



DRAFT—PLEASE CITE ONLY WITH PERMISSION

**Prepared for the conference
“Human Rights: Challenges of the Past and Challenges for the Future”
Woodrow Wilson International Center for Scholars
Washington, D.C.
June 2, 2009**

Reframing the Peace and Justice Debate: Reflections on Africa and Latin America

Priscilla Hayner¹
International Center for Transitional Justice – Geneva

1. Introduction

In the last few years, the ‘peace and justice’ debate has intensified. Much of this debate and controversy is focused in Africa, and much of it in reaction to the engagement of the International Criminal Court in several contexts of ongoing conflict. A simplified debate has emerged around the question of whether ‘peace should be sacrificed for justice’ or whether it is wiser to support ‘peace first’ rather than ‘justice first’. The subtext is clear, from those worried about the engagement of the ICC: seeking accountability for serious crimes while a conflict is still underway – or even if a conflict is threatened to reemerge – is unwise and foolhardy, and likely to damage prospects for peace.

The intensity of this has peaked in the context of the arrest warrant released against the president of Sudan, Omar al-Bashir, which was confirmed by the ICC in March 2009. However, resistance to justice that is perceived as ‘foreign’ has also emerged in the context of universal jurisdiction cases against Rwandans (brought in French and Spanish courts), and even to some degree around the hybrid Special Court for Sierra Leone.² The regional bodies of the African Union (AU), the Organization of the Islamic Conference (OIC), and the Arab League, as well as many of their individual member states, have expressed strong support for Sudan and rejection of the ICC warrant.

In Latin America, the ‘peace vs. justice’ debate has never reached this level of intensity. There were grumbings from some in the region in reaction to the arrest of Augusto Pinochet in London in 1998, with some officials denouncing both the Spanish judges behind the warrant and the British government for ‘legal colonialism’. But these sentiments did not seem to run deep, nor extend for example to civil society or regional bodies, and disappeared quickly when Pinochet returned to Chile. On a national level, there have certainly been instances where robust justice measures were met with a threats from the military or former authoritarian rulers (Argentina, Chile), or where those complicit in mass crimes have simply held too much power to allow serious accountability measures to take shape (Guatemala, El Salvador).

¹ Priscilla Hayner, Director of the Peace and Justice Program and the Geneva Office of the International Center for Transitional Justice, can be reached at phayner@ictj.org.

² The universal jurisdiction cases in Europe indicted forty Rwandan army officers (by Spain in 2008) and nine senior government officials (by France in 2006) in relation to the 1994 genocide. In both cases, the indictees were members or close allies of the current government. Rwanda retaliated by opening a commission to investigate France’s role in the 1994 genocide, and exploring legal possibilities for the indictment of Europeans in Rwanda.

In general, however, Latin American nations have responded to mass abuses with national measures that have been shaped in part by the guidance and requirements that have developed from the Inter-American Court of Human Rights and its sister Inter-American Commission, and in some measure have tried to meet international best practice. Even the ICC engagement in the region, in Colombia, has been explicitly targeted to push national authorities to respond sufficiently so that the ICC would not need to, though with mixed reports on the effect. Many more universal jurisdiction cases brought in Europe have been developed against Latin Americans than Africans, but without triggering the same degree of sensitivity.

Understanding the varied responses to international justice in Latin America, vs. Africa, may shed light on the currently intensifying ‘peace vs. justice’ debate.

2. Peace and Justice

The ‘peace vs. justice’ debate spans a spectrum of several inter-related issues, or potential challenges, which arise in different ways and at different points in time. In brief, we can generally outline two distinct questions: First, what is the impact of justice measures (usually international justice measures, and in particular the ICC) that are put forward during an ongoing conflict or in the context of an existing authoritarian regime? Does pushing for accountability of those still involved in abuses worsen a conflict, entrench authoritarian rulers, and prevent or forestall democratization and peace? Second, once peace negotiations begin, is it possible to incorporate future accountability mechanisms – and avoid a broad amnesty – when the very groups responsible for the crimes must be persuaded to sign any agreement for peace? (This was raised in Uganda and Liberia, for example.) Are international courts and strengthened international human rights standards (and law) effectively limiting the options for despots and other perpetrators, thus limiting the option of negotiated peace?

In Latin America especially, there has been a third strand of concern that is worth noting. Once peace or post-authoritarian democracy has been established, is there a risk that justice measures may disturb the peace or threaten a return to authoritarian rule? Argentina and Chile hesitated or cut short efforts at justice in the years immediate after the return to democracy, with explicit threats from the armed forces or their backers. African states have also grappled with this tension, such as Sierra Leone where local activists hesitated to challenge the broad domestic amnesty law too soon after the end of the country’s brutal civil war, with some fearing it could result in a violent backlash.

This essay will look most closely at the first and third of these questions – how does justice impact ongoing conflict and the prospects for peace (or, a different but related question: democracy and stability), and is there a difference in how Africa and Latin America have understood the answers to these questions?

3. African Experiences

As is often noted, African states took the lead in calling for the establishment of an International Criminal Court, both at the Rome Conference in 1998, and in signing on to the treaty as member states. As of early 2009, thirty African states had ratified the ICC statute (of a total 108 member states), and eight had signed but not yet ratified the statute.

At present, all of the ICC’s four active country situations are in Africa, all of them contexts of current or recent major conflict between the government and rebel groups. In two of these contexts – Uganda and Sudan – there has been an outcry that the peace talks would be destroyed or impeded by the intervention of the ICC (and in the case of Sudan, that a prior peace deal for a conflict between north and south Sudan would also be damaged). In the Democratic Republic of Congo, the involvement of the ICC has had comparatively less of a direct impact on the varied peace talks.³ Even the Central African Republic, the fourth and most recent situation to be taken up by the ICC prosecutor, has expressed concern that ICC engagement may disrupt a recent peace agreement.⁴

³ See Laura Davis and Priscilla Hayner, “Difficult Peace, Limited Justice: Ten Years of Peacemaking in the DRC,” International Center for Transitional Justice, March 2009; available at www.ictj.org.

⁴ CAR requested that the UN Security Council consider an Article 16 resolution to defer the ICC investigations.

The reaction to the arrest warrant against President Bashir has been stark. The Organization of the Islamic Conference, with its 57 member states, immediately put out a statement saying that it “strongly rejects” the warrant, that it would lead to “dangerous ramifications and greater destabilization” for the region, and condemned the “selectivity and double standards” of the international community.⁵ Libyan President Muammar Kadhafi, current chairman of the African Union, said that the ICC represented a “new world terrorism” and that:

It is public knowledge that third-world countries oppose this so-called International Criminal Court, because it’s not treating people equally...This court is against countries that were colonised in the past, and they want to re-colonise now.⁶

Unflinchingly supportive of Sudan, and worried the warrant would “seriously undermine” the peace process for Darfur, the AU has said it will meet in June to discuss the possibility of member states’ withdrawing from the ICC. Likewise, the Arab League has “rejected” the arrest warrant and vowed support for Sudan.⁷

However, many observers note that there has been only a minimal peace process for Darfur lately in any regard. Meanwhile, the government reacted to the arrest warrant by immediately throwing out of the country many international humanitarian organizations, considerably worsening the situation. It has also shown its harsh authoritarian character in cracking down on human rights advocates and civil society, accusing them of cooperating with the ICC.

In Uganda, ICC arrest warrants were unsealed against five members of the rebel Lords Resistance Army (LRA) as peace talks sputtered in 2005. The warrants seemed to drive the LRA to the peace table for more serious talks. But many worried that the ICC’s involvement ultimately would prevent a peace deal from being reached, as there would be little incentive for the LRA leadership to give up their arms and turn themselves in. Local community and traditional leaders were among those very worried about the ICC impact on the peace talks. Ultimately, the head of the LRA was unwilling to sign the final agreement, and the LRA continues to fight, now mostly causing havoc over the border in the DRC. However, there has not yet been a close analysis of the degree to which the ICC arrest warrants were a factor in deterring the signing, and there are differing views on this.

Elsewhere, there is a different picture. In Liberia, an international arrest warrant against the president, on the opening day of the peace talks in 2003, resulted in a much stronger and more serious peace process and a final agreement that has stayed in force until today.⁸ In Sierra Leone, the arrest of the former rebel leader on charges of new violence was critical for solidifying the peace.⁹ And some African governments have been very cooperative with international justice initiatives, including the ICC. The DRC government has until recently quickly complied with ICC requests and warrants (though in most cases, those targeted by the ICC were opponents of the government, not its allies).¹⁰ The Sierra Leone authorities directly facilitated the arrest of one of its own Ministers, at the request of the Special Court for Sierra Leone. The Liberian government has provided strong financial backing of the Liberian Truth and Reconciliation Commission, even when the current President herself was called before the Commission to testify about her misdeeds early in the civil war. The

⁵ “OIC Secretary General strongly rejects the ICC indictment against President of the Sudan,” OIC press statement, 4 March 2009, available at: www.oic-oci.org/topic_detail.asp?t_id=1970&x_key.

⁶ “Kadhafi says ICC represents ‘new world terrorism’ as Beshir travels to Qatar,” Radio France International (website), 29 March 2009, available at: rfi.fr/actuen/articles/111/article_3318.asp.

⁷ It should be noted that these anti-ICC sentiments are not generally echoed in African civil society, nor necessarily shared by all African governments.

⁸ See Priscilla Hayner, “Negotiating Peace in Liberia: Preserving the Possibility for Justice,” ICTJ and the Centre for Humanitarian Dialogue, November 2007. Available at www.ictj.org.

⁹ See Priscilla Hayner, “Negotiating Peace in Sierra Leone: Confronting the Justice Challenge,” ICTJ and the Centre for Humanitarian Dialogue, December 2007. Available at www.ictj.org.

¹⁰ The cooperation from the DRC government changed in 2009, when an ICC-indicted rebel leader changed colors and joined a military campaign of the government (against another rebel group), with the government closing its eyes to the outstanding ICC warrant.

International Criminal Tribunal for Rwanda has also enjoyed a relatively high level of cooperation from African governments over the years.

4. Comparing Latin America

The threats in the past from powerful military forces in Latin America (and sometimes from their civilian leaders) to prevent measures of justice are of a different nature than what is playing out in Africa. The authoritarian and anti-democratic foundation of the demand for impunity is similar, but in Latin America it was a matter of cowering (and sometimes killing – where judges have bravely gone ahead) national actors, rather than lashing out at an international court that cannot be controlled. Where robust criminal justice has been able to develop in recent years – in Argentina and Chile, for example, long after the end of authoritarian rule – this has reflected in part the reduced power of these authoritarian forces.

The power of the army in Guatemala did not prevent some justice-related successes in the peace agreement, with an amnesty excluding most serious crimes, and an agreement for a truth commission that turned out to be much stronger than expected. There has been some, although very minimal, progress since in human rights cases going to court, but the ‘post-conflict’ context has worsened in the thirteen years since the peace agreement, with serious threats against judicial authorities now coming from drug lords rather than warlords.

It is in Colombia, however, that the peace and justice issue has played out in the most interesting way. Rather than trying to skirt accountability entirely, or deny its legal obligations, the Colombian government has created a new, Colombia-specific model for responding to those obligations. The Justice and Peace Law, providing reduced sentences for those demobilized paramilitaries accused of serious crimes in exchange for the revelation of the truth about those crimes, has intended to satisfy the demands for both peace and justice. It has not been free of criticism, both of its structure and implementation. But it certainly represents an advance on the notion that a full amnesty can be provided based only on admission of facts, as in South Africa. Colombia is not out of the woods yet, however: it is not at all clear that leftist armed groups such as FARC would accept such an arrangement. The classic peace and justice challenges are bound to emerge again.

Meanwhile, the ICC Chief Prosecutor has visited Colombia and pushed authorities to uphold the highest judicial standards in implementing the Justice and Peace Law. The effect of this is not yet clear. The ICC believes they have effectively pressured the government to do more; but Colombian judges and prosecutors reportedly feel offended by this ICC intervention and implicit threat.

Of course, in many ways, Latin America and Africa cannot be compared. The conflicts have been fundamentally different, as well as the transitions. To vastly simplify: wars in Latin America could be seen as more right vs. left, whereas in Africa, they have been east vs. west or north vs. south – that is, resentments and conflict between regions of the country and, to be more precise, often between the ethnic groups therein, largely over the control of resources.¹¹ In Latin America, the strongest resistance to accountability has often been from a powerful and unrepentant military. In Africa, it is powerful rebel groups who have equally defined terms.

But the lack of any criminal justice in many post-conflict African states simply reflects the extremely weak systems on which this would depend: decrepit, overburdened, under-resourced courts and prisons, non-existent witness protection programs, little investigatory expertise, and extremely low trust in these institutions by the public. Many conflict or post-conflict African states have little to no history of well functioning state systems. In comparison, most of Latin America can boast of functioning institutions – often seriously compromised

¹¹ Ethnicity has often been manipulated in Africa to serve the ends of the rebel or government leadership, with violence breeding resentment and further violence. Of course, this is not an African phenomenon alone: conflicts in Europe (most recently in the Balkans) and elsewhere have taken on very similar dimensions. While some Latin American conflicts have had ethnic overtones (such as the targeting of the Mayan community in Guatemala), there are not the same examples of fighting forces that are fully comprised of one ethnic group, specifically targeting other ethnic groups. Liberia, Rwanda, and recently Kenya come to mind.

during war or undemocratic eras, and perhaps not reaching the entire country well – but with a foundation on which to build.

The ICC did not yet exist in the years when Latin American went through many of its classic transitions out of war.¹² Would Latin American military leaders then have reacted similarly to the idea of an international court holding them to account, as we are seeing in some African states today? If that might be true, perhaps it suggests that things may ultimately shift in Africa: today, the Latin American elite does not countenance, nor try to defend, blanket impunity in the same way that it did twenty years ago. A respect for rule of law and the international human rights framework is now broadly accepted as an uncontroversial given.

5. Preliminary Conclusions

Why the difference between Latin America and Africa on these question of peace and justice? Three factors may be worth pondering:

First, the strength of the Inter-American human rights system has no match in much of the rest of the world, including Africa. This has helped fundamentally shape national responses to rights violations throughout the region since the early to mid-1980s, even if this system only handles cases of state responsibility and not individual responsibility for abuses. This has also helped prevent Latin Americans from feeling that human rights demands from the outside (such as from universal jurisdiction cases originating in Europe) are based on ‘foreign,’ ‘European’ notions being forced on them inappropriately.

The Inter-American system has gained its strength in part due to the hard work of civil society organizations in the region, which have pushed the Inter-American Commission and Court to take up many difficult cases and to ensure that governments comply with the decisions. Civil society is gaining strength in Africa, as is, slowly, the African human rights system. Perhaps this will help to frame a more robust rights posture for the African region.

A final point on the role of the regional system in shaping responses to peace and justice: the US influence in Latin America, and as a member the Inter-American system, has an impact here. Since the late 1970s, when the US changed its general posture towards severe rights abuses in Latin America (although this new US position certainly did not hold so strongly in the 1980s), the Organization of American States no longer offered a safe space for like-minded states to join together in favor of impunity. There are no corresponding member states in the African, Arab, and Islamic organizations yet playing a role of counter-balancing those that are standing together against a strong international rights framework.¹³

Second, the real backlash in Africa is in the context of an arrest warrant for a current head of state in an authoritarian regime. Comparatively, the arrest of Pinochet in London took place many years after he left power. There was no international mechanism, and certainly no independent-enough national court, to consider charges against the heads of state of other infamous military regimes in Central and South America fifteen to twenty-five years ago.¹⁴

Third, the peace-and-justice debate has perhaps been disproportionately affected in Africa by the now widely-referenced case of Charles Taylor. This former president of Liberia was granted political asylum in Nigeria, only to be arrested two years later and sent to Sierra Leone for trial by the Special Court for Sierra Leone (for his sponsoring a horribly abusive rebel group there). Some African leaders feel the possible arrangements for ending a conflict have now been limited, with despots likely to hold on to power if they cannot trust an offer of asylum elsewhere.

¹² The ICC can cover cases since July 2002, or from the date on which a new state party ratified the statute.

¹³ On the other hand, the US stance against the ICC, particularly strong in the ICC’s early years, should be noted.

¹⁴ A useful exploration of criminal charges brought against heads of state can be found in: Ellen L Lutz and Caitlin Reiger, *Prosecuting Heads of State*, Cambridge, 2009.

Reframing the peace and justice debate

Ultimately, there may be a need to change how we understand the peace and justice debate. We should move away from a simplistic notion of ‘peace vs. justice’, as if one could choose between the two, and instead insist on *smart* justice and a *deeper* peace. The Bashir case in Sudan has naturally raised questions of strategy, timing, and intent on the part of the prosecutor (for example, the choice to release the arrest warrant publically rather than in a confidential, or sealed, manner, which may have increased the chances of an arrest and much reduced any political backlash).¹⁵ Even if the prosecutor does not intend to be ‘political’, his actions do obviously impact on real-time realities – including political and otherwise. His strategic decisions must surely take into account the likelihood and most effective means of achieving his aims (and a clear assessment of what those aims are). Any prosecutor should apply strategic wisdom in his or her decisions: it is not just justice, but *smart* justice that we must insist on. Could there have been ways to avoid the current confrontation with the government of Sudan, which has led to a strong regional backlash against the Court?

Likewise, any peace deal should not aim to just cease the violence, but to be sustainable – and to address to the degree possible some of the root causes that often lie at the center of a conflict. Not just peace, but deeper peace.

Indeed, not surprisingly, these may be related. Many experts insist that sustainable peace must be built on a reliable rule of law and, ultimately, a trust in the state’s ability to provide basic provisions for justice (for current and future crimes as much as those of the past). This simple maxim is an extraordinarily difficult – even seemingly impossible – goal in some countries, where national systems are in ruins. However, small steps in the right direction, as part of a serious peace process committed to rule of law, will help to strengthen the trust in the peace.

Some observers may fear that Africa represents the future: that the ICC and other international justice mechanisms, and even the international principles of human rights, may be weakened over the next years. But perhaps Latin America provides us with another vision. Rather than a rejection of accountability, is it possible that states will recognize that reliable rule of law mechanisms – both national and international – are the surest means to reinforce democracy, counter rigidly authoritarian regimes, and solidify peace for the longer term? There are many Africans, including in civil society as well as in governments, who support universal human rights standards, principles, and frameworks. For a broader shift to take place, institutions such as the ICC may need to enhance local understanding, ownership, and support for their work. This requires significantly more outreach and building deeper partnerships with those who have rule of law interests in mind.

The future strength of the international justice system, and the future of certain ideas and notions that are now rarely questioned in much of Latin America, will partly depend on how this peace and justice debate plays out in Africa. To find out if Latin America might represent the future – in terms of the global understanding of justice and the role of international norms and institutions – watch Africa.

¹⁵ The ICC prosecutor has said that he did not consider a sealed warrant to be workable in this context.