



Discussion Paper

Justice, Human Rights, and the International Legal System

Independent Commission on Multilateralism

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Introduction

The United Nations Charter, in its preamble, links fundamental human rights to the dignity and worth of the human person and the equal rights of men, women, and nations.¹ It also calls on nations to establish conditions under which justice and respect for international law can be maintained. It is not surprising, then, that human rights feature as one of the three pillars of the UN in its Charter, along with peace and security, and development. Efforts to better integrate work on human rights and the rule of law more generally within the other areas of work of the UN are ongoing, from current peace and security reviews to the 2030 Agenda for Sustainable Development and the secretary-general's "Human Rights up Front" initiative, explored below.

Immediately after its founding in 1945, the United Nations embarked upon a normative process of defining the fundamental rights and freedoms it aimed to promote and guarantee. In 1948, as a first step in that process, the UN General Assembly adopted the Universal Declaration of Human Rights (UDHR). While not a legally binding instrument, it remains up to this day the cornerstone of international human rights law and paved the way for a myriad of more detailed and binding instruments to come.² In 1966, the General Assembly adopted its first two international human rights treaties: the International Covenant on Civil and Political Rights (ICCPR) and the International Covenant on Economic, Social, and Cultural Rights (ICESCR).³

Thus, adopted under the auspices of the United Nations, the UDHR, ICCPR, and ICESCR form the core of the "universal human rights system"—universal in that the normative instruments are universal in their scope of application and adherence is open to all states. The UDHR was adopted by consensus, and its normative core remains uncontested and is considered to be part of customary international law. The ICCPR and ICESCR are amongst the most widely ratified international treaties. They have been and continue to be further built upon by a significant number of more subject-specific instruments. The content of the UDHR, ICCPR, and ICESCR has, to a large extent, also inspired the normative substance of national and regional human rights instruments.

Accompanying these normative instruments is a wide variety of international mechanisms to assist states with implementing their legal obligations, to monitor actual compliance, and to investigate and prosecute violations. They range from the establishment of the Office of the High Commissioner for Human Rights (OHCHR), to treaty monitoring bodies, to the UN Human Rights Council and its Special Procedures, to international criminal tribunals. Several of these mechanisms will be discussed below. The significant development of the human rights framework and architecture of the United Nations and its resonance at regional and national levels are an indication of an increasingly stronger culture of human rights around the world.

¹ United Nations Charter, Preamble: "To reaffirm faith in fundamental human rights, in the dignity and worth of the human person, in the equal rights of men and women and of nations large and small." Full text available at www.un.org/en/sections/un-charter/preamble/index.html.

² The text of the UDHR is available at www.ohchr.org/EN/UDHR/Pages/UDHRIndex.aspx.

³ The text of the core human rights treaties is available at www.ohchr.org/EN/UDHR/Pages/UDHRIndex.aspx. Other universal human rights instruments are available at www.ohchr.org/EN/ProfessionalInterest/Pages/UniversalHumanRightsInstruments.aspx.

The UN has played a pivotal role in fostering global acceptance and respect for a number of universal and inalienable rights and freedoms and a shared commitment to hold those responsible for violating these rights and freedoms accountable and bring perpetrators to justice. Both in the multilateral system anchored in the United Nations, as well as more generally, human rights have come to occupy a major place on the stage of international relations. As one scholar asserts: “No discussion of international law and international politics can ignore the human rights movement. In some ways, we live in an age of human rights triumphant.”⁴

However, we are still far away from being able to take respect for human rights for granted. Significant challenges in terms of implementation and full compliance remain, around the globe. Despite the widespread adoption, ratification, and implementation of human rights treaties, the establishment of a significant number of treaty-monitoring bodies, existing programs for technical assistance with implementation, and the establishment of a variety of quasi-judicial and judicial mechanisms to detect and address alleged violations and prevent impunity, there are still more states that fall short of fully respecting human rights than there are states that fully comply.⁵

As no component of the multilateral system anchored in the UN other than the Security Council has actual enforcement powers, the international human rights architecture is particularly weak when it comes to enforcing compliance and systematically holding states and individuals accountable for failures to respect human rights and ensure their full enjoyment by all. This also raises important questions about the efficacy of the international human rights architecture to guarantee systematic access to justice when human rights are violated. While tremendous progress has been made over the past three decades in investigating and prosecuting widespread and systematic human rights violations, the multilateral system anchored in the UN is often not able to prevent or halt even these most egregious of human rights violations. In many cases, either geopolitics gets in the way or the demands for peace triumph over demands for human rights and justice. While the full enjoyment of human rights by all is the primary responsibility of states—requiring a series of measures that can only be taken in the domestic legal order—the multilateral system anchored in the UN has a responsibility to hold states to their obligations and commitments under international norms that uphold human dignity and fundamental rights and freedoms (in particular human rights, humanitarian, and refugee law).

This paper deals with challenges related to the enforcement of human rights compliance through accountability and justice mechanisms in the international human rights architecture.⁶ It focuses first on the UN’s efforts to enforce respect for human rights through international

⁴ Lawrence M. Friedman, *The Human Rights Culture: A Study in History and Context* (New Orleans: Quid Pro Books, 2011), p. 1.

⁵ In its annual *State of the World* report, Amnesty International warned that short-term national interest and draconian security crackdowns led to an unprecedented assault on human rights in 2015, highlighting in particular the brazen violations of the rights of migrants, asylum seekers, and refugees. Available at www.amnesty.org/en/latest/research/2016/02/annual-report-201516/.

⁶ While a crucial component in the promotion of and respect for human rights worldwide, regional instruments and mechanisms are not dealt with in this paper, which, in light of the ICM’s mandate and focus, focuses on the multilateral system anchored in the UN.

criminal justice, in particular the role of the Security Council. It then examines alternatives to international criminal justice for ensuring compliance with human rights, as well as accountability and justice for violations thereof. The paper then puts forth some general conclusions and submits specific recommendations to strengthen the multilateral system's capacity to promote and ensure respect for human rights, as well as accountability and justice for violations thereof.

I. The UN, International Criminal Justice, and the Role of the Security Council

The United Nations Charter entrusted the Security Council with the maintenance of international peace and security, while the other core tasks of the organization—notably human rights and development—were assigned to its other principal organs. Under the Charter, the Economic and Social Council (ECOSOC) is the main organ with responsibility for human rights. Over time, however, and in particular since the end of the Cold War, the Security Council has increasingly taken on tasks related to human rights, most notably to ensure justice for the most serious violations of human rights: genocide, crimes against humanity, and war crimes.⁷

After using its legislative powers under Chapter VII of the UN Charter to establish the ad hoc International Criminal Tribunals for the Former Yugoslavia (ICTY) and Rwanda (ICTR) in the early 1990s,⁸ states also conferred two key competencies on the Security Council under the Rome Statute establishing the International Criminal Court (ICC): the power to refer situations to the ICC (Article 13) and the authority to suspend specific investigations and prosecutions (Article 16).⁹ The Council also played a central role in the establishment of hybrid courts prosecuting international crimes, notably the Special Court for Sierra Leone (SCSL) and the Special Tribunal on Lebanon (STL).¹⁰

The Security Council thus played a key role in the rapid development of the international criminal justice architecture. However, it has taken on this role rather reluctantly and on an ad hoc basis—and there is ongoing skepticism within the council as to its role in enforcing respect for human rights and assuring accountability and justice for violations thereof.

⁷ For an overview of the definition of genocide, crimes against humanity, and war crimes under international criminal law, see www.internationalcrimesdatabase.org/Crimes/Introduction.

⁸ The ICTY and ICTR, respectively, were established by UN Security Council Resolutions 827 (1993) and 955 (1994). In Resolution 1966 (2010), the council called upon both tribunals to finish their work by the end of 2014 to prepare for their closure and transfer of responsibilities to the UN Mechanism for International Criminal Tribunals (MICT). See also www.internationalcrimesdatabase.org/Courts/International.

⁹ Rome Statute of the International Criminal Court (1998), available at www.icc-cpi.int/nr/rdonlyres/ea9aeff7-5752-4f84-be94-0a655eb30e16/0/rome_statute_english.pdf.

¹⁰ See UN Security Council Resolutions 1315 (2000) and 1664 (2006). See also www.internationalcrimesdatabase.org/Courts/Hybrid.

Track Record of the Security Council in International Criminal Justice

Ad Hoc Tribunals

Using its powers under Chapter VII of the UN Charter, the Security Council set up two ad hoc international criminal tribunals to investigate and prosecute the most serious international crimes committed in the context of the armed conflicts in the former Yugoslavia in 1993 and Rwanda in 1994. In doing so, the council not only acted as an international legislator by adopting the statutes of the two tribunals, but it also took on the task of enforcing cooperation with the tribunals by obliging member states to fully cooperate, including by arresting indicted persons. Yet the council was reluctant to fully assume the responsibilities that came with its enforcement role, especially in the context of the International Criminal Tribunal for the former Yugoslavia, where the permanent members' use of their veto power hampered council action to secure the arrest of General Radovan Karadžić and former President Slobodan Milošević. Both tribunals are nearing completion of their work, and while their case law has been seminal to the development of international criminal law and international humanitarian law in a number of key areas, their record in ensuring adequate accountability and justice will likely be mixed.¹¹

With the establishment of the Special Court for Sierra Leone, the Security Council ventured into a hybrid model of an ad hoc tribunal, integrating domestic and international dimensions. Created in 2002, the court started its first trial in 2004, convicted former Liberian President Charles Taylor for war crimes in 2012, and concluded its work in 2013. While some have criticized the constrained timeframe, many view it as an exemplary model to follow. On the other hand, the Special Tribunal for Lebanon, established by the council to prosecute those responsible for the killing of late Lebanese President Rafiq Hariri in 2005, has so far had limited effect; it officially began to function in 2009 and began proceedings against key defendants in absentia in 2014.¹²

Apart from the Security Council, both the General Assembly and the secretary-general can and have played a role in the establishment of mixed international-national, or so-called hybrid, tribunals. For example, in 1997, the General Assembly, at the request of the Cambodian government, took the initiative to set up the Extraordinary Chambers in the Courts of Cambodia (ECCC). This model has not been replicated since, partly due to the mixed success of the ECCC, but also due to the emergence of the ICC. While there have been significant problems with the ECCC, the General Assembly should keep this precedent in mind for the future.¹³

While proposals to establish ad hoc tribunals emerge every now and then, it is generally expected that both the Security Council and other UN organs will be reluctant to create more

¹¹ See, for instance, Lilian Barria and Steven Roper, "How Effective Are International Criminal Tribunals? An Analysis of the ICTY and ICTR," *International Journal of Human Rights* 9, no. 3 (2005).

¹² Beth van Schaack, "Lebanon Trial Begins Work," *Just Security*, January 16, 2014, available online at www.justsecurity.org/5827/lebanon-tribunal-begins-work/.

¹³ For an overview of co-called hybrid tribunals, see www.internationalcrimesdatabase.org/Courts/Hybrid.

tribunals of this nature, for a variety of reasons: they have proven to be costly and difficult to finance, have taken more time than expected to finish their work, and overall have not demonstrated themselves to be fully effective. For these and other reasons, states supportive of the ICC will likely continue favoring referrals to the ICC where there is no possibility for adequate justice through domestic courts.

The International Criminal Court (ICC)

As a permanent international criminal tribunal, which at least technically has jurisdiction over international crimes regardless of where they have been committed,¹⁴ the ICC remedies many of the disadvantages inherent to ad hoc tribunals. While not established by or under the auspices of the Security Council, the council has a key role in the ICC system. As mentioned above, the council has the power to suspend specific investigations and prosecutions by the court (Article 16) and to refer specific situations to the court (Article 13). The council's wielding of both these powers has been subject to criticism.

In 2002, the council used Article 16 of the Rome Statute to effectively defer court proceedings by unanimously adopting a resolution that granted immunity from ICC prosecution to UN peacekeeping personnel from countries that were not party to the court (Resolution 1422). In 2003, it renewed that resolution for another twelve months (Resolution 1487). This very controversial decision, which some consider to be incompatible with at least the spirit of the Rome Statute and the UN Charter, was made in the context of possible allegations regarding the peacekeeping operation in Bosnia and Herzegovina. It is interesting to note that Article 16 of the Rome Statute has never been applied to suspend judicial proceedings in the interest of pursuing peace agreements, the original purpose for which it was incorporated in the Rome Statute (even though the option was submitted and discussed regarding situations in Uganda and Kenya).

The council has only used its power to refer specific situations to the court twice. It did so for the first time in 2005 for the situation in Darfur (Resolution 1593), and a second time in 2011 for the situation in Libya (Resolution 1730). The Libya referral was consensual (i.e., supported by all fifteen council members), while the Darfur referral was subject to a vote, in which eleven states voted in favor and four abstained (Algeria, Brazil, China, and the US). While the council has been asked and even urged to refer other situations to the court, including the situation in Syria, it has chosen not to do so.

Criticism of Security Council referrals to the ICC has come from all sides. Many have argued that the referrals it has made—and not made—are politically motivated, an argument supported by the fact that the council has been inconsistent in applying its referral power. Some have also argued that the council does not have the power to enforce cooperation with the court by a state that is not party to the Rome Statute. However, most agree, including the ICC itself, that

¹⁴ It may not always be able to exercise that jurisdiction, depending on whether the states concerned are parties to the ICC and whether the Security Council does or does not exercise its referral power.

Chapter VII of the UN Charter—under which the Security Council can make decisions binding to all UN member states—provides a solid legal basis for the council to take such action.¹⁵

Moreover, where the council has referred situations to the court, it has not, or at least not always, followed up on its referral decision by enforcing cooperation by states with the court — in particular in the area of arrest and surrender. Rather than genuinely pursuing an accountability agenda, some argue, the council has chosen to refer situations to the court as a matter of political expediency—and then neglected to follow up on referral decisions to enforce cooperation with the court. For example, the council has never included individuals indicted by the ICC in its sanctions lists, has not included the issue of cooperation with the court in its terms of reference when visiting situation countries, and has refrained from issuing statements demanding full cooperation by the situation country, even when the court had issued a formal finding of non-cooperation (as in the case of Libya).¹⁶

States parties to the Rome Statute are also increasingly critical of the practice of imposing the financial costs of investigations resulting from council referrals on the states that have joined the Rome Statute system, instead of on the UN membership that the council at least formally represents. At a time when the court is increasingly under financial pressure, referrals that do not result in effective prosecutions—including due to lack of council action—seem too costly, and financial pressure leads to active investigations having to be limited, as in the case of Darfur.¹⁷

So while council referrals were initially hailed as a strong message of support to the court, as well as a commitment to accountability and justice by the UN Security Council, advocates of the court have, over time, become wary of such referrals and today often view them as mixed blessings for the court—a view that is increasingly shared by the court itself, as the chief prosecutor expressed in some recent statements to the UN Security Council.¹⁸

Obstacles to the Council's Effectiveness in Pursuing International Criminal Justice

One reason for the Security Council's reluctance to ensure accountability is the complex relationship between peace and security, on the one hand, and justice, on the other. It is generally accepted that, without justice, lasting peace is impossible to achieve. It is equally true, however, that justice is very hard to achieve without peace, or at least the cessation of hostilities with sincere efforts to negotiate and, if need be, enforce peace. Pushing accountability demands at the wrong time or in the wrong way can be counterproductive for achieving both peace and better respect for human rights. While it is also generally accepted

¹⁵ See also Zhu Wenqi, "On Co-operation by States Not Party to the International Criminal Court," *International Review of the Red Cross* 88, no. 861 (March 2006), available at www.icrc.org/eng/assets/files/other/irrc_861_wenqi.pdf.

¹⁶ The Prosecutor v. Saif Al-Islam Gaddafi, ICC-01/11-01/11-577 (Pre-Trial Chamber I, December 10, 2014).

¹⁷ International Criminal Court, "Twentieth Report of the Prosecutor of the International Criminal Court to the UN Security Council Pursuant to UNSCR 1593 (2005)," 2015, para. 12.

¹⁸ International Criminal Court, "Twenty-First Report of the Prosecutor of the International Criminal Court to the UN Security Council Pursuant to UNSCR 1593 (2005)," 2015.

that the challenge of reconciling the equally legitimate goals of justice and peace is often one of timing and sequencing, in practice this has frequently proven to be a very difficult task.

The so-called “peace-justice dilemma” has existed for a long time, but the challenge it represents has grown in the past decade. During this time, international criminal justice has evolved significantly, resulting in an emerging international consensus that there can be no impunity for the most serious crimes under international law—and that amnesties or immunities for such crimes are not acceptable. This gives additional momentum to those advocating an accountability agenda, while limiting the room for maneuver for mediation and negotiation efforts, which often rely on amnesty and immunity deals to achieve political solutions able to halt conflict.

As far as the Security Council is concerned, and given its primary role of maintaining international and peace security, the council clearly gives priority to the demands of peace in situations of acute crisis. It seeks primarily to end violence and to prevent further casualties by forging peace agreements or taking measures that at least pave the way for speedy cessation of hostilities, often a prerequisite for holding peace talks in the first place. The human rights dimension (both in its preventive and remedial aspects) and demands to ensure accountability for crimes that have been committed as part of a conflict are often considered to be at best demands of secondary importance and at worst are not considered at all.

Apart from the inherent tensions between justice and peace, the council’s broader divisions limit its effectiveness in wielding its powers related to ensuring justice for serious human rights violations. Not all members of the Security Council want it to play a leading role in ensuring accountability—and certainly not by making use of its referral powers under the Rome Statute. Three of the permanent members of the council are not parties to the Rome Statute, and all of them can at any time veto any referral proposal they deem undesirable. Even where referrals have proven possible, necessary follow-up action has consistently failed over lack of political agreement in the council. Expectations that a strong numerical majority of ICC states parties on the council (as in the year 2014) would lead to more consistent accountability work or more political support for the court have not been realized. Skepticism among council members with veto powers thus remains one of the main obstacles to effective engagement with the court.

The Syrian crisis can serve as an example of this dynamic, since there was substantive and reliable documentation early on that serious war crimes and human rights violations were committed systematically and on a large scale. This led to calls from the UN High Commissioner for Human Rights and others for accountability for these crimes, in particular by asking the Security Council to possibly make a referral to the ICC.¹⁹ But many governments took a pragmatic position, wishing to safeguard the option of an immunity offer to Syrian President Bashar al-Assad and his inner circle as a means to facilitate an end to the conflict and a peaceful transition (disregarding the fact that the Syrian regime never showed interest in an immunity

¹⁹ UN Human Rights Council, “Report on the Working Group on Enforced or Involuntary Disappearances,” UN Doc. A/HRC/27/49, August 4, 2014, para. 32.

offer). It thus took considerable time for governments to formally ask that the UN Security Council refer the situation in Syria to the ICC—and a further eighteen months for the demand to be taken up in the Security Council. In the end, the proposed referral failed due to vetoes cast by two of the council's permanent members.²⁰

The use of veto power to block efforts by the international community to prevent or halt mass atrocity crimes, including by ensuring accountability for those responsible for widespread and systematic human rights violations, has been the subject of serious criticism. Efforts to elaborate a code of conduct on the use of the veto in situations where mass atrocities occur,²¹ which would also entail a commitment not to block ICC action, are important to address this problem. These efforts, however, are still in relatively early stages and, if ever realized, may take a long time to have full effect.

II. Beyond International Criminal Justice: Complementary Mechanisms

The ICC currently has jurisdiction in the 124 states that have ratified the Rome Statute.²² In all other countries, when states themselves fail to investigate and prosecute international crimes through national proceedings, only the Security Council has the power to ensure access to justice, via the creation of ad hoc tribunals or through referrals to the ICC.²³ As discussed above, however, the council is often divided on whether to pursue such action, and permanent members in particular are not keen to impose international justice mechanisms on states they consider political allies. For the ICC itself, referrals by the Security Council can be highly problematic, as the Council has shown a lack of willingness to enforce the state cooperation necessary to conduct effective investigations.

Nevertheless, the need to prevent impunity for international crimes—and, consequently, calls for accountability—will continue and is likely to increase over time. The multilateral system anchored in the UN can and should continue to play a predominant role in heeding those calls. It is therefore important to consider other options than establishing ad hoc international tribunals or referrals to the ICC by the Security Council, in particular as these may well continue being the exception to the rule in the future.

²⁰ “Russia, China Block Security Council Referral of Syria to International Criminal Court,” UN News Centre, May 22, 2014, available at www.un.org/apps/news/story.asp?NewsID=47860#.VafNEvIhHw.

²¹ These efforts include a French initiative, the Accountability, Coherence and Transparency Group (ACT) initiative, and a reform proposal by the Elders. For a good summary, see Security Council Report, “The Veto,” October 19, 2015, available at www.securitycouncilreport.org/atf/cf/%7B65BFCF9B-6D27-4E9C-8CD3-CF6E4FF96FF9%7D/research_report_3_the_veto_2015.pdf.

²² An up-to-date list of states parties is available in the UN Treaty Database, available at https://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=XVIII-10&chapter=18&lang=en.

²³ This is within the multilateral system anchored in the United Nations. There are, of course, other bodies that can play this role in regional human rights system, such as the African Court on Human and Peoples' Rights, the European Court of Human Rights, or the Inter-American Court of Human Rights.

Domestic Criminal Justice and the Principle of Complementarity

The Rome Statute of the ICC is based on the principle of complementarity, whereby states have the primary responsibility to investigate and prosecute the most serious crimes under international law. The court was set up as a reserve option to prosecute the most serious international crimes when states are unwilling or unable to do so. This essential feature of the ICC—based also on lessons learned from the ad hoc tribunals for the former Yugoslavia and Rwanda—has been largely neglected by the Security Council. By actively seeking to make the principle of complementarity work as envisaged in the Rome Statute, the council could show commitment to fighting impunity for serious human rights violations. It could also open opportunities to strengthen domestic capacity to ensure respect for human rights, accountability, and justice and other interesting alternatives to setting up new tribunals or referring situations to the ICC.

Rather than going through new tribunals or the ICC—with all the political and financial implications they entail—the council could systematically express concern over particular human rights violations and urge states with jurisdiction over these crimes to conduct impartial and effective investigations, with a view to bringing perpetrators to justice. Where necessary, these domestic investigations could receive international support (financial or technical support or active judicial cooperation by UN member states). Progress on efforts made by affected states to investigate and prosecute serious human rights violations could be included in reporting to the council, which would allow for effective follow-up where necessary.

Where states are reluctant or unwilling to assert their jurisdiction over serious and widespread human rights violations, the council could consider setting deadlines and indicating that it would consider the option of referring the situation to the ICC if it was not satisfied with the response from the states in question. It could thus use the threat of referral to enforce effective measures to prevent further human rights abuses, as well as to ensure perpetrators are held accountable and brought to justice. In many situations, such strategic use of the principle of complementarity—and the requirement that states live up to their primary responsibility to investigate and prosecute international crimes—would not only promote greater national ownership of justice and accountability processes (the very *raison d'être* of the inclusion of this principle in the Rome Statute) but could also lead to more timely, sustainable, and culturally appropriate solutions.

For domestic jurisdictions to be able to carry often significant caseloads of criminal investigations into and prosecutions of serious and widespread human rights violations, they must not only be willing but also able to do so. International technical assistance to build domestic jurisdictions' capacity to handle these caseloads will, in many cases, be of crucial importance for success. Measures to strengthen national law enforcement and judicial systems and to enable them to carry out effective investigations and prosecutions do not necessarily require an intergovernmental mandate or even involvement from the Security Council or

General Assembly; they can be and are part of technical assistance programs offered by various parts of the UN system (as well as by many other relevant actors).²⁴

In some cases, host governments may prefer this option, as it is not only in line with their primary responsibility and ensures national ownership but also gives them more control and exposes them less to scrutiny from intergovernmental bodies. Nevertheless, a significant level of transparency will be required in any case, as the funding of such technical assistance programs can quickly become costly, and donor countries will only want to contribute financially if they have faith in the quality of the program and the political will of the state involved.

Hybrid Criminal Justice Models

Domestic criminal justice mechanisms may, however, not always be available, and even if they are, they may not be functional or compliant with international human rights standards for criminal investigations and prosecutions. Where this is the case, and where there is not time to wait for long-term capacity building to be complete, the international community has resorted to so-called hybrid courts or tribunals, partly national and partly international in nature. Such courts or tribunals usually have jurisdiction over serious crimes under both international and national law and are generally staffed by a mix of local and international judges, prosecutors, and other staff. These hybrid models allow the international system to play a significant role while at the same time investing in local capacity building.

While such hybrid models are not always easy to replicate, as they need to be based on the specific context, culture, and priorities of the state concerned, creative models are possible. Examples include the Special Panels of the Dili District Court in Timor-Leste, the Extraordinary Chambers in the Courts of Cambodia, the War Crimes Chamber of the Court of Bosnia and Herzegovina, the Special Court for Sierra Leone, the Special Tribunal for Lebanon, and, most recently, the Special Criminal Court in the Central African Republic. It would be interesting to draw upon their respective successes and failures to establish lessons learned to build on in the future.

Non-judicial Mechanisms

Targeted Sanctions for Human Rights Violations

Over time, some non-judicial approaches, such as economic sanctions against countries that are responsible for international crimes or fail to prevent impunity for such crimes, have been explored and tested, but in general they have proven to cause disproportionate harm to little

²⁴ At times, such support can be institutionalized, as was the case with the establishment of the International Commission against Impunity in Guatemala, an independent international body set up through a bilateral agreement between the UN and Guatemala to support the domestic criminal justice system in investigating and prosecuting serious human rights violations. See www.cicig.org/index.php?page=mandate.

avail.²⁵ In light of this, the Security Council has also experimented with so-called targeted sanctions—also questionably referred to as “smart sanctions”—aimed directly at elite interests and specific individuals responsible, either directly or indirectly, for committing international crimes or offering safe havens to alleged perpetrators of such crimes.

The Security Council has adopted, over time, three categories of such sanctions: those targeted at individuals, at specific commodities, and at particular regions in a country. In the hope of limiting negative side-effects on the full enjoyment of human rights and on humanitarian and development work, all UN sanctions today are “targeted,” but not all succeed in avoiding these unintended consequences. “Smart” sanctions, which directly target specific individuals, raise the most concerns and criticism, including because they can create serious issues for persons who have the misfortune of sharing the same name as the individuals targeted.

Moreover, while the implementation of targeted sanctions is a relatively recent approach,²⁶ their use in several contexts has provided enough evidence to demonstrate that they can be effective but that caution is warranted when implementing them in support of peace. This evidence indicates that “targeted sanctions have unintended consequences, including increases in corruption and criminality, strengthening of authoritarian rule, burdens on neighboring states, strengthening of political factions, resource diversion, and humanitarian impacts.”²⁷

The Human Rights Council and Its Special Procedures

While many of the mechanisms explored in this paper to ensure accountability for human rights violations deal with the responsibility of individuals, it is worth recalling that states bear the primary responsibility for ensuring and where necessary enforcing protection of human rights and, as such, must also be held accountable for failure to respect their obligations under international law. The Human Rights Council, a subsidiary body of the UN General Assembly, plays an important role in this regard.

The establishment of the Human Rights Council in 2006—to replace the Human Rights Commission, a subsidiary body of ECOSOC—is itself an example of multilateral reform aimed at increasing state compliance with international human rights law and accountability for violations thereof.²⁸ The Human Rights Commission was criticized as not only ineffective but also overly political in its investigations and reports and selective in its examination of country situations. The Human Rights Council was designed to correct this by having a higher bar for the election of its membership, ensuring that its methods would be “transparent, fair, and

²⁵ UN Economic and Social Council, “The Bossuyt Report: The Adverse Consequences of Economic Sanctions,” UN Doc. E/CN.4/Sub.2/2000/33, June 21, 2000.

²⁶ Global Policy Forum, “Targeted Sanctions,” available at www.globalpolicy.org/security-council/index-of-countries-on-the-security-council-agenda/sanctions/targeted-sanctions-new-tools-new-challenges.html.

²⁷ Targeted Sanctions Consortium, “The Effectiveness Of United Nations Targeted Sanctions,” November 2013, available at <http://graduateinstitute.ch/files/live/sites/iheid/files/sites/internationalgovernance/shared/Effectiveness%20of%20UN%20Targeted%20Sanctions%20-%206.Nov.2013%20.pdf>.

²⁸ For a short overview, see Security Council Report, *The Security Council and Human Rights: An Evolving Role*, January 2016, pp. 3–4.

impartial,” and establishing a mechanism for periodic review of all UN member states’ compliance with their international human rights obligations and commitments.²⁹

The Human Rights Council’s founding resolution established a new procedure named the Universal Periodic Review (UPR). Its creation aimed to broaden the new body’s focus to include all UN member states and ensure equal treatment in the way each country’s human rights record is assessed. It also allowed the council to counter some of the criticism that its predecessor was politically motivated in selecting which countries would have their human rights record scrutinized by the international community. The UPR is a continuous process; the council reviews the human rights record of at least forty-eight UN member states each year so that all member states are reviewed every four years. The process stipulates that member states sitting on the Human Rights Council are reviewed during their term of membership—a measure that aims to address the perceived hypocrisy of known human rights violators winning election to the council. Three reports serve as the basis of each review: a report from the state itself on achievements and challenges; information from independent human rights experts, treaty bodies, and UN entities; and reports from NGOs and other national stakeholders in the state under review. While many of the exchanges in the UPR remain quite “diplomatic,” and some resulting recommendations are more meaningful than others, it has effectively become an important “springboard for follow-up action by non-governmental organizations, governments, and the UN itself.”³⁰

Fact-Finding Mechanisms and Commissions of Inquiry

Since the beginning of the 1990s, fact-finding mechanisms and commissions of inquiry have become increasingly part of the international community’s “tool box” to respond to allegations of serious and widespread violations of international human rights and humanitarian law. International organizations, including the UN—under the auspices of the Security Council, Human Rights Council, General Assembly, and Office of the Secretary-General—have established commissions of inquiry, fact-finding missions, independent panels of experts, monitoring components of peace operations, and special rapporteurs or representatives. These are all tasked—albeit with varying mandates and powers—with monitoring and/or investigating alleged violations of international human rights and humanitarian law, thus offering some sort of accountability and sometimes paving the way for criminal justice at a later stage.

Mechanisms of this nature created by the Security Council have been criticized for their isolated approach, often ignoring the main human rights actors on the ground, such as the UN Office of the High Commissioner for Human Rights or international and national human rights NGOs, when collecting evidence of violations. They have been criticized less for duplicating the work of these other actors than for compiling incomplete facts and evidence due to their short mandates and limited presence in the field. Better interaction with the broader UN system and

²⁹ UN General Assembly Resolution 60/251 (April 3, 2006), UN Doc. A/RES/60/251, OP 12; Andrew Clapham, *Human Rights: A Very Short Introduction* (Oxford: Oxford University Press, 2015), pp. 72–75.

³⁰ *Ibid.*, p. 76.

other human rights actors on the ground could qualitatively and quantitatively improve the outcome of these Security Council initiatives.

The Human Rights Council has in recent years also created a number of commissions of inquiry for situations involving widespread and serious violations of human rights. These commissions have done important work, albeit with certain limitations. The Commission of Inquiry on Syria, for example, has not (yet) contributed to ensuring accountability in the country, even though it has reported extensively on the violations committed by the conflict parties in a large number of reports and has several times called on the Security Council to refer violations to the ICC. The Commission of Inquiry on Human Rights in the Democratic People's Republic of Korea—equally challenged in achieving actual accountability—chose a different approach by producing a detailed and extensive final report and asking that its mandate be discontinued. This had a strong and lasting symbolic impact, even though it has not resulted in the implementation of one of its main recommendations: an ICC referral.

The work of the commissions is sometimes also of limited use for criminal investigations if and when these take place, as the information gathered is often subject to confidentiality guarantees (i.e., the identities of the witnesses are not disclosed to anyone) or is insufficiently precise or direct to meet evidential standards. This makes the work of the commissions effective for fact finding and establishing patterns and policies but of more limited use in actual court proceedings. The main value of the work of commissions of inquiry is therefore to raise awareness of an ongoing human rights crisis and to make concrete recommendations on possible accountability mechanisms. The Human Rights Council can use this work as a basis for recommendations to the General Assembly, which can then take relevant action. Another powerful tool of the council is to designate a special rapporteur to examine a situation, preferably through a country visit. Even when a country is uncooperative, the rapporteur may produce a report offering his or her understanding of the human rights situation.

The Largely Untapped Potential of the Peacebuilding Commission

The Peacebuilding Commission (PBC) could potentially play a bigger role in ensuring accountability and justice for serious human rights violations as part and parcel of peacebuilding efforts. Where a country emerges from conflict, effective transitional justice mechanisms can be essential to assist a community in its reconciliation process and to facilitate the transition to stability. The PBC's mandate allows it to bring all the necessary actors together, as well as to raise the necessary funds. So far, however, work on transitional justice has not played a prominent role in the activities of the PBC, even when truth and reconciliation were important elements of the national process (such as in Liberia). There seems to be a general recognition that the potential of the PBC for accountability work remains to be explored.

The Role of Human Rights and Justice in Achieving Lasting Peace and Sustainable Development

The need for coherence and for fully integrating justice and human rights into the UN's work is also recognized in current policy debates on the link between peace, inclusivity, and

development. Respect for human rights, including, and perhaps in particular, those of women and girls, is essential to achieve and sustain both peace and development. The 2000 United Nations Millennium Declaration and Development Goals (MDGs) recognized the link between human rights, good governance, and development. But while it was clear to most that achieving human well-being and dignity for all would not be achieved if development goals were pursued in isolation from efforts to promote human rights, the MDGs failed to fully integrate the human rights dimension.

The 2030 Agenda for Sustainable Development, with its inherently universal, transformative, and inclusive approach, takes the linkage between human rights and development much further. Goal 16 of the 2030 Agenda calls for the promotion of “peaceful and inclusive societies for sustainable development,” the rule of law, and justice and accountable institutions. But synergies between the aspirations of the 2030 Agenda and obligations under international human rights law go well beyond Goal 16. As the Preamble of the 2030 Agenda points out, the seventeen Sustainable Development Goals (SDGs) can and even “seek to realize the human rights of all.”³¹ The agenda’s pledge to “leave no one behind” also resonates fully with the foundation of international human rights law reflected in the Preamble of the UDHR, which recalls that “recognition of the inherent dignity and of the equal and inalienable rights of all members of the human family is the foundation of freedom, justice and peace in the world.” The implementation of the 2030 Agenda and the SDGs and targets offers a critical opportunity to take on board and build upon the positive power of full respect for human rights to achieve sustainable development for all. At the same time, implementation of the goals and targets will contribute to efforts to realize the human rights of all people, everywhere and without discrimination.

Respect for human rights is also a fundamental ingredient for any recipe to build or restore peace. Failure to uphold basic human rights is one of the main drivers of violence and root causes of conflict. But so far, the international community has focused more on addressing past violations of human rights than on recognizing the positive power of human rights for peace.

The international community has increasingly come to accept the need to address human rights violations in transition processes from conflict or state repression to peace. Transitional justice mechanisms are important “because systemic human rights violations affect not just the direct victims, but society as a whole.... A history of unaddressed massive abuses is likely to be socially divisive, to generate mistrust...and to hamper or slow down the achievement of security and development goals.... [U]ltimately, [it] can lead to cyclical recurrence of violence in various forms.”³²

But more recognition is needed of the positive power of promoting and guaranteeing respect for human rights, in particular those of women and girls. The enjoyment of such rights by all,

³¹ For an overview of the linkages between the SDGs and the core international human rights instruments, see www.ohchr.org/Documents/Issues/MDGs/Post2015/SDG_HR_Table.pdf.

³² International Center for Transitional Justice, “What Is Transitional Justice?,” available at www.ictj.org/about/transitional-justice.

particularly vulnerable groups, fosters inclusive, cohesive, and peaceful societies and contributes to achieving sustainable development and deep and lasting peace. Already in 1945, the drafters of the UN Charter recognized the importance of ensuring respect for human rights for maintaining international peace and security. Article 55 of the charter sees “universal respect for, and observance of, human rights” as integral to “the creation of conditions of stability and well-being which are necessary for peaceful and friendly relations among nations.”³³

Important progress has been made through the inclusion of human rights components in UN peace operations.³⁴ But respect for human rights cannot be outsourced to peace operations alone. It must become an integral part of the multilateral system’s efforts to prevent and resolve conflict and build lasting peace. Two secretary-generals, Javier Pérez de Cuéllar and Kofi Annan, have tried to push the Security Council to step up its conflict prevention measures by focusing more on human rights violations as early warnings of developing conflicts. But systematic engagement of the council in this area remains difficult, and much depends on the activism of the secretary-general or individual council members.³⁵

The report of the secretary-general’s High-Level Independent Panel on Peace Operations stressed the significant role of human rights in conflict prevention, protection in conflict, and peacebuilding. It put forth a number of specific recommendations that could strengthen the council’s effectiveness in preventing or mitigating human rights violations in situations of armed conflict. The panel also underlined the need to react to information on massive human rights violations early on.

Similarly, the report of the Advisory Group of Experts for the 2015 Review of the Peacebuilding Architecture gives significant consideration to accountability for human rights violations. The report recommends that the UN take a clear stance against impunity in post-conflict settings and “support governments and civil society to tackle this obstacle to sustainable peacebuilding through political engagement, as well as national and international processes of justice.”³⁶ Overall, the report argues that successful peacebuilding is dependent upon uniting the peace and security, development, and human rights pillars of the UN.

Human Rights up Front

The UN has also sought to mainstream the promotion of respect for human rights in its work by trying to induce a different mindset in thinking about human rights within the UN system. In late 2013, the secretary-general launched the Human Rights up Front initiative, primarily a coordination tool that seeks to bring about cultural, operational, and political changes that will

³³ Security Council Report, *Human Rights and the Security Council*.

³⁴ For a short overview, see *ibid.*, p. 10.

³⁵ *Ibid.*, pp. 14–16.

³⁶ UN Advisory Group of Experts, *The Challenge of Sustaining Peace*, June 29, 2015, p. 57, available online at www.un.org/en/peacebuilding/pdf/150630%20Report%20of%20the%20AGE%20on%20the%202015%20Peacebuilding%20Review%20FINAL.pdf.

ensure the UN system takes early and effective action to promote and encourage respect for human rights and to prevent or respond to large-scale violations. It sets out six actions that can help the UN system meet its responsibilities on human rights, from training all UN staff to see human rights as central to their work—regardless of their department or program—to improving management of information on violations.³⁷ But the question remains whether and how the Human Rights up Front initiative can address the multilateral system’s main weakness: enforcement of respect for international human rights norms and standards.

III. Conclusions and Recommendations

The past three decades have seen significant developments with respect to international criminal justice, including for serious and widespread violations of human rights. The International Criminal Tribunals for the former Yugoslavia and Rwanda, as well as other ad hoc tribunals that were subsequently established have driven the speedy and in-depth development of international criminal law. The ICC was established as a permanent, independent, international tribunal to deal with the most serious crimes under international law. While the ICC is often subject to criticism, suffers from lack of adequate diplomatic and financial support, and has recently not attracted many new states parties, it is clearly here to stay and remains at the heart of international effort to fight impunity for international crimes.

Many of these developments, in particular the establishment of the ICC, would not have been possible without the significant and persistent efforts of civil society, which were essential to mobilizing the political will required to achieve these results. More generally, civil society has and continues to play a seminal role in promoting respect for human rights, as well as accountability and access to justice for violations thereof. In order to implement and achieve many of the recommendations below, it will be key for civil society to continue to play that role, with the support of the UN and members states, both at the local and international levels.

Beyond its initial role in setting up the ICTY and ICTR, the Security Council has been and continues to be a key player in ensuring justice and accountability for the most serious international crimes. Crucial in this respect is the council’s competence, under the Rome Statute of the ICC, to refer situations to the court for investigation and prosecution. The council, however, has only twice made use of its competence in this respect and been criticized roundly for its lack of follow-up to and enforcement of these decisions. While the council could take a number of measures to reduce its perceived and real bias in relation to international criminal justice, its internal political dynamics, which prevent a more consistent, effective, and productive use of ICC referrals, are unlikely to change in the near future. It is therefore equally important to invest in complementary mechanisms able to ensure accountability and access to justice.

A key entry point for action here is for states and the UN alike to walk the talk on the principle of complementarity that underpins the Rome Statute for the ICC. This principle recognizes and

³⁷ See www.un.org/sg/rightsupfront/doc/RuFAP-summary-General-Assembly.shtml.

emphasizes the primary responsibility of states to investigate and prosecute international crimes. Increased reliance on domestic criminal justice not only avoids the need to overly burden the ICC but also contributes to national ownership and capacity. Giving a more prominent role to domestic justice for international crimes does, however, require adequate technical, financial, and diplomatic support from both the UN and its member states.

Apart from criminal justice mechanisms, the international community should also continue to invest and strengthen other mechanisms to ensure human rights compliance and accountability. Mainstreaming human rights into the UN's work on peace and security and development is important not only to ensure full respect for human rights but also to reach the ambitious goals of achieving lasting peace and sustainable development.

The international community's "toolbox" includes a variety of existing mechanisms and programs. They should be used and sequenced in a manner appropriate and tailored to each context's specific challenges, opportunities, and constraints.

Moreover, the UN should set the example and adopt and implement a zero-tolerance policy for human rights violations by its own representatives and personnel. The recently adopted Security Council Resolution 2272, which endorses special measures recommended by the secretary-general to prevent and combat sexual exploitation and abuse by UN peacekeepers, is a significant step in the right direction.

Finally, the UN and its member states should invest more in the positive power of human rights. Where individuals and societies fully enjoy their fundamental rights and freedoms, lasting peace and sustainable development are easier to achieve. Promoting respect for human rights is not, and should not be, a soft option in foreign policy and multilateral work. It is vital to the UN in achieving its fundamental purposes of preventing the scourge of war, achieving lasting peace and security, and "leaving no one behind."

Recommendations

- 1. Invest in prevention and the positive power of human rights:** Serious and sustained investment in promoting respect for human rights will contribute to conflict prevention, lasting peace, and sustainable development and reduce the scale of the need for ex post facto justice and accountability processes.
 - Member states should increase their own and the UN's budgets for domestic and international prevention programs that strengthen human rights compliance, accountability, and justice mechanisms. They should strengthen financial and technical support for national and local human rights architectures and capacities, recognizing and reinforcing the important role played by civil society actors. They should also increase the budget of the OHCHR so that it can strengthen its presence on the ground and better involve local actors in reporting to ensure deep contextual understanding and build local capacity.

- Member states, the UN, and civil society should ensure that strategies and policies to implement the 2030 Agenda for Sustainable Development take on board its human rights dimension to ensure that no one is left behind and to monitor and assess progress on the SDGs and their targets in achieving results for all people, in particular women and girls and other particularly vulnerable groups. To this effect, they should integrate human rights into national development plans.
 - Member states and the UN should ensure respect for human rights and the capacity to work on preventing and addressing human rights violations in their responses to conflict and violence, including sanctions regimes, counterterrorism measures, and programs for preventing and countering violent extremism. They should integrate safeguards to avoid a negative impact on human rights protections and on the space for political, diplomatic, and operational engagement, in particular with non-state armed groups, to improve respect for human rights and humanitarian law.
 - The UN secretary-general should maintain a dedicated team to lead and expand the Human Rights up Front initiative and apply it more systematically.
- 2. Ensure access to adequate justice:** The UN, member states, and civil society should join efforts to make the principle of complementarity work by increasing the use of domestic justice mechanisms and by supporting international mechanisms where domestic ones are not able or willing to act.
- a. *Strengthen domestic capacities***
- The Security Council should systematically pressure states to comply with the Rome Statute of the ICC by investigating and prosecuting international crimes where they have domestic jurisdiction and by cooperating with other states and the ICC where the latter have jurisdiction. Wherever appropriate, the council should impose travel bans and assets freezes on people investigated by states or the ICC for international crimes.
 - Member states and the UN should seriously commit to and invest in building the capacity of national and local justice systems by using all available measures to create the necessary political will and by providing or mobilizing resources and technical assistance. In doing so, they should prioritize countries where massive violations of human rights occur or are likely to occur. Where states are unwilling or unable to investigate or prosecute international crimes within their domestic jurisdiction and the international system must step in, hybrid mechanisms should be the preferred option and should be designed to maximize the transfer of knowledge and expertise to relevant domestic professionals and institutions.
 - Civil society should build on the ICC's Rome Statute movement to push for political will and adequate resources.
- b. *Reduce bias and selectivity in the Security Council and international criminal justice system***

- Member states should make genuine and real commitment to human rights and the fight against impunity a condition for election to and possible enlargement of the Security Council.
- The Security Council should commit to constraining its permanent members from using vetoes in situations of mass atrocities, building on existing proposals.
- The Security Council should set up a mechanism to obtain systematic briefings by the prosecutor of the ICC on ongoing preliminary investigations and should request that all country-specific briefings to the council include a section on the availability of justice for human rights violations (to facilitate early warning and continued monitoring and evaluation).
- The Security Council should adopt criteria or guidelines for referrals to the ICC so as to increase systematic consideration of cases and decrease the possibility of real or perceived selectivity. The criteria should include a mechanism for states under consideration to adjust their position and response to human rights violations to avoid the need for a referral.
- The Security Council should engage in a strategic dialogue with the ICC to address the challenges it faces (e.g., by organizing an annual retreat for council members and key ICC staff) and, when it refers cases to the court, it should ensure the court has adequate financial and human resources to fulfill its mandate.
- The General Assembly and the secretary-general should, wherever they feel it is appropriate, recommend situations for ICC referral to the Security Council.³⁸

c. *Complement justice with other mechanisms that contribute to accountability*

- Member states and the UN should select and sequence available tools and mechanisms in light of each context's specific needs, opportunities, and constraints.
- Member states and the UN should provide adequate resources for existing international mechanisms.
- Member states and the UN should increase the impact of fact-finding commissions and commissions of inquiry by ensuring they have appropriate mandates, expertise, access, and political support, as well as by making better use of the International Humanitarian Fact-Finding Commission in contexts with serious and widespread violations of international humanitarian law.
- Member states and the UN should, where possible, support regional human rights courts, which have a particular role to play in guiding and supporting national systems.

3. Manage the complex relation between human rights, justice, and peace: The multilateral system anchored in the United Nations must embrace the fact that there can be no justice without peace and no lasting peace without justice and should address the inherent and complex tensions between their respective demands.

³⁸ The proposal to give referral competence to the General Assembly itself under the Rome Statute has been on the table for a number of years but is not seriously pursued by the proponents as it has very limited chances of success.

- Member states and the UN must acknowledge that the relationship between human rights, justice, and peace is complex and will articulate itself differently in different contexts and at different points in time (no one size fits all). Moreover, they should acknowledge that protection of human rights requires a comprehensive approach and commitment. The UN Peacebuilding Commission, in coordination with OHCHR, academia, and civil society, could provide a forum for exchanges on what has worked and not worked in dealing with the tensions and dilemmas in different contexts. The input from civil society organizations on the ground will be crucial in such an exercise.
- Member states and the UN should look at the whole toolbox of mechanisms for pursuing justice and should use and sequence appropriate tools in light of specific and evolving contexts. “Justice” does not always have to be criminal justice—appropriate transitional justice mechanisms can be powerful tools to address the tension between the demands of criminal justice and the demands of both immediate and sustainable peace.
- Member states and the UN should involve and, where possible, support a lead role for national, local, and regional actors to ensure adequacy, efficiency, legitimacy, sustainability, and ownership of peace process that fully integrate the human rights dimension.
- Member states should strengthen the mandate and resources of the Peacebuilding Commission, its relationship with the Security Council (with the latter encouraging and recommending states to resort to the PBC), and its funds for supporting peacebuilding capacity on the ground.
- The UN should train and instruct mediators and negotiators on the importance of tackling human rights and justice issues throughout peace processes and establish a forum to exchange and document lessons learned.

