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DISCUSSION SUMMARY

The Expectation Gap: Summary of the First Meeting of the Vancouver Dialogue

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Executive Summary

The idea behind the Vancouver Dialogues is to merge the experience, expertise and resources of experts from institutions, governments, civil society and funding organizations involved in international justice as part of an ongoing, off the record forum to discuss the most pressing international justice issues. The broader goal was to create a venue that can be used as a marketplace of international justice services where the needs of the institutions are paramount and duplication can be avoided. To launch this undertaking, the first topic, identified by the institutions themselves as the timeliest, was the “Expectation Gap”. In other words, the difference between the expectations that the international community has of international justice institutions, and what they are likely to be able to deliver.

The two institutions currently involved with infrastructure building, the International Criminal Court (ICC) and the Sierra Leone Special Court (SLSC) shared their experiences and identified areas of challenges. Based on these presentations, the Dialogue, conducted under Chatham House Rules, considered ways to help institutions meet these challenges. While the dialogue revealed the differences in expectations from the widely different perspectives of the participants, this same diversity helped create a broad set of considerations, all of which are potentially helpful to close the “Expectation Gap”.

These can be grouped in three broad categories:

1. Make Better Use of Economies of Scale

- Focus on the start-up of an institution;
- Minimize resources on core functions;
- Adapt to the cyclical nature of the investigation-prosecution-appeal process;
- Make use of precedents and outside expertise;
- Create a “lessons learned” system; and,
- Build links to international and regional organizations.

2. Manage Expectations Through Communications

- Making communications part of the start-up process of an institution;
- Ensuring that in addition to communications there is also community dialogue;
- Making full use of the political infrastructure of the institution;
- Broaden involvement in international justice beyond the legal community; and,
- Establishing an effective external relations capacity for international justice institutions.

3. The “Impunity Gap”

- Defining and communicating prosecutorial policy as early as possible;
- Allowing for a meaningful role for other international justice institutions where appropriate;
- Building links with domestic institutions; and,
- Recognizing the special needs of transitional situations.

The participants in the Dialogue identified communications and the “Impunity Gap” as the next most pressing issues that could be taken up in this forum. These, along with our own lessons learned about making the Vancouver Dialogues as user friendly and effective as possible will be carefully considered as we prepare for the next dialogue. In the interim, participants will hopefully follow-up on the opportunities provided for informal contacts.

The Expectation Gap

The premise for the first of the Vancouver Dialogues was the recognition that impunity for the worst crimes known to humanity has grown to become unacceptable to the vast majority of the international community. In addition, the concepts of justice and reconciliation are becoming accepted as important components in achieving greater stability in post conflict situations.

As international justice thus becomes an integral part (a brick in the wall) of the international relations architecture, it gives rise to expectations among international public opinion that international justice is here to stay. The coming into force of the ICC reinforces this view.

There has also emerged a parallel expectation, especially in government circles that the “next generation” of international justice institutions, (the ICC, the SLSC, the Khmer Rouge Tribunal), will function in a more economically sustainable manner, and will bolster the domestic legal systems with which it comes into contact. At the same time, these institutions, once created, naturally expect that they will receive the necessary level of support to fulfill their mandates.

These different expectations are seemingly proceeding in divergent directions. The danger exists that if they are allowed to continue, an “**expectation gap**” will develop.

The Institutional Experience

The first step in addressing a potential “expectation gap” was to hear from the two international justice institutions currently involved in creating the infrastructure for fighting impunity. These institutions, the ICC and the SLSC provided a wide contrast in both their mandates as well as the stage of their preparations. The ICC has a permanent, potentially global mandate based on the principle of complementarity, and is in the initial stages of infrastructure building. The SLSC is an *ad hoc*, hybrid court with mixed international and Sierra Leonean staff, enforcing both international and Sierra Leonean law. It has already commenced its investigation and prosecution functions. The similarities and contrasts helped to put into perspective the priority needs of international justice institutions and pointed to some areas where the concerns of the “expectation gap” could be addressed.

The International Criminal Court

The ICC's daunting challenge is to establish an entity, which has to be both a "treaty body" organization and a judicial institution in a climate of international public expectation, political adversity and shrinking resources. This circumstance makes it difficult for the ICC to base itself on the ICTY/R model, which very roughly works on a ratio of a staff of 1200 persons and a budget of \$120 million (USD) annually to maintain an infrastructure which has allowed a relatively small number of high profile prosecutions to take place. As the ICC will potentially have to be involved in a larger number of situations at one time, the costs associated with multi-jurisdictional involvement would be prohibitive, even if economies of scale were taken into consideration.

At the same time, it is impossible to build the ICC without a basic infrastructure. For example, the initial **Set-up Phase** is estimated to involve approximately 200 staff, with at least a quarter going to the Office of the Prosecutor (OTP) from where all action is initiated. To be able to move to a **Preliminary Examination Mode**, the staff of the ICC would have to increase to about 350 to 400 persons. This would constitute the **basic core** of the ICC. From this relatively stable base, each situation in which the ICC becomes involved, starting with the **Pre-trial Phase** is likely to see an increase of additional 400-500 staff members. While some economies of scale are possible, a similarly significant increase in personnel is anticipated with each new situation in which the ICC is involved.

This scenario is based on an interpretation of the complementarity principle, which places maximum emphasis on the involvement of national judicial institutions. Thus where the ICC may have to exercise its back-up function, the OTP would likely only investigate the most egregious cases at the top of the prosecutorial pyramid (crime base), with an even smaller subset of prosecutions. Such interpretation would also mean that ideally, the bulk of prosecutions falling under the "ICC threshold" would be handled by domestic institutions, and that the ICC would have an interest in assuming a significant role in the ongoing international effort to assist states in building-up their domestic judicial infrastructure. Only in this way could the rest of the "prosecutorial pyramid" be addressed without leaving an "impunity gap". In order to accomplish this function, the OTP would require an extensive external relations capacity.

All of this will take time to put into place, and a lesson learned from the ICTY/R experience shows the importance of getting it right the first time. Yet, given the pressure of international public expectation, the ICC has to find ways to "buy sufficient time". Some ways of achieving this include the clear enunciation of the above prosecutorial strategy and an effective media and outreach program to dampen expectations; and making full use of technology to filter communications and shorten the set-up period.

Yet the ICC also faces the expectations that it will cost less, not just be more efficient than its predecessors. Ways to achieve that could include no permanent contracts to enable the ICC to respond to the "waves" in the prosecutorial cycle (investigations and prosecutions not happening at the same time), thus minimizing the number of persons on staff at any one time. Other ways include having shorter trials, thus having more judges on staff (as opposed to longer trials with fewer judges); ensuring that issues such as reparations for victims does not place unrealistic burdens on the Court; and economies of scale and the use of existing expertise and material are maximized, including from other courts and tribunals as well as from civil society.

The Sierra Leone Special Court

The SLSC is a *sui generis* international entity created by a Security Council mandated agreement between the UN and the Government of Sierra Leone (GOSL). The SLSC is comprised of both international and domestic staff at all levels, and enforces both international and Sierra Leonean law, using the procedures of the ICTR. It was intended to operate over a three-year period at a projected cost of \$56 million. It is funded exclusively through voluntary contributions. While first year costs have been covered in this way, pledges and money for the next two years both fall well short of needs. The SLSC is administered by a unique “management committee”, which includes not only the UN and the Government of Sierra Leone, but also six contributing nations willing to assume the responsibility for the oversight of the court’s non-judicial functions.

The SLSC is the most current example of an *ad hoc*, hybrid tribunal. It is designed to be lean and efficient in every respect. This is evident from the clear indication to the prosecutor that only “those bearing the greatest responsibility” fall within the subject matter jurisdiction of the court; through the limited timeframe; the modest budget based on the smallest possible staff; to the funding by voluntary contributions and the hands-on management by contributing states. Its only other mandate is to contribute to the re-building of Sierra Leone’s legal and judicial infrastructure. The structure of the SLSC is traditional in the sense that the Registry supports the operation of the OTP and Chambers. However, the Registry also supports Defense counsel to ensure fair and equitable representation, which in an environment as difficult as Sierra Leone is important to ensure that justice is done. The SLSC also co-exists with a Truth and Reconciliation Commission.

The challenges inherent in this arrangement include not only the obvious need always to be fundraising, but also the need for court management to economize as much as possible. As part of leaving a strengthened legal infrastructure, the SLSC is constructing a court building and refurbishing detention facilities. With all these tasks, there is little time for anything above core functions, so while attention is paid to hiring locally, issues such as long term planning, training, procurement and personnel policies must take second place. There are few resources for victims and witnesses issues. Outreach is a major challenge as the success of the court, in ensuring that its efforts translate into a contribution to long term peace and stability depend greatly on public understanding and acceptance of its tasks. It is clear that the SLSC would very much have benefited from the use of existing models and studies – and intends to leave as much of this kind of legacy as possible.

One important element of delivering international justice in troubled parts of the world is the need for courts to work together with other international agencies on the ground. The SLSC’s reliance on the protection and infrastructure of UNAMSIL is an important lesson that is not unique in this case. It is likely that any court, including the ICC will likely have to function in environments where peace will be kept by the UN, regional organizations, or other forces. Additionally, UN Funds and Programs, and international humanitarian and human rights NGOs can and will be able to partner with courts on some issues, most notably on outreach.

The Dialogue

The gathering was unique in that it consisted of experts from international justice institutions, governments, civil society and funding organizations. Participation from all these pillars of the international justice community revealed early that different expectations were represented around the table. This was not surprising, given the wide range of perspectives represented at the gathering. Yet in spite of the fact that the presentations were from the ICC and the SLSC, the discussion easily embraced the theme of the Dialogue: that it was about international justice at large, not about specific institutions. It was clear that the participants' broad conception of international justice embraced not only the work of international justice institutions, but that this work should be coordinated with other institutions involved in governance issues.

There was also the idea that the ICC was well placed to develop a capacity to play a central role in drawing together the wide spectrum of the international justice architecture. While different terms were used, the idea of the ICC as a **lynch-pin** in the delivery of international justice as a whole seems appropriate. Simply, this means that ICC managers, states and other actors should work to enable the ICC to assume the role of a catalyst, helping to set standards which both domestic and international institutions need to meet, and ensuring continuous awareness of the need to fight impunity.

The main purpose of the Dialogue was to bring the expertise and resource based views of government, civil society and funding organization experts together with the priority needs of the international justice institutions themselves. While a wide range of topics were touched on, in relation to the aim of the Dialogue three broad themes emerged:

- (a) The need to make better use of economies of scale;
- (b) The need to manage expectations through communications; and,
- (c) The need to address the "Impunity Gap".

While there are obvious overlaps, it is possible to examine these three themes distinctly to create a broad picture of ways in which the expectation gap can be closed.

A. The Need to Make Better Use of Economies of Scale

If we are to satisfy the expectations of both international public opinion, that international justice is here to stay; and that of governments that international justice will be more affordable, then there is a need to make better use of economies of scale for current and future generation international justice institutions. Several suggestions emerged in the Dialogue which could help in this respect:

1. The Start-up is Crucial

It has to be done with care to ensure that the parts of the institution are built properly from the start. Lessons learned from the ICTY/R show the duplication of resources when systems are introduced in a hurry. At the same time, the institution is subject to expectations pushing it to be functional as soon

as possible. Thus a balance is required between efficiency and thoroughness. One idea is to first focus only on those organs and functions which are essential to get the institution off the ground (e.g. ensuring that the institution has the best personnel and related policies is an obvious initial step, while issues relating victims and witnesses could likely wait until there are investigations). Another useful consideration is the need for flexibility; that is to build the institution from the start-up in a way which anticipates the cyclical investigation-prosecution-appeal cycle (e.g. use or create adaptable systems – notably with regard to human resources; design flexible space).

2. Minimize Core Infrastructure

According to the information provided during the Dialogue, the ICC is expected to have a minimum of 350 to 400 core positions. A traditionally important consideration in any organization is “loyalty”. Thus personnel policies tended to favor providing attractive career opportunities to employees. The downside of this approach is the creation of a rigid system that is not easily adaptable to the investigation-prosecution-appeal cycle of international courts. While it is impossible to do away with long-term staff, it is possible to minimize the core functions of the institution where long-term staff is more likely to be found.

3. Adapt to the Cyclical Nature of the Investigation-Prosecution-Appeal Process

While it is more evident in the case of *ad hoc* tribunals, even the ICC is expected go through a cycle where personnel and resource needs will shift with the progress of court activity in a given situation (ICC officials expect to need 400-500 persons for each situation, over and above core functions). Unlike with core functions, it may be easier for institutions to offer a variety of limited duration employment contracts to meet the ebb and flow of investigation, prosecution and appeal requirements. These could range from simple short term contracts to more complex loan agreements with other institutions (e.g. governments, civil society, academia, and other international justice institutions). The ability of the Court to hire short-term staff would be greatly enhanced by the existence of some sort of mechanism that would allow for the speedy identification of available and suitable personnel from other tribunals, governments and civil society. There are, however, uncertainties involved in this kind of flexibility. They include the “loyalty” factor; the need to keep such experts not only employed but professionally current when they are not with the institution; and the need to ensure that international justice remains an attractive career path (although such a mechanism could be designed to aid personnel to maintain their level of excellence and preparedness as they move in the broader international justice network). While these challenges may appear daunting at first blush, the changing nature of employment from single to multiple careers and the more open-mindedness of employers to the benefits of experience gained elsewhere offer some promise for the success of this approach.

4. Make Use of Precedents and Outside Expertise

According to the presentations, re-inventing the wheel has been the norm, rather than the exception in the establishment of international justice institutions. Additionally, outside organizations, especially those in civil society have done extensive background work and systems definition for the use of these institutions. These can and have ranged anywhere from various codes of conduct; the

unique information technology requirements of international justice institutions; legal analysis of relationship agreements between institutions; draft domestic implementing legislation; community dialogue strategy; and procedural rules from procurement to victims and witnesses. Managers should be encouraged to become familiar with previously developed systems as well as the expertise available elsewhere, especially in civil society to create or adapt these, or make use of civil society resources as a way of minimizing start-up costs, time and to reduce the size of core functions.

5. Create “Lessons Learned” for Future Use

Managers should also be encouraged to look ahead, and wherever possible document the successes and shortcomings of the processes used by their institutions in a lessons learned format. While this function is best prepared by those who actually lived through the experience, it can be assisted, or even facilitated by outside expertise found in civil society, thereby minimizing the institution’s need to maintain an ongoing, internal, lessons learned capability.

6. Build Links with International and Regional Organizations

One of the most noteworthy revelations during the Dialogue is the vulnerability of international justice institutions to be stymied in their work, unless they are able to secure the support and cooperation of other international and regional actors. The most obvious need is one of security. In most cases the work of international justice institutions will be in areas in or just emerging from conflict. Without the cooperation (read also protection) of UN or regional forces, such institutions will be hard pressed to investigate, not to mention secure accused. The former Yugoslavia and Sierra Leone are prime examples, where court activity would be impossible without active cooperation from peacekeeping forces. However, this need goes beyond security. UN Funds and Programs as well as other agencies have local knowledge, contacts and resources which international justice institutions would be well served to cultivate. These contacts could well enhance the courts’ knowledge and ability to create effective community dialogue. Rwanda, Yugoslavia and Sierra Leone all demonstrate that a court’s success is greatly determined by its ability to reach the population and be able to explain how its function will contribute to lasting peace and security.

B. The Need to Manage Expectations Through Communications

1. Make Communications Strategy a Part of the Start-up

A recurring theme in the Dialogues was the need to manage the various expectations under which international justice institutions labor, without the institutions being stampeded into too hasty action or too insufficient infrastructure. One recommendation which was generally welcomed was for an early and effective communications strategy which would explain the process of bringing the institution to readiness. Making this communications strategy part of the start-up phase of the institution would be important, as it is easier to educate than to re-educate. It was also repeatedly mentioned that this kind of communication should not be solely the responsibility of the international justice institution. Governments and civil society should not only assist, but also use their resources to “get the message out” on both time and resources.

Community Dialogue Goes Beyond Communications

The acceptance of international justice as an important component (or brick in the wall) in both effective post-conflict peace-building and ensuring an environment of lasting peace and security needs the understanding and support of populations especially in those countries where these institutions have to work. Public outreach, a component of a successful communications package is one way of helping populations understand and accept the work of these institutions – in other words to manage their expectations. Community dialogue goes further, however, creating a two-way flow of information which is important for courts and other types of justice institutions (e.g. truth and reconciliation commissions) to do their work.

2. Make Full Use of the Political Infrastructure of the Institution

The political infrastructure of international justice institutions consists of their governing bodies. For example, in the case of the ICC it is the Assembly of States Parties; in the case of the SLSC it's the Management Committee. Such bodies often play a role in setting expectations. Yet their commitment to the success of their institutions requires that they help manage expectations, both by “helping to get the message out”, as well as keeping their own expectations of the institutions realistic.

3. Broaden involvement beyond legal community

One of the interesting ideas which emerged from the Dialogue is the need to move international justice issues out of the “ghetto of lawyers”. The delivery of international justice serves many purposes beyond deterrence and seeing justice done. As already mentioned above, it has become a recognized part of successful post conflict peace-building, and it is one of the components of viable governance solutions. Yet international justice has remained relatively exclusively in the realm of lawyers. It was suggested that it was time other international actors, especially those involved in human rights issues and development assistance are involved in the creation and work of these institutions. The involvement of other experts would broaden the perspective of the international community regarding the work of international justice institutions, thus helping to meet expectations.

4. Create an Effective External Relations Capability

It has been already mentioned that it was considered vital for international justice institutions to be able to cooperate and rely on the assistance of international and regional organizations in order to carry out their work. In the next section another notion will be advanced showing the need to build effective links to domestic institutions. In order to carry out both of these functions, international justice institutions have to have a strong and effective external relations capability. This is especially important for the OTP in order to carry out prosecutorial functions as basic as ensuring that investigators are able to go into the field. In addition however, a strong external relations capability will make it possible effectively to project the intentions and limits of an institution's prosecutorial scope and strategy, thereby keeping expectations about the work of the institution realistic.

C. The Need to Address the Impunity Gap

1. Define and Communicate Prosecutorial Policy as Early as Possible

It was pointed out in the course of the Dialogue, that setting out and communicating prosecutorial strategy helps managing expectations by creating known parameters. Doing this as early as possible reduces the possibility of having to counter already existing expectations. Without infringing on prosecutorial discretion, it seems generally understood that international justice institutions cannot prosecute all those who may be indictable for crimes within the jurisdiction of the court. Indeed, the history of international justice institutions shows that only those “bearing the greatest responsibility” are likely to come before these courts, however the personal jurisdiction of the statute may be phrased. International prosecutors, like their domestic counterparts work within finite financial parameters, and they have to act accordingly. Another important reason for being clear at an early stage about prosecutorial strategy is that it allows the prosecutor to find alternate ways in which to try to “fill the impunity gap” by other means. Whether it is by recommending the use of other institutions (e.g. truth commission) or helping to enhance domestic capability, it puts the institution “ahead of the curve”. It should be noted that there is an inherent difficulty in the ICC context, where the “jurisdiction” of the Court in the strictest sense of the word kicks in when national institutions are unable or unwilling to act. Thus, there may be no actual or credible national infrastructure that could benefit from assistance. This is worth noting even from the point of view considering it within the context of the 2009 review Conference).

2. Allow for an Effective Role of Other Institutions

The coming into force of the Rome Statute and the establishment of the ICC has meant a quantum leap for international justice. Now, for the first time, there is a specific organization which can act as a **lynch-pin** with the potential to bring together the various strands of international justice and help apply the most appropriate solution to a given situation. There exists an arsenal of possibilities consisting of enhanced domestic capability, internationalized domestic courts, a variety of domestic and internationalized courts and commissions, and possibly (though controversially) future *ad hoc* hybrid tribunals which can and may usefully complement the ICC. Numerous examples exist of two or more of these institutions working together, the most recent and prominent being the SLSC and the TRC. In order to cover the entire crime-base pyramid and reduce the chances of an impunity gap, we should not neglect these tried and proven tools of international justice.

3. Build Links with Domestic Institutions

It has been stated that one measure of the success of the ICC will be how seldom (not how often) it will have to become involved in investigation and prosecution. To help realize this goal, a pro-active interpretation of the complementarity principle was encouraged, whereby the ICC, especially the OTP engages actively in building links with states’ domestic judicial institutions in order to enhance their capabilities to handle situations should they emerge. As noted above, this will require that the OTP have a strong external relations capability as early as possible. Not only does this make sense from a justice point of view, it will also result in significant resource savings for the ICC by reducing the

number of situations it will have to involve itself in. Moreover, when a domestic judicial system reaches the level of being able to take care of crimes within its jurisdiction, there is no jurisdiction gap. Even if the capability of a weak domestic system can be strengthened, it is believed that it will be easier to address any impunity gap by adding its capabilities to the available arsenal. Perhaps most importantly, a functioning domestic judicial system will itself assist in preventing future mass crime.

4. Recognize the Special Needs of Transitional Situations

Among the situations calling for international justice, many (perhaps even most) involve countries emerging from conflict and attempting to make the transition to functioning societies. The needs of these societies are more complex than just the requirement to see justice done in a “no peace without justice” manner. Reconciliation measures, such as documenting a history of the conflict through a truth-seeking initiative, as well as other restorative measures, sometimes involving local and traditional justice remedies should be utilized to complement retributive justice in narrowing the impunity gap. Such steps should also contribute to making the usually hard fought and expensively acquired peace more secure, further reducing the likelihood of future mass crimes – as well as the consequent need for any ICC involvement.

Other Pressing Topics

As the Vancouver Dialogues is designed as an on-going forum, participants were consulted as to what are the next most pressing issues for international justice. Among several suggestions, the two that seemed to be considered to be the most pressing and appropriate for a group of experts representing all parts of the international justice architecture to consider were: (a) the need for assistance in developing communications strategies for international justice institutions; and (b) the need to help find ways to fill the “impunity gap”.

A. Communications

As discussed in the previous section under the need to manage expectations, a comprehensive communications strategy will help international justice institutions shape these expectations better to reflect the expected capabilities, outputs and needs of the institution. Furthermore, communication is a vital tool in delivering justice through enhancing public understanding and support through outreach and community dialogue. In spite of this, international justice institutions, like their domestic counterparts are not naturally inclined to make communications one of their core functions. This is especially true in the present case of chronic resource shortages. What emerged from the Dialogue is not only that this is a challenge in urgent need of consideration, but also that solutions are readily available from all participating sectors. It is, therefore, a combination of an urgent need and the possibility of being able to deal with this issue efficiently that makes “communications” an ideal topic in the near future for the Vancouver Dialogues.

B. Impunity Gap

Even a definition of what is meant by the “impunity gap” is difficult to agree on. In one sense, it refers to the portions of the crime-base pyramid which would not be covered by investigating and prosecuting the top echelon offenders. In another sense, however, it also relates to the various quasi-judicial remedies (e.g. truth commissions) that can be used to complement international justice and foster reconciliation between perpetrators and victims. Still in another sense, it is a question of how to design the combined use of the various international justice models now that the ICC has come on the scene to be the lynch-pin of international justice efforts. Like communications, the “impunity gap” is a pressing matter for discussion, since it is part and parcel of the considerations that will necessarily inform the ICC prosecutor in defining his prosecutorial strategy. Unlike communications, however, it is not a topic that may have ready solutions. Thus the need to consider the “impunity gap” early on in the Vancouver Dialogues comes with the recognition that the Dialogues – in the words of Kofi Annan - are meant to be a process, rather than an event.

Lessons Learned

The reason for the inclusion of this section is to highlight that the Vancouver Dialogues is meant to be your process. It is there to help all participants, from the institutions, governments, civil society or funders to make best use of their resources. Given that the Dialogue is in its infancy, we want to make sure that it develops in a way that is most useful to you. Thus the purpose of this section is to try to identify what worked (and thus what we should retain), and what could stand improving. Your frank comments and recommendations would be much appreciated in this regard.

What we think worked well:

- Assembling a working level group of experts
- Ensuring informality and confidentiality helps to open dialogue
- Having a single topic helps focus the discussion
- Ensuring ample non-structured time helps foster a clearing-house/marketplace type atmosphere
- Having a mix of actors from all walks of international justice is useful

What we think could be improved:

- As mixing actors from all walks of international justice is still new format, should more attention be paid to coordinating points of view?
- Should the mix of actors be cast even wider to include other expertise needed from time to time (e.g. human rights; development assistance; media relations)?
- Would a more structured agenda help focus debate further?
- Would goals or targeted conclusions hone the debate?
- Would it be useful for the Dialogues produce a product such as this type of discussion paper?