not be seen as an alternative, but rather supplementary to criminal justice processes, with the Court concentrating on those responsible for the most serious crimes.

34. As for victims, experience showed that their views shifted over time, with an immediate goal for peace followed by a quest for justice. Questions arose as to how to educate victims about the option of pursuing justice, without unduly raising their expectations.

35. In conclusion, the moderator observed that the establishment of the Court constituted a development as momentous as the adoption of the Universal Declaration of Human Rights. He called on States to translate their commitment into actions, in particular, through executing arrest warrants and helping to reinforce the rule of law across the globe, but also by building new institutions, social and economic, to achieve, in the long term, justice in a broader sense.

36. Mr. Roth called upon States and other stakeholders to stand up to those defiant of the Court. Justice, he concluded, is never going to be without enemies.