

## TRANSCRIPT

# " BOOK LAUNCH—THE PEACEMAKER'S PARADOX: PURSUING JUSTICE IN THE SHADOW OF CONFLICT "

*A conversation with Priscilla Hayner and Richard Dicker*

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### **ANNOUNCER:**

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### **ARYEH NEIER:**

I'm Aryeh Neier. I'm President Emeritus of-- the Open Society Foundation. So I'm delighted to-- to be here this evening-- to-- help launch the-- book by-- Priscilla Hayner-- *The Peacemaker's Paradox: Pursuing Justice in the Shadow of Conflict*. Looking around-- at the audience-- I-- recognize-- many faces. There are quite a lot of-- people-- here who are-- deeply experienced-- in the-- the international human rights field-- who could just as well be on this side of the table-- as on-- that side of the table.

So-- I think we're going to have-- a very good-- discussion-- this evening. The book that we are launching-- by-- Priscilla Hayner-- deals with the difficult-- questions-- that arise-- when one-- tries to-- bring a conflict to an end. And-- there can be-- contradictions-- between the effort to-- to pursue justice-- and the effort to-- to end an armed conflict. I don't think there's-- any simple answer-- to the-- the questions-- that arise.

I think these are-- very complex issues. But I think this book-- does an outstanding job of-- of addressing-- these issues. Priscilla Hayner-- it says on the cover of this book has been-- active in the field of transitional justice for 25 years. Looking at her, I don't quite believe that-- (LAUGH) that is the case. But-- since I've known her I think through most of that period-- I give credit to-- to what is-- stated-- on the-- the cover of the book.

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Priscilla-- was-- one of the-- the founders of the-- the International Center for Transitional Justice. She is widely known-- as-- the leading-- author on-- truth commissions. And I think anybody who-- who deals with the subject of truth commissions-- consults her work and-- and cites-- her work. For a number of years-- now-- Priscilla has been-- directly involved in-- trying to deal with the-- the problems that arise-- when one tries to-- to end a conflict-- and at the same time-- to do justice.

Most recently she has been-- deeply engaged-- in-- the process to-- or in the effort-- to end the-- the longstanding-- war in Colombia between-- the Revolutionary Armed Forces, the FARC-- and-- the government-- military, and also the-- the-- right-wing-- militias which have been-- an important (MIC NOISE) part of that conflict for-- an extended-- period-- in Colombia. Right now-- she is-- a member of the United Nations-- standby team of senior mediation advisors.

I actually didn't know what that was-- and saw I asked-- Priscilla to-- to tell me about it. And-- it's a small group of (MIC NOISE) persons-- who are called upon-- by the United Nations to-- try to help mediate-- conflicts-- in-- in all parts of the world and to bring-- their expertise in different aspects-- of the-- the process to bear-- in trying to-- to end those conflicts. We have asked-- Richard Dicker to-- to be a participant-- in the-- discussion-- this evening.

Richard-- is somebody I have known-- even longer than the 25 years Priscilla has said to be active in the-- (LAUGH) transitional justice-- field. I asked-- Richard-- how many people were still left at Human Rights Watch from the day-- that I was-- there, which was-- actually I'm told 25 years ago. And he tells me that there are five people-- still at Human Rights Watch-- from that era. Another of them, Dinah Pokempner-- General Counsel of Human Rights Watch is-- sitting over there on-- on-- on my right.

Richard-- has-- long directed the-- the International Justice-- Program-- of-- Human Rights Watch. He was-- one of those who took part in-- the effort to create the-- the International-- Criminal Court. He also-- led-- an effort on behalf of-- Human Rights Watch to-- to bring a genocide-- prosecution-- or a genocide case-- in-- in the International Court of Justice-- against-- Iraq under Saddam Hussein-- for the Anfal the-- the massacre of the-- the Kurds-- in 1988-- towards the end of the-- Iran Iraq War.

And the way we're going to-- to proceed is I'm going to ask-- Priscilla to-- spend a little time-- telling us about the book and telling us about-- some of her main thoughts-- in connection with the book. And then-- I will open it-- for comments and-- and questions-- by Richard. I will join in-- the-- the comments and questions and then open it up to the-- to the others-- who are here for-- questions and, again, extremely brief-- comments. So-- with that-- Priscilla-- would you tell us about your book?

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## PRISCILLA HAYNER:

Thank you so much, Aryeh. It's a real pleasure and honor to be here and especially with you and with Richard. I don't actually usually like speaking from podiums because it seems to be more formal, but I think it's also better for you because you can actually see the person who's speaking. So I'll-- I'll speak from here, but it's not intended to make it a formal-- event in-- in that sense. As I said, it is-- it is-- a real pleasure to be here and also, as Aryeh said, to be with so many people in the room who have also worked in this field-- in one form or another.

So I hope that you all will come in on-- on the discussion as we grapple with some very difficult issues. So I-- entered into this book-- a number of years ago because I-- essentially because I was perplexed and I was also curious. But I was also a bit-- confused-- as well as frustrated. So all of those emotions-- carried me through to the end. And the reason I was perplexed is because it seemed that it was clear to everyone at-- at the-- at the-- first glance that the-- the-- that the tensions between peace, negotiating your way out of-- of a war and justice, finding accountability for the people (NOISE) who have committed usually very-- often very serious crimes in a way.

Clearly there's a tension between them. But I couldn't hear anybody actually saying something that's sort of useful, and concrete, and-- and-- in depth enough that we could find our way through. Many people would say, "Well, we-- we just don't know enough to say something intelligent about this." Or others would say, "Well, you know, but everyone at the end of the day believes in both peace and justice, so there's not really a tension between them."

But I found those unsatisfying and also unhelpful in terms of finding a solution, especially as I was beginning-- I had worked in transitional justice for-- for a number of years, perhaps up to 25. (LAUGH) And-- and then-- and then after the last year I had been working more in the field of peace mediation or advising those who were under-- undertaking peace mediation. And clearly this issue was coming up and clearly nobody really knew how to grapple with it.

And it was becoming a bit of-- of a problem. I was also frustrated because it seemed to me that-- to say, "Well, we just don't know enough to say something sort of intelligent about this," wasn't-- didn't really-- it wasn't sufficient for me because clearly many countries have gone through this problem and grappled with these very issues. And many have actually come out the other side of a peace negotiations and had an agreement that in some way or another resolved this tension.

So clearly there are things to learn from those experiences. So I started in on this project as, well, let's go ask people what is there to learn. And what do the-- what do we see when you look at the experience out there? So it was very-- it was very interesting. And I will cite a couple of the key lessons. But the first thing that I learned is, yes, indeed, there is a problem. I think it doesn't help for us to say there's not really a problem here.

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It's a difficult problem. There's no one solution, but when you speak with folks that are directly involved in conflict, including, or perhaps especially, the people who are actually fighting a war, they're very aware of this-- of this problem, many different contexts. So I was in Colombia-- as Aryeh said, I had a chance to ad-- advise sort of on the outskirts of that process over several years.

And-- and spoke with the leadership of the FARC rebel group. And they said from day one of those peace talks, "We really have no intention to spend one day in jail." At the same time there were all kinds of obligations that the Colombian state had to hold persons to account who had committed serious crimes. So if the senior leadership of the FARC rebel group is saying that then you know that that will trickle down and that they don't expect to see criminal accountability, actually prison time for anybody.

And they had-- certainly they had the power to just not come to an agreement. When I went to Libya about-- six years ago or so-- it was about a year after Muammar Gaddafi had been killed and the revolution took place. And I had a chance to speak with some of the people who were very close to Mu-- Muammar Gaddafi in his last months and in his last days. And it's clear from their description and the conversations that Gaddafi was having with his inner-- inner circle that he felt trapped; that the-- the arrest warrant that was out for him from the International Criminal Court-- you know, he may have pretended publicly that it wouldn't bother him, but he knew that he (COUGH) didn't have an easy way out and he didn't know what his options were or if there were any options, actually.

So the only solution he had was to keep fighting, which is what he did. I was in Uganda-- where about 10 years ago-- peace negotiations ended after two years of very serious talks and very close to getting to the point of having Joseph Kony and the Lord's Resistance Army agreeing to disarm and actually end that-- that absolutely brutal war. And I was told while I was in Uganda a number of years ago interviewing people about the process.

They said, "If you had talked to any five-year-old child on the street in Uganda during those two years of the talks and you would say, 'Why isn't there peace in Uganda?' then the five-year-old child-- child would say, 'Because of the International Criminal Court. Because of the ICC. It's that-- that's why we don't have peace in Uganda.'" Which to-- to-- to sort of get to the punchline on Uganda, that isn't entirely true.

There were other things that were happening-- that were-- made those talks very difficult-- to say the least, that-- that ultimately they didn't arrive at success and disarm the rebel group. But the ICC influence was-- was considerable. It definitely affected the nature of the talks. It definitely from the people who were close to-- not close to but often visited Joseph Kony, the very renowned and brutal rebel leader.

He was constantly asking about the ICC. "What does that mean for me? What does it mean for my people? What actually will happen in the future?" So the-- the problem of the peace justice tension is real. We see that in lots of different places. The solution is not so clear cut or it's not so obvious. It's certainly not one solution for-- every place. What I'd like to do is touch on two issues-- that might point us either in the direction that I think that we're going

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or the direction that I think that we should be going to help to sort of resolve and cut into-- to this issue.

So the first issue is the-- is essentially the question of how one negotiates justice during a peace process. So this doesn't necessarily have to do with an international court coming in. It's something that essentially all peace negotiations now grapple with. And what was interesting to see was in how many cases actually those groups or those individuals that we would think of as perhaps the most obvious and most senior perpetrators of serious abuses they often were the people that put the issue on the agenda and said, "We have to talk about the justice issue."

Because they wanted to know what their future was. They're not-- they're not dummies, essentially. I mean they know sometimes explicitly there's actually arrest warrants out for them or-- or they know that they will be held to account by the government or by-- by an international court, whatever it might be. They want the justice issue to be settled. So it-- it's-- it's often there and it's almost always-- or it's almost always there and it's almost always difficult. In-- in a word, because of course we won't have time, unfortunately, in this first round to go into too much detail and to avoid getting into any sort of legalese, which I don't think is-- is-- is-- we-- we won't have time here. And it's not-- not necessarily what we should do here.

But essentially I think there are a couple of approaches to the core dilemma that we have. And you can see a signaling of this in the resolution that the Colombian government and the FARC rebels ultimately came to, which was essentially not giving up on the obligation to prosecute or to hold criminally liable the people on all sides of the conflict that may have committed serious abuses. That is required under international and often national law. But there is more flexibility, interestingly, in terms of the penalty regime, in terms of what kinds of sentences have to be given. So in Colombia the-- the agreement ultimately is that there will be restricted-- a regime of restricted freedoms or restricted liberties for those-- former rebels that have disarmed and those that-- were-- are found-- that have-- have to come through a system of admitting to the truth, telling-- telling-- a new tribunal exactly what they did.

And then they actually don't have to go to jail. They have to be sort of confined in a geographical space, basically a village, and undertake reparatory activities, so to payback through some form of service. A lot of this is still being worked out even now in Colombia. And they're having quite a hard time of actually implementing this.

But the idea was captured well. And after a couple of years of really going around as to all kinds of scenarios that might be possible for the Colombia agreement they ended up with that essentially playing with the obligations in terms of the penalties. So it's completely legal. The International Criminal Court has said, "That sounds good to us as long as you fully implement what you've put there on paper." What was interesting-- there's a number of-- of surprises that I ran to-- ran into in the course of my research, as you can imagine. And one surprise is how many stories there are about what actually happens in the course of peace negotiations. Pretty-- pretty extraordinary-- stories. And-- but one specific thing I found was that a number of years-- it would've been about eight years before the Colombian

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agreement-- the Ugandans-- the agreement that didn't quite get to fruition that ended 10 years ago-- they essentially had come to a very similar agreement. They-- it-- it-- it's in the draft agreement that wasn't ultimately finalized and signed in Uganda, but it's not as explicit as it is in Colombia and spelled out in detail. But it's very clear that the intention-- and you speak with people who are involved in the process-- the intention was Joseph Kony and the others would have agreed to disarm in order to not go to jail but to essentially go away on a farmhouse somewhere and undertake other activities. So it's very interesting that this is coming up in different places and different time. And I didn't actually realize that that history was there. The second general-- approach I think that would help us to resolve this sort of core dilemma is that for all of us that are interested in advancing human rights to think beyond criminal prosecutions. So we've-- I think the human rights community internationally-- I think we've all been a little bit too focused on the prosecution side which has a number of downsides.

One is that you can usually only prosecute a few, even in the best of circumstances. And you rarely have the best of circumstances. So you end up with very few or compromised justice systems, or politicized justice, or all kinds of problems. But the other major downside is you sort of miss everything else. So if you ask a typical survivor, the victim communities that have gone through these wars, you know, what is it that they want at the end of a war? They usually actually-- some of them say justice in the criminal justice prosecution sense, but most of them actually focus more on they want the truth, they want rebuilding of their communities, they want reparations, they want to know where their loved ones that-- that were disappeared-- where are they? Are there the remains of people who were killed who they don't have?

Those-- how you get to that and those elements of a solution are very important. And I should say maybe as a footnote to be fair that in Colombia in addition to sort of looking at alternative penalties, alternative sentencing they also incorporated what they considered to be a comprehensive system of justice or transitional justice. So they included requirements to take part in the truth commission, requirements to feed information into the search for the disappeared, and various other elements.

And they saw that as equally important. The second-- general issue that I'd then like to turn to is you-- you can hear in some of my earlier stories-- that some of the concerns have come through-- from those that feel that justice is threatening them if they're sort of of armed groups that feel they might be well-prosecuted. Some of that is because of the International Criminal Court, the ICC.

So the-- the-- there's two elements here. One is that there's a risk as to what the impact of the ICC might be in peace negotiation contexts. That's the first question I'll briefly address. And the second is a more positive side as to whether the ICC's involvement in-- in these kinds of either peace negotiations or just ongoing-- whether in fact it has a deterrent effect, whether it stops crimes or stops violence, in fact.

And I think sort of-- sort of there's-- sort of there's an up and the down-- the down and the upside of this question. And I'll address them in-- in that order. The question of whether

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there's a risk to doing damage by the ICC I think, unfortunately, we can say that there is. And we see this in various places. If you look back at the International Criminal Court's work over the last decade and a half now it's tricky.

But essentially there are many different specific examples where the timing, the nature-- the approach-- the-- how public and how private of an arrest warrant is put out, all of these elements add up in terms of what kind of impact the ICC's acts will have on the ground. And you can see that playing out in many different contexts. And when I was working in Colombia one of the local, a very prominent and very impressive-- human rights advocates who had been working on human rights accountability for decades---he wrote a blog-- responding to some of the perceived intervention essentially from the ICC prosecutor-- where the prosecutor in the Hague was sending signals that seemed to be almost making it impossible to make progress on the justice conversation because she kept saying, "You can't do that and you can't do that." And he wrote a blog saying, "It cannot be the intention of the International Justice System and the ICC in particular to make negotiated peace illegal and impossible."

"That can't be where we want to go." And he was essentially pushing back, very interestingly, again, from a human rights perspective. Their first priority was stopping the conflict. There were still lots of victims every day. These are atrocious conflicts, many of them. And of course we know that and we see that in the daily news. We have to-- he and others have often argued we have to take into account-- the priority of stopping the conflict. And if national actors are finding solutions we need to allow them room to find these different kinds of solutions without cutting them down at every move. So what I push for in the book-- is essentially that the ICC prosecutor should perhaps more intentionally and more explicitly take into account the context in which she's working in and the likely impact that her actions will have.

This can be assessed in various ways, and I'm not suggesting that the International Criminal Court and the prosecutor doesn't already assess this to some degree. They do and they're aware that they don't want to be a spoiler of peace, but I think we haven't quite sort of gotten there in terms of really fully taking into account sort of the political side of the equation. What the ICC does will affect the local political situation and armed conflict. And what happens on the ground will affect the possibilities and the possibilities for success of the International Criminal Court. So we need to recognize that. And just in a passing sentence before I get to my final point-- there's actually-- a short phrase in the Rome Statute, which was the treaty that created the ICC 20 years ago. It refers to the importance of the prosecutor assessing whether it's in the interest of justice to prosecute, which is sort of an ironic notion.

But maybe it wouldn't be in the interest of justice to actually prosecute serious crimes case. It's not defined as to what that means, but most people-- most legal scholars have pick up shed pretty far, including people who were there in Rome when the Rome Statute was negotiated, have pushed quite far to say, "Clearly this was a signal that this was the area where you could have an open door to take into account all kinds of other-- criteria, context factors."

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You can interpret the interests of justice in many different ways and very broadly, if that's appropriate. You can get maybe more justice in the medium to long term if you don't have immediate prosecutions now, for example. To make a long story short: The-- the prosecutor still has sort of stayed on a very narrow definition saying that only pertains to the justice in this specific case.

So it's sort of his-- his-- kept close the door which could be opened to allowing much more of-- of an analysis taking into account these many factors. I'm gonna-- conclude with my final point, which is the positive side of-- of this question, which is whether and how there's a deterrent effect deterring crimes or even deterring conflict, actually. And in fact, I have no hesitation concluding after looking at lots of cases and asking about these kinds of examples in many different contexts.

I have no hesitation concluding that clearly there is a deterrent effect from the work of the International Criminal Court that when somebody individually or groups know they're under the spotlight and that the ICC prosecutor is watching then they change their behavior. They don't undertake violence which was threatened or they cut back on the crimes which they were thought to be doing. So the deterrent effect I think is clearly there. That's positive. The unfortunate second part of that-- point is that it tends to be a relatively short term effect. So once the-- they feel like, "Oh, they're not watching anymore," then actually in the very same place the very same actions start up again. So there's various examples of that. So that's quite unfortunate. And the other unfortunate thing is that the original hope was that the ICC's existence would have more a general global deterrence and we would have less human rights crimes all the way around the world knowing that this international court existed to prosecute these crimes.

But in fact, it tends to be-- the deterrence tends to be-- at least from what I've found-- tends to be very specific to that place. So essentially that place and that time. So it does deter. There's been very powerful examples of that, but it's not as generalized as we would all hope and certainly was hoped when the ICC was founded. I'm gonna actually close my comments there. I've gone a couple minutes longer than I intended. But thank you very much, Aryeh. Look forward to the discussion. (APPLAUSE)

## **RICHARD DICKER:**

Good. I'm very glad to be here with Priscilla on the occasion of-- the launch of her book and of course-- with my-- long ago but in many ways still current leader-- Aryeh. So-- and with all of you-- again-- thanks. This is such an important conversation. And-- and that's-- that's the real reason I'm-- I'm-- I'm very glad we're having it-- and glad to-- participate. It-- it's an important conversation because the stakes are very high for the people of greatest concern, that is communities at risk where armed conflicts are taking place-- victims and potential victims.

And I think that-- unifies-- the perspective of-- how we're looking at this, though we see-- the problems and solutions-- differently than-- Priscilla has outlined them in some ways.



first, there is a problem. And I would say that the reason there is a problem-- in-- in negotiating peace and justice is because the norms, the prohibitions on torture and genocide-- and war crimes that came about immediately after the Second World War in the convention to prevent and punish genocide in the Geneva Conventions in the 1948 convention against torture what's happened is that institutions have been created by the international community to enforce norms that have been on the books since 1948, 1949. And I think that's a darn good thing for the communities most at risk. So is there a problem?

Yeah, there is. Is it because of the ICC prosecutor's-- interpretation of interests of justice? I don't think so. I think it's because whether with the-- Yugoslav War Crimes Tribunal, whether with the special court for Sierra Leone, and with the ICC judicial institutions that have a mission to investigate and prosecute have come into being and, if you will, upset the traditional-- operations.....where mediators could offer amnesties, explicit or implicit, to individuals who were responsible for horrific crimes. So that's why we have a problem. And-- and I welcome that problem, frankly, because it's a sign of progress. I-- I think-- justice-- has made enormous contributions. And-- and just to bullet point them. For example, in-- and this is touched on in-- Priscilla's book-- with one Charles Taylor.

Now, Charles Taylor-- and Priscilla goes into this-- the prosecutor at the special court for Sierra Leone unsealed the indictment when-- at that point President Taylor was in nearby Ghana for peace talks. The effect and-- and Priscilla-- acknowledges this-- was to marginalize Charles Taylor and eliminate any potential of-- playing a role in a transitional government. And I would say-- and Priscilla says that was a darn good thing.

We saw the same phenomena earlier with Ratko Mladic and Radovan Karadzic, indicted by the Yugoslav tribunal and thus unable to participate or disrupt the negotiations that led to the armed conflict in the former Yugoslavia. So I think justice's role has played in some, not all, situations a very important marginalization of bad actors. I think it also helps take guilt from the collective to the individual. It helps make clear these were individuals committing heinous acts.

It wasn't everyone belonging to this nationality or ethnicity. So those are two important value-adding functions justice provides in the long run. And I think this is in-- in-- in dispute, certainly justice and-- criminal trials provide a bulwark against revisionist thinking. And-- and think of that in regard to-- the Holocaust and what role the Nuremberg Proceedings played in-- in staunching, not stopping, but staunching-- revisionist thinking-- of scholars of-- of one sort or another.

I think justice also helps bring an end to renewed cycles of violence. The downside-- to talk about the negative for a moment-- is where justice is bypassed, or as I like to say, thrown under the bus, in the hope of arriving at a peace settlement. You can see it again and again. Sierra Leone, 1999, the Lomé Peace Accord that gave Foday Sankoh, the head of the Revolutionary United Front whose-- signature act was amputation of limbs in Sierra Leone. And the Lomé Accord gave Mr. Sankoh an important position in government, and shortly thereafter conflict broke out again in Sierra Leone. Afghanistan. The bomb conflict of-- 2002-- where-- Lakhdar Brahimi said, "Justice? Push it to the side. Bring all kinds of

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warlords into the Loya jirga, the council to create the next government, and let them serve in government." What that did with the likes of General Dostum, who was responsible for suffocating hundreds of suspected Taliban in container-- trucks-- it made him an important official in the government.

So sidelining justice, I would posit, doesn't often have the hoped for benefits-- that we hear about in practice. And at the end of the day puts the community that we are most concerned about at renewed, if not greater risk. Let me say a word about Colombia. And Aryeh, we know each other well enough. So you'll, you know, hit me or something when I go on too long.

## **ARYEH NEIER:**

You're doing fine.

## **RICHARD DICKER:**

Okay.

## **ARYEH NEIER:**

So you can keep going.

## **RICHARD DICKER:**

Okay. Just-- a word or two about Colombia. I think that Human Rights Watch has had real concerns about this agreement. It's not that we are against the end of armed conflict that has gone on-- as-- as Priscilla has made clear for 50 years and had hundreds of thousands of victims. It's whether or not the details of the agreement will mean meaningful justice for those responsible as well as likely to contribute to a durable peace.

We've seen problems in that agreement and we have been fierce in articulating those-- concerns in service of our underlying theory of change. And that is when you see problems you can them out and you put pressure as best you can-- on the relevant actors to-- to make changes. The concern in the Colombia agreement-- and I wanna say right here-- we hope it works. I mean we-- we are not in opposition to a positive implementation. We want to see this work.

And we are committed-- to trying to strengthen the provisions so that it will work. But a real problem is the definition given to responsibility of senior commanders, okay? There is a distinct variance in the Colombia definition of how commanders can be held to account or what is required to hold commanders to account from the international standards set in the Yugoslav Tribunal and set at the ICC. That is enormously concerning because we fear that

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those most responsible, given the definition that has been worked out, will be able to avoid criminal accountability.

One concern. Second concern-- the-- the penalties imposed. It's not that we are addicted to imprisonment. What we have consistently called for has been deprivation of liberty of those who go before the special jurisdiction for peace. And to our eye the-- limitations of-- deprivation of liberty, as Priscilla's comment highlighted, it's very unclear. Does it mean the village? Does it mean the province? What does it mean precisely? We don't know.

And we think there needs to be clarity and enforcement in instances of non-compliance with the terms of the deprivation of liberty. Very much related to that is what Priscilla flagged at the outset. That is those-- in the FARC, the guerilla movement, are free to campaign and hold political office while serving their reduced sentence in these yet unclear and obscure-- restrictions on their movement. That strikes us as very concerning. And Priscilla was absolutely correct. The FARC made clear from day one-- they see this as a means of them putting down their weapons and entering into political life.

But to allow those sentenced to campaign for office and hold political office-- to our eye that undermines the gravity of the crimes that they have confessed to. And let me just underscore. These are not-- you know, ordinary-- burglaries or even ordinary murders, if there are any ordinary murders. They're not ordinary criminal law offenses. These are the most serious crimes under international law. And to allow those who have confessed and been convicted of these crimes then to campaign and hold political office seems to us to-- to really-- cut-- the seriousness out of the sanction imposed.

I-- I should wind up. I-- I do want to say that-- deterrence-- and I-- I share Priscilla's assessment of deterrence. We have seen it as well-- as a result of ICC prosecutions. But it is localized and it is short-lived. I-- I've come to the view that it will take years, if not decades, to create the kind of deterrent effect from international prosecutions that we (MIC NOISE) all want in-- in terms of precluding or limiting the commission of these most serious crimes. So I share that and take it a little bit further. And-- and I'm struck today by the commission of-- truly horrific crimes in a whole number of states that, unfortunately but not surprisingly, are outside the reach of the International Criminal Court. I'm thinking Syria, Iraq, Yemen, South Sudan, and most recently Myanmar. I mean I-- I'm not a political scientist, but I do believe it's not coincidental that this rise of crimes has taken place in all-- in countries that are beyond the reach of accountability.

That's not the only factor, but it's very disturbing to me. And I think the ICC needs to up its game to improve its practice and become a more-- persuasive beacon for accountability, both in those countries-- that have joined the ICC treaty and those that are beyond the court's reach, as in Syria, Iraq, et cetera. Let me stop there and-- again, thank you, Priscilla.

## **ARYEH NEIER:**

Thank you very-- very much. I will add to this-- just-- a little bit. First, on-- on the question of-- deterrence. The difficulty with-- with deterrence is one-- is really forced to be anecdotal.

You can't really-- prove the-- deterrence. And yet-- I think that-- if one has-- been active-- in this field-- for-- a long period-- you do see-- enough circumstances-- in which it seems as though-- deterrence-- is-- a factor.

I-- I-- I will tell-- one anecdote. And that is-- during the-- the war in El Salvador-- I recall-- going at one place-- at one point-- to-- a small-- place in El-- El Salvador where there was a Salvadoran military outpost-- but the general area-- was-- controlled by the-- the guerillas fighting the-- the armed forces of El Salvador. It was a place called San Francisco Gotera. And-- I went to see the-- the military commander the the ase-- in should Gotera.

And-- he had a small office. And-- on the door-- to his office as I came in-- he-- he had-- a full page-- cut out of one of the newspapers about the-- trials taking place-- in Argentina at that point of the generals-- who had-- been members of the-- the military juntas that-- had ruled the country for the-- seven and a half years of-- of military dictatorship. And-- it seemed to me-- he was-- intent on-- showing his military associates who were-- most of the people who would've entered that office-- what the consequences could be-- of the-- the kinds of crimes that were-- attributable-- to the-- the Argentine generals.

And-- I could tell you-- a great many-- anecdotes-- along those lines. So I do think-- not-- something that can be proved, but I do think-- that-- deterrence is a factor. In-- in my own thinking on-- this issue I've had-- a very difficult time-- and still have a difficult time-- coming up with-- with generalizations. The-- my impression has been that-- each case is sui generis. That-- you have to-- look at the particular circumstances that justice and peace are both-- crucial-- that if you possibly can-- but you may not be able to.

If you possibly can-- you try to achieve both. If you can't-- achieve both-- you try to achieve a measure-- of-- each-- a measure of justice if you can't get-- justice. I-- I-- I'll use a couple of extreme-- examples. In-- in World War II the Allies-- took the position-- that-- the only way-- that the-- the war would end-- was with unconditional surrender-- that if the-- the Nazis had tried to negotiate-- any-- exit for themselves-- that would not have been-- a basis for-- ending the-- the war.

And given-- the-- the level of atrocities-- that had been committed it's hard really to imagine-- any other-- approach in-- in those circumstances. In fact-- a very large number of people-- were killed in the waning days-- of the-- the war. Probably hundreds of thousands-- were killed in-- the-- the last-- months of the war in 1945 after the war had been-- won and the-- the Nazis-- had been-- defeated. But the demand for unconditional-- surrender nevertheless, despite the-- the carnage that took place in 1945 and-- despite the-- the immense-- loss of life-- seems to me the only possible-- reaction in those circumstances.

Now, an extreme case on the other side-- or I think of it as an extreme case-- is what took place-- in-- South Africa in the-- the transition. And that is that-- essentially the-- the nationalist government-- in-- South Africa-- made it clear that they would not-- agree to a peaceful transition-- unless there was an amnesty. And an amnesty had to be-- written in terms of the-- the temporary constitution-- that would govern-- South Africa during the-- the period of transition.

And Nelson Mandela-- agreed-- to the-- the amnesty and the-- the temporary constitution. His justice minister-- a man named Dullah Omar-- made the best-- out of the situation. He

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said-- "Yes. Amnesty is required by the temporary constitution, but amnesty has to be individual rather than collective. And therefore, in order to-- to qualify-- for amnesty-- people had to acknowledge the crimes they committed and-- make full disclosure."

And that's what-- ended up making the-- the South African Truth and Reconciliation Commission-- a particularly-- effective instrument. But, you know, there were people who-- who challenged that. The family of Steve Biko-- went to-- to court-- to challenge-- the amnesty, and the South African constitutional court-- ruled against-- their effort to-- to challenge the amnesty. My-- my feeling in that circumstance was that if-- the transition had not taken place in that fashion, if there had to be armed conflict, at least a million people-- would've been killed-- in-- South Africa.

And-- it's hard for me to-- to criticize Mandela's decision in that circumstance to-- to go along-- with the amnesty even though some terrible crimes-- had been committed in-- in those circumstances. So, you know, these are opposite-- results-- in-- different cases. And-- I think-- each case-- is different. That you have to try to make the best-- of-- a situation. That if you are going to-- try to make peace and-- the same time-- insist on justice you may have to restrict justice-- to the-- the top-most-- persons-- who are-- ultimately responsible for-- the most heinous crimes.

You may have to say that this will not extend-- beyond-- a certain-- level. And, you know, that can end up putting a great deal of pressure-- on those top-most persons-- to go along-- with-- a peace settlement. Because-- those who have carried out-- the crimes certainly are responsible for their own acts. They deserve to be prosecuted and punished. But the persons who are-- the commanders deserve it-- even more. And-- making sure that justice is available for that top-most level may be the-- the best that you can achieve-- in-- certain circumstances.

But as I say, I-- I have a hard time-- coming up with-- a way of-- determining-- what approach to use-- in advance. I think everyone one of these-- circumstances-- has-- its own characteristics-- and that-- you really have to do the best-- you can. Just-- peace is immensely is important, but justice is not less important. They are-- comparably-- significant. And you have to weight in every circumstance-- what is the-- the best result that you can-- possibly achieve. So-- Priscilla-- do you-- do you wanna react to those comments?

## **PRISCILLA HAYNER:**

I'm happy to. I'm also conscious of the time, being sure-- maybe I'll just say two words--

## **ARYEH NEIER:**

Okay.

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## PRISCILLA HAYNER:

--and then open the floor so that we have-- more of a chance for people to come in on the discussion. But I mean perhaps just to say-- perhaps Aryeh's comment responded to exactly what I was gonna say in terms of Richard's comments, which is that I-- I certainly was not intending to suggest in my original intervention that-- that justice should be sidelined. Rather, that there should be a strategic approach to justice.

And I think on this we all agree. But I think Aryeh's examples are very much down this line of-- of reasoning. You have to think about that place and that time and what the-- possibilities are. Now, when I say you, I'm-- everything from a prosecutor who may have jurisdiction there, to local actors, to a mediator, to international NGOs as well that will affect things locally. And they-- and they do and-- and should in many respects.

Because I think that voice is also very important. But to think about this and-- and approach it-- strategically-- and context-specific. In a sense, the-- the examples-- just responding further to-- to some of Richard's points-- although, I won't have a chance to-- to respond to-- to all of them. But Colombia is certainly a country that has suffered not only over 50 years of armed conflict, as Richard said, but many, many different armed groups.

It's not just the FARC. It's many others that were demobilized 25 years ago. And some of those people who were demobilized in the late-'80s are now actually central persons in politics. One of them actually is a presidential candidate in the election next month. So-- and there's also one in particular fairly significant armed group, the ELN, which is still armed and still fighting. They are sort of on and off in peace talks with the government now. On and off in terms of a ceasefire holding or not. But there's still armed conflict in Colombia. So FARC was the biggest group, but everything isn't over there. And certainly the ELN getting them demobilized will be probably even more difficult than getting the FARC-- FARC's agreement-- for a number of reasons. So to-- to approach the issue of justice in a way that doesn't appreciate the importance of trying to get the armed groups to stop and-- and allowing the national actors to find a solution that will work in that context while fully respecting their legal obligations.

I think-- I think we as those that are outside of any country, Colombia and all the others that we're talking about, I think we need to be sober and respectful as to when and how we come in, whether we're NGOs or whether we're the ICC prosecutor, who of course she has her mandate-- to prosecute. But to be cognizant that everything is taking place in very tricky and politicized environments and that-- and that you as an outsider is playing very much a role in that.

And you could-- as I mentioned in some of my earlier accounts, you could feel that resistance even from, you know, the Colombian human rights community. It's very strong and very smart and very deep-rooted. And they really felt like they could find a solution, but they needed that space to do so as well as-- as well as the political class in Colombia. So perhaps I'll just leave it there. There's all of these issues we could discuss at much more

length, but I think it's-- it's fair to open up for the floor. Thank you very much.  
 (APPLAUSE)  
 (OFF-MIC CONVERSATION)

## **BRENDA TANEHAM:**

My name is Brenda Tanebam (PH). One comment and one question. Reconciliation is not working in South Africa because the white farmers are running to Australia. Their land is being taken again. And-- sometimes-- well, that-- that was more the comment. The question is are these political groups jealous of one another? Are they causing trouble? And is the ICC also-- experiencing that kind of feeling based on the competition between the groups and themselves? And-- is the ICC political?

## **CARLOS FERNANDEZ:**

Yeah. Thank you very much-- Priscilla, for the presentation. I wanted to ask you--  
 (COACHING NOT TRANSCRIBED)

## **CARLOS FERNANDEZ:**

Carlos Fernandez. NYU-- Scholar in Residence at-- at New York University Center for Human Rights and Global Justice. I want to ask you-- it seemed to me that there was-- in your-- in your presentation-- to detect a change of policy-- in the UN when it comes to amnesties. And I'm referring to the-- the previous-- policy on no amnesty for crimes against humanity war crimes and genocide-- which was I think a side note on especially in general - in the-- in the peace agreement in Sierra Leone.

And afterwards-- it was-- in the-- in the-- in the-- I think that was around five-- principles against impunity. It was also-- extended to-- gross-- violations of human rights. And for your presentation it seemed to me that that-- UN policy is kind of changing. That's what I understood. So I would like to ask you if that is the case. Thank you.

## **CHESTER CHEN:**

Okay. So this is actually to follow up on the question of-- whether, let's say, justice and the enforcement of it by the ICC or in general indeed is a political one. My name is Chester Chen (PH). I happen to be a New York City social studies teacher. And-- so just looking at a couple of examples in history, for example. Should a Blenkin (PH) be considered a war criminal? What about Moshe Dayan? What about Curtis LeMay?

I-- I haven't seen any cases where these individuals have even been considered for justice. So I-- I think it's slanted in some ways. That's not to say that enforcement or the ICC isn't important. In fact-- I am deeply gratified by the investigation of many of the criminals that

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you all had mentioned. And the-- I think I really feel evenhanded since of-- their priority of-- peacemaking over justice for its own sake.

So I-- I deeply appreciate and respect the efforts that have been made. I think it's something that-- I'm definitely going to get the book. And-- I can't say enough to support the efforts that have been made. I-- I am, however, once again, concerned about the issue of the victors creating the sense of what justice is. Thank you.

## **GEORGE VICKERS:**

George Vickers. Ex of the Open Society Foundations. The-- I just wanted to sort of-- sort of a combination-- comment question, but very brief in keeping it. 'Cause I always obey-- Aryeh's orders. The-- the-- one is that the-- a lot of the discussion around this seems to me framed often in terms in-- in the-- as though all questions of justice have to be settled in the context of the settlement of the conflict, you know, in-- in conflict situations. And that if-- if they're not that-- then there's no possibility of dealing with them.

Now, my-- my own sense about a number of experiences-- which were not-- armed conflicts ending, but also transitions from dictatorship to-- democracy in which supposedly avenues of justice were closed off by constitutional methods, as in Chile, or by-- just by the realities of power suggest otherwise. And I think that's important-- both because the moment of, you know, trying to settle an armed conflict is the most difficult time.

Not only because of the-- the people at the negotiating table-- don't wish to or intend to to the extent they can subject themselves to accountability, but second, the victims and the potential victims-- have no reason to-- and America not-- at all certain whether the terms of an agreement will hold and-- if they come forth and testify, and-- and-- and-- and insist on prosecution and accountability. That, in fact they-- they-- and rather than being-- rewarded and feeling fulfilled by that will in turn get killed because the agreement didn't hold.

And I think there's at least-- there-- there are several places that raise questions about that, but-- Chile is one where the creative interpretations of-- of local justices, not just international-- frameworks. South Korea is another where-- you know, dictators were in fact-- ultimately brought to justice-- because of the continuing-- insistence upon finding accountability and working around frameworks of-- of-- impunity that were established at times of transition.

So I don't think one needs to give up on the questions of that, although I understand the symbolic importance of it. The second is I think from my own experience at least that one has to be humble about the role of the international community. The international community in settling armed conflicts can advise, can pressure, can provide expertise and-- and suggestions. But the-- the reality is that the-- the-- the-- the will, (LAUGH) if you will, of the international community to enforce the constructs it offers-- or imposes-- are limited and insufficient without the actual buy-in of local actors.



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In-- in my experience the-- the will of the international community to provide support-- for-- an-- an agreement the it helped-- construct and impose is about five years. That's how long people are willing to fund it-- and to provide political press for it-- until the next conflict comes along or the next domestic issue that turns attention elsewhere. So you-- so the notion that the creation of an international framework of law can actually-- by itself create the ongoing pressure and power I'm skeptical-- based on my experiences of it. So that-- and so I think it puts me sort of somewhere between Pri-- not Pr-- somewhere more with Aryeh and Priscilla on this side of the question.

## **PRISCILLA HAYNER:**

Absolutely. Thank you so much. And I'll repeat-- I wanted to especially address the-- the second question-- and then the others. And I don't think everyone heard the second question. The mic wasn't quite working then. So the question was whether my comments reflected a change in UN policy-- in terms of the amnesty. So the UN has had a policy for the last almost 20 years now-- that the UN-- personnel and representatives will not support amnesty for international crimes, crimes against humanity, war crimes, genocide.

That is still stated as a policy. It's not stated as necessarily international law, which is interesting because law is in development. Some people would argue that's actually also law. But to make it simple: This is UN policy. That has not changed. And so I'm very glad you raised that question. And also to clarify that that's also not what I was trying to suggest. And it may have been inferred in my comments. So I completely appreciate that and I appreciate your question.

So what I'm suggesting is actually not-- when I say allow room for flexibility, let's say, for example, in Colombia, Colombia actually was never considering amnesty for these crimes. Amongst all the various kinds of ways they were considering approaching it they knew that that was out of bounds not only because the ICC was watching, not only because their national law excluded it, which was probably the first point of-- order, the first port of call if there had been an amnesty, but also there's an inter-American system which also would've cut it down and changed.

So they knew that just on the face of it-- and-- and Colombia is very legalistic. They are very sort of by the book. And-- and-- and human rights issues and impunity issues are a big issue there. And so they would never have considered an amnesty outright. But they were trying to look at all different kinds of ways to cut in which would've been legal but-- but would've also allowed the FARC to agree. And as-- as we've discussed, they came to that-- that particular arrangement-- as-- as-- as we've discussed.

But it wouldn't be for an amnesty. And I think in other cases as well there's various-- alternative approaches that are being considered that are not amnesty. So-- so just to be very clear about that. So I appreciate that. I mean I-- just for the record, I'm-- I'm actually a UN consultant, although full time. So I don't-- anything I say doesn't represent the UN in-- in

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any-- in any regard. But-- but at the same time I-- I fully-- agree with and think that that policy has been quite-- important in setting things out from there.

So perhaps-- perhaps just two other brief comments. One is that-- there were two questions that pertained to how political justice is de facto or could be perceived as being. Or just the question of whether in fact we should see it as-- as political per se. I would restate that as saying-- rather than saying justice is political, but to say that the-- the kind of justice that we're looking at is taking place very much in political contexts that you can't escape, right? So you-- you're-- you're unfortunately-- you, whoever you might be in international community, local actors, you're constrained by the realities in which you-- you work. It's not that we all wouldn't want to say, "Well, these principles are X, and therefore, X will happen." A lot of these things we can't resolve through principles. We actually have to resolve through-- through practical and creative solutions that take into account the principles absolutely. But that doesn't actually resolve the challenges if we just go by principle.

So to say that justice is affected by politics and politics is affected by whatever justice-- initiatives, both of those are true. But that's different than saying that justice therefore just politics or-- for example, the ICC doesn't have jurisdiction in a number of really key states, as Richard-- correctly stated. And that's unfortunate. You know, things are moving in the right direction, but that's also not gonna resolve all our problems either.

And perhaps just as a final comment-- to respond to George Victor-- Vickers'-- comment-- that it's not-- and-- and that's right. We shouldn't just think of these issues in the context of what actually takes place at the moment of transition. Not that transition takes place one day to the next, but at the moment of-- of a war being negotiated and agreed to be ended and disarmament taking place. That's true. And as you said-- and I agree-- you know-- you know, some people will argue that, well, then therefore maybe we shouldn't be too concerned about what the agreement is in terms of amnesty.

Because then you can sort of change it later and we can sort of-- well, after-- after things change the amnesty can be changed, and therefore-- and I've heard people argue that in the past. I don't think that's-- the good or smart route-- because I think that sort of closes more doors than necessary and creates more difficulties in the long run getting-- getting to justice. But at the same time-- and this is actually-- was a surprising and-- and-- and important conclusion, which I'm, to be honest, still mulling over what it means.

But it's rare to find a peace agreement that is implemented as it was agreed in particular on the justice component. So ironically, one works very, very, very hard, especially those who care deeply about it-- at-- at the local level, to get the right kind of agreement and armed groups are fighting to get their protections in place. After they're disarmed, after things start shifting, often actually how things are implemented changes.

So we're seeing this in Colombia. It's actually quite a difficult time in Colombia because there's a lot of shifting as to what the agreement will actually be implemented as. And we can see it in many other places. In South Africa, as Aryeh noted, it was a positive change.

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There was very little in that final agreement, this interim constitution, but they used that-- those few words to create actually a much more robust system of requiring people to tell the truth before giving them amnesty.

So you see all kinds of shifts that people didn't see coming. And especially the people that were most-- you know, sort of involved in the conflict they didn't see coming because the-- the powers that be also changed in terms of who is literally at the table and the discussions going forward, be it members of Congress, civil society-- victims. They have a much greater voice as one tries to put things in place.

So I think George's-- George Victor's comment-- Vickers' comment made-- made clear that-- that-- that over the time or the years things do shift. The trick is to get them to shift in-- in a positive direction. But-- but-- but it's right. We don't actually have it all sealed up at the point of agreement even when people think they may. Thanks very much.

## **RICHARD DICKER:**

Briefly-- I'll focus on the question about-- the ICC in particular and-- politicized justice. And-- as the departure point-- I wanna reference Priscilla's comment a moment ago which I think is spot on that-- justice is being-- carried out on a highly political and politicized landscape which creates very-- steep challenges for those tasked to apply-- justice. I'll tell you what concerns me-- in regard to the politicized justice. Two-- two examples-- two-- two themes.

First that the ICC whether it's in Cote d'Ivoire-- or Uganda-- that it not restrict itself to the side of the insurgents in terms of investigation and prosecution. And I think it's imperative that the ICC prosecutor complete her investigation-- and either-- have sealed arrest warrants or public warrants-- for those who were on the winning side in the Ivoirian Civil War, who Human Rights Watch documented were responsible for serious crimes in the west of the country.

So that kind of looking at crimes committed by all parties in a conflict is imperative in terms of the legitimacy of any justice institution, the ICC in particular. The second issue that concerns me is what we all know as the fundamental unevenness or double standards that permeate the international justice undertaking. In other words, as best we know-- Vladimir Putin is not worried about an arrest warrant or an investigation by the International Criminal Court. Donald Rumsfeld may have been. The--

## **ARYEH NEIER:**

It restricted his travel plans.

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## **RICHARD DICKER:**

It did restrict his travel plans. But the reality is up-- and that's a good thing. But up until now there haven't been investigations that could reach to the most powerful states. And, Aryeh, I remember you saying back in 1997 or 1998 that the ICC needed to be a court that could reach not only those associated with the less powerful states but reach to those from the most powerful states. I think the ICC is trying to correct-- a decade of-- worrying practice from that perspective in that it has opened an investigation in Georgia that could look at-- some on the Russian side.

I expect the ICC judges will approve the prosecutor's request to open an investigation in Afghanistan that includes looking at U.S. armed forces personnel and CIA personnel. And I think that is a very important step. So those are my two criteria of politicized justice by the ICC. And I think we've got to push-- for them to take on that difficult task. And I'll just wrap up by-- by saying that I think really my point overall is that justice does contribute to a durable peace.

There are some tools-- and Priscilla refers to them in the book-- timing of a prosecutorial decision-- and one you've referred to, Priscilla-- whether an arrest warrant is made public or kept sealed. And I think those two tools, if used well, can help reduce some of the tension. And-- and-- and finally-- we need a lot more than criminal trials. And I couldn't agree more with the point that this is one tool, criminal prosecution, in what must be a very large toolbox to help heal the-- the scars and the wounds that come about from these kinds of-- conflicts.

Trials have gotten so much attention because they are the most controversial aspect, I believe. But let's not lose sight of the picture that it's only one element and ignore-- truth telling documentation, vetting, reparations, and economic reconstruction, all of which are vital.

## **ARYEH NEIER:**

Thank you. Priscilla, would you like a final word?

## **PRISCILLA HAYNER:**

I don't think so.

## **ARYEH NEIER:**

Okay. (LAUGHTER) All right.  
(OFF-MIC CONVERSATION)

\* \* \*END OF TRANSCRIPT\* \* \*