



Q U A R T E R L Y

July–December 2007
ISSN: 1384-282x

INTERFACE BETWEEN PEACE AND INTERNATIONAL JUSTICE IN AFRICA

- The Dynamics of International Criminal Justice
- A Holistic Approach to Attaining Peace and International Justice in Africa
- The Interface between Peace and International Justice in Africa
- National Peace and International Justice
- Peace and International Justice: The Contribution of the African Union (AU)
- Experiences of the Great Lakes Region
- Peace, Security and International Justice in Africa
- Peace and International Justice: Competing or Complementary Principles
- Peace and / or Justice: The Dilemma of Power Sharing
- Gender Crimes
- Alternative Forms of Justice
- National Courts and Complementarity
- Peace and International Justice: Making the Link
- Africa and the ICC: The need for closer Partnership
- African Courts and Accountability for International Crimes



“There can be no healing without peace; there can be no peace without justice; and there can be no justice without respect for human rights and the rule of law.”
Kofi Annan, Former U.N. Secretary-General

ABOUT AFRICA LEGAL AID (AFLA)

Making Human Rights a Reality

Africa Legal Aid (AFLA) is a small Pan-African NGO devoted to promoting and protecting individual and collective rights throughout Africa and to challenging the impunity of gross human rights violators. AFLA provides leadership and support to key institutions and organizations working for the respect and recognition of human rights through legal protection. The tools AFLA uses to accomplish these goals include capacity-building training programs, research and analysis, media outreach, publications, a web site, a lecture series, networking and consultation with selected organizations and individuals. AFLA has close working relations with the International Criminal Court (ICC), the International Criminal Tribunal for Rwanda (ICTR), the African Commission on Human and Peoples' Rights (ACHPR) and the African Court on Human and Peoples' Rights (ACHPR). AFLA has offices in Accra (Headquarters), The Hague, and has registered an office in South Africa.

Through implementation of its multiple tasks and activities, AFLA has over the years created an extensive network of leading experts, judges, academics, human rights advocates, and policy makers most of whom have become loyal supporters of AFLA and its activities.

Africa Legal Aid on the World Wide Web



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AFLA's website, www.africalegalaid.org, provides a wealth of information for the human rights community, including legal documents, excerpts from past issues of the Africa Legal Aid Quarterly and AFLA's books, conference proceedings, reports and other documents. The website contains information on Africa Legal Aid's activities and programmes, including:

- *The Interface between Peace and International Justice in Africa*
- *The New African Court on Human and Peoples' Rights*
- *Africa and the Universal Declaration of Human Rights*
- *Litigating Economic and Social Rights in Africa*
- *Universal Jurisdiction for Crimes against Humanity*
- *African Perspectives on Universal Jurisdiction for International Crimes*
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- *The AFLA Quarterly*
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ABOUT THE AFRICA LEGAL AID (AFLA) QUARTERLY

In a strategic review of AFLA, this is what the external facilitator had to say about AFLA's Publications: *An important and critical medium for AFLA's work has been its publications. Particularly significant in this regard has been the AFLA Quarterly, the flagship of the organization. The AFLA Quarterly is now considered by many academics and human rights advocates in Africa and abroad to be an important source of information for human rights and legal developments relating to Africa. It is shaping the way academics and advocates think about complex human rights questions. It graces many a shelf around the world and is boldly expanding and revolutionizing the way both Africans and non-Africans think about African Human Rights issues.*



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July 2007 – December 2007

ISSN: 1384 – 282x

The AFLA Quarterly is published
by AFLA, ACCRA

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The views expressed in the AFLA
Quarterly are those of the contributors and
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Published by Africa Legal Aid

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Table of contents

The Dynamics of International Criminal Justice <i>H.E. Adama Dieng</i>	6
A Holistic Approach to Attaining Peace and International Justice in Africa <i>Evelyn A. Ankumah</i>	8
The Interface between Peace and International Justice in Africa <i>H.E. Luis Moreno-Ocampo</i>	10
National Peace and International Justice <i>H.L. Justice Georgina T. Wood</i>	14
Peace and International Justice: The Contribution of the African Union (AU) <i>Hon. Nana Addo Dankwa Akufo-Addo</i>	16
Peace, Security and International Justice in Africa <i>Prof. Shadrack Gutto</i>	19
Peace and International Justice: Competing or Complementary Principles <i>H.E. Fatou Bensouda</i>	22
Peace and International Justice: Competing or Complementary Principles <i>H.E. Hassan Jallow</i>	24
Peace and / or Justice: The Dilemma of Power Sharing <i>Dr. Jeremy Levitt</i>	27
Peace and / or Justice: The Dilemma of Power Sharing <i>Dr. A..P. van der Mei</i>	31
Peace and / or Justice: The Dilemma of Power Sharing <i>Phakiso Mochochoko</i>	34
Gender Crimes <i>Brigid Inder</i>	37
Gender Crimes <i>Patricia Viseur-Sellers</i>	41
Gender Crimes <i>Nana Oye Lithur</i>	47
Alternative Forms of Justice <i>Beatrice Le Fraper du Hellen</i>	53
Alternative Forms of Justice <i>Judge Dunstan Mlambo</i>	56
Alternative Mechanisms of Justice: The Case of Northern Uganda <i>Caroline Ort</i>	61
National Courts and Complementarity <i>Justice Emile Short</i>	64
National Courts and Complementarity <i>Nsongurua Udombana</i>	70
Experiences of the Great Lakes Region <i>Francis Dako</i>	73
Peace and International Justice: Making the Link <i>H.E. Adama Dieng</i>	76
Africa and the ICC: The need for closer Partnership <i>Judge Fatoumata Diarra</i>	84
African Courts and Accountability for International Crimes <i>Mouhamed M. Kebe</i>	88
Appendix:	
Cairo-Arusha Principles on Universal Jurisdiction In Respect of Gross Human Rights Offences: An African Perspective	92
Excerpts of the Rome Statute of the International Criminal Court (ICC)	95

The Dynamics of International Criminal Justice

H.E. Adama Dieng

U.N. Assistant Secretary-General, Registrar of the International Criminal Tribunal for Rwanda (ICTR)



H.E. Adama Dieng

It is with great honour and humility that I accepted the invitation of our sister and friend, Ms. Evelyn Ankumah, Executive Director of Africa Legal Aid to assume the noble responsibility of being a moderator at the opening ceremony of this colloquium on the Interface between Peace and International Justice in Africa.

May I please take this opportunity to welcome the Distinguished Guests and to recognize the presence of His Excellency Honourable Nana Addo Dankwa Akufo-Addo, Minister of Foreign Affairs, Regional Integration and NEPAD of the Republic of Ghana, Honourable Lady Justice Georgina T. Wood, Chief Justice of the Republic of Ghana, His Excellency Luis Moreno-Ocampo, Prosecutor of the International Criminal Court, and Professor Shadrack Gutto, Director of the African Renaissance Studies Centre of the University of South Africa and Acting Chair of the Governing Council of Africa Legal Aid.

Once again, Ms. Ankumah is offering us today and tomorrow the opportunity to gather in the capital city of the country which is known throughout the world as the birthplace of the African pan-africanist movement, which was spearheaded by the founding father of the Republic of Ghana, the late Dr. Kwame Nkrumah.

Excellencies and distinguished guests, the times we live in are turbulent and difficult. As you can see we live in a world in great need of global thinking and global solutions. By welcoming you to this opening ceremony, I am confident that we shall share views and thoughts about various themes that are part of the two-day agenda for this colloquium. This will enable us to contribute to the growing reflection about the link between Peace and International Justice in Africa.

As you know, the African continent has been for the past three decades the theatre of major conflicts which have claimed hundred thousands if not millions of lives of innocent people, mostly civilians. Numerous sources of tension are lingering in different regions of Africa. The African leaders who fuel those conflicts undoubtedly do so because of long prevailing culture of impunity on this continent.

Given the unprecedented momentum gained by the system of international justice over the course of this decade, one may assume that this will have a significant impact in eradicating the culture of impunity and prevent the recurrence of conflicts generated thereof.

The equation between the emergence of international justice and the prevention of conflict leading to sustainable peace in Africa is however far from being straightforward. Wherever international justice has been called upon to sort out a nation, it was to punish persons responsible for serious violations of international humanitarian law than prevent the occurrence of a conflict. In Rwanda, Sierra Leone, Burundi, the DRC, Uganda, Ivory Coast and in Sudan, just to name few, the idea of international justice is put across as a response to gross violations of human rights already perpetrated. This however, ought not to lead to the hasty conclusion that international justice merely serves to punish and not to prevent.

The deterrent function generally attached to criminal justice, also applies at the international level. This is more so when one understands that international justice is often an alternative to the national justice unwilling or unable to perform its normal functions.

In the new international legal environment characterized by the existence of numerous international criminal jurisdictions, in addition to the concept of universal jurisdictions, all people and particularly faction leaders responsible for devastating conflicts must know that sooner or later they may be held accountable for their deeds.

Excellencies, Distinguished Guests, one may rightly consider that Peace and International Justice in Africa are therefore two key components of an equation that is far from being straightforward, but, when these two are combined with two other components, good governance and respect of rule of law, they may undoubtedly play important and dynamic roles in fostering Africa's socio-political and economic development. During the next two days, I am convinced that we shall do everything we can to ensure that, by the end of this colloquium, we have made real progress in our thinking process and in the adoption of a coherent and effective plan of action that stands out as a sign of hope for Africa in its quest for peace, security, justice and sustainable development.



“AFLA has played a pioneering role in developing African Perspectives in International human rights law”

A Holistic Approach to Attaining Peace and International Justice in Africa

Evelyn A. Ankumah

Executive Director, Africa Legal Aid (AFLA)



Evelyn A. Ankumah

Honorable Chief Justice, Honorable Minister, Excellencies, Prosecutors of the International Criminal Court and the International Criminal Tribunal for Rwanda, Excellency, Mr. Chair, Dear Colleagues, Dear Friends.

On behalf of Africa Legal Aid I thank you for having accepted the invitation to attend this conference. I am pleased that you have come in such great numbers. I am very grateful for this, knowing that many of you had to travel from afar and that you all in spite of your busy schedules and agendas have found the time and made the effort to be here today. Thank you, your presence is greatly appreciated. I would like to say to you “Akwaaba,” welcome. I hope you will enjoy your brief stay in Ghana.

Africa Legal Aid is an International and Pan African Non Governmental organization that was established in 1995 in Maastricht, The Netherlands. The choice of venue for the launch an African Organization was largely coincidental, an accident of history. AFLA has since moved its Headquarters to Accra which is now the anchor of AFLA’s Pan African and International Operations. The office in Maastricht has relocated to The Hague, the international legal capital and is on the same premises with other international organizations working to end impunity, including the Women’s Initiative for Gender Justice and the Coalition for an International Criminal Court, both of whom are represented here today. AFLA has registered a satellite office in South Africa.

At the time when Africa Legal Aid was launched the African Charter on Human and Peoples’ Rights was already in force but the various rights enshrined in that treaty still seemed nothing but an empty legal shell for

the vast majority of Africans. AFLA was founded with the aim of transforming these paper written rights into a practical reality for all Africans irrespective of race, ethnic origin, gender, wealth or other unacceptable grounds of differentiation. In 1995 International Criminal Law was still in its infancy. Criminal Law still was very much a national affair. The notion that the international community too has a responsibility to hold perpetrators of the most serious crimes criminally accountable was recognized in legal writing but had not yet materialized in practice. AFLA has joined the battle to bring an end to the era where enemies of humankind could kill, maim, rape, loot, and plunder with impunity.

AFLA’s intervention has been, through triggering and fuelling debate on the specific African dimensions or perspectives on international criminal law. Most notably of these efforts have resulted in the adoption of the Cairo-Arusha Principles on Universal Jurisdiction in Respect of Gross Human Rights Offences, an African Perspective. These principles have gained wide recognition and were cited in an opinion of the International Court of Justice in the well known case between the D.R.C. and Belgium. Since the mid 90s we have seen the establishment of the International Criminal Tribunal for Rwanda, the Special Court for Sierra Leone and the permanent International Criminal Court. The establishment of these institutions made clear that criminal law was no longer an exclusively national affair but a matter for the international community and that perpetrator of genocide, war crimes and crimes against humanity will longer escape accountability and enjoy global impunity.

The Interface between Peace and International Justice is a subject of growing significance in Africa and in the international community. On the one hand peace and justice may complement each other. Without peace there can be no justice and the cases now pending before the ICC are examples of the most utmost importance for peace processes in the countries in question. On the other hand, it might be that there are tensions between peace and justice. Criminal proceedings against war lords and rebels might hamper the conclusion of peace and power sharing agreement. The possibility of criminal trials as the Darfur case suggests, may pose an obstacle to the decision to establish peace keeping forces in efforts to achieve peace. Politicians may prefer truth and reconciliation committees or other alternative forms of justice over court proceedings. Traditional lawyers on the other hand, may see this as insufficient means of achieving justice, thus, in addition to exploring how we can complement our tasks and activities, this conference may also give us the opportunity to

consider possible tensions between law and politics, between peace and justice. Peace and justice are broad terms, far extending between the fields of criminal and human rights law. To achieve a peaceful and just Africa, the continental and sub regional efforts aimed at economic and political integration are important tools to consider.

In a few days, the AU Assembly will hold its 9th Ordinary Session here in Accra. The main theme on the agenda is the so called grand debate on the future of the Africa Union. The purpose of the summit is to undertake an in-depth discussion both at the level of the Assembly and the Executive Council on the nature of the continent's integration agenda. The assembly has already affirmed that the ultimate goal of the Union is to achieve full political and economic integration leading to a "United State of Africa". The objective now is to consider how we should more concretely proceed towards an African Union government. The grand debate is of importance for the topic of this conference. In a preparatory study entitled "Study on an African Union Government: towards the United States of Africa", the so called committee of seven chaired by his Excellency President Olusegun Obasanjo of Nigeria, identified a number of strategic areas of focus for the future union government. A first area of direct relevance to this conference is gender and youth which covers for example the aim of promoting gender mainstreaming and a continent wide campaign against child labour particularly in military activities. Another area identified by the committee of seven involves governance and human rights. In this area special attention will be paid to the strengthening

of legal systems in African States and promotion of the independence of the African Court on Human and Peoples' Rights.

Finally, mention must be made of current and future AU activities in the field of peace and security. In recent years the African Union has made progress in this area, and in particular the role of the peace and Security Council has been an important one. The significance of a common defense policy for the Union including the actual establishment of the African standby force is undeniable. To achieve these and other more concrete objectives, the African Union will work on better, more democratic and more efficient institutional framework. In the next days the AU Assemble and Executive Council will consider how the current structure can be improved and the outcome of these debates will be crucial for making substantive progress in the fields of peace and international justice.

Ladies and Gentlemen, the list of participants of this conference is diverse: government, international governmental organizations, the judiciary, NGOs, women's organizations and many more are all represented here today. We all may have different tasks, and work from different angles, but let us not forget that we all have a common goal of making Africa a more peaceful and just place. I am confident that the conclusions and recommendations of this conference will go a long way in achieving peace and justice for Africa and its people.

The Interface between Peace and International Justice in Africa

H.E. Luis Moreno-Ocampo

Prosecutor, International Criminal Court (ICC)



H.E. Luis Moreno-Ocampo

Excellencies, Mr. Moderator, Dear friends and Colleagues, I am very glad to be in Ghana today for a first visit. I came here, as the Prosecutor of the International Criminal Court, to reiterate to my interlocutors, African leaders and civil society, that we can, we must work together.

We have a common task, the task to set up and consolidate the International Criminal Court, a new international institution serving the people from all over the world, especially the most vulnerable, those who were raped, those who lost their parents, those who lost their homes and live in refugee camps.

To be strong, truly international and independent, the Court needs Africa.

The Court needs leaders such as His Excellency Nana Addo, the Minister for Foreign Affairs of Ghana ; an experienced lawyer, a skilled Ghanaian politician with international vision, he knows the importance of respecting the independence and impartiality of the Office of the Prosecutor ; at a critical moment, when I was presenting my case on the Darfur situation, his support to the Office has been outstanding, both in New York - in the Security Council and in Addis Ababa - in the African Union.

The Court needs civil society institutions such as African Legal Aid, with dynamic leaders such as Evelyn Ankumah who organized this meeting as part of AFLA's efforts to develop the understanding and support for international justice. The Office of the Prosecutor is very thankful for the constant support and cooperation from all the representatives of AFLA present today in this opening ceremony.

Finally, the Court needs the expertise and wisdom of all those, judges, lawyers, scholars, who have worked for years within their countries and internationally to promote and implement the rule of law. I have been a Prosecutor in Argentina; Prosecuting generals who ruled the country; I know of the challenges you face daily.

As Prosecutor of the ICC, I have been inspired by the extraordinary work achieved by pioneer institutions such as the ICTR; they convicted 28 top Rwandans leaders, including generals and the former Prime Minister, they contributed to stabilizing Rwanda. It is an honor and a pleasure always to be here with my friends and colleagues from the ICTR, Hassan Jallow and Adama Dieng.

Together, we are creating a new system of international criminal law. We need to make sure this new system serves the interests of the African people

Ladies and Gentlemen,

For centuries conflicts were resolved through negotiation and sharing of power. In Rome in 1998, a new and different approach was adopted. Lasting peace requires justice -- this was the decision taken in Rome by 120 States. They committed to put an end to the impunity for the most serious crimes of international concern and thus to contribute to the prevention of such crimes. Significantly, delegations from Europe, Latin America and Africa, continents plagued by massive atrocities during the last century, played the first role in the negotiation. At this point, 104 States are party to the treaty, with Senegal the first to ratify and Chad the last one. Out of them 29 are [African States](#).

They created an International Criminal Court, a permanent court, with jurisdiction over genocide, crimes against humanity and war crimes, when committed after July 1 2002, when the treaty entered into force.

The ICC is the result of an evolution which started just 60 years ago in Nuremberg. For the first time, those who committed massive crimes were held accountable before the international community. For the first time, the victors of a conflict chose the law to define responsibilities after a conflict. In the word of the Nuremberg Prosecutor Justice Robert H. Jackson:

“That four great nations, flushed with victory and stung with injure stay the hand of vengeance and voluntarily submit their captive enemies to the judgment of law is one of the most significant tributes that power has ever paid to reason”.

Nuremberg was a landmark. However, the world was not ready to transform such a landmark into an institution. It took almost half a century before the Security Council decision to create the ICTY and the ICTR connected peace and international justice again. The Ad Hoc tribunals developed the law, prosecuted the worst perpetrators and contributed to establish peace. Their experience paved the way for the decision to establish a permanent criminal court.

The Rome Statute is not only a new stage in this long evolution. It is a legal revolution. It creates a global criminal justice system.

Substantial law has been codified in one detailed text; sexual crimes, offences against children were further elaborated upon; elements of the crimes have been meticulously defined; different legal and procedural traditions have been integrated into a new international model; this new approach has received almost universal acceptance; even States which have not ratified the Statute are using the new normative framework as a reference.

The new system reaches beyond any national or regional boundary; ICC jurisdiction extends over the territory and the nationals of more than a 100 States Parties; it could extend to the entire world as the UNSC can refer any situations to the Court.

The new system is based on the interaction between national States, international organizations and individuals, all of them committed to end impunity for the most serious crimes of international concern and a permanent international judicial institution.

Even more important, and the object of fierce debate in Rome was the States' decision to established the *proprio motu* powers of the Prosecutor to open an investigation. It creates a new autonomous actor on the international scene. Such a provision, which allows the Court to act without an additional trigger from States or the UN Security Council, ensures that the requirements of justice will prevail over any political decision. This is a revolutionary provision. It creates a legal framework, providing guidelines and limits to international political actors.

Ladies and Gentlemen,

This was the system envisaged in Rome. The issue is no longer about whether we agree or disagree with the pursuit of justice in moral or practical terms; there is a law and the issue is how we deal with the legal reality that now exists.

Let us not buy too easily the idea that international justice is a European or western idea; establishing the law and ending impunity are founding concept of the Constitutive Act of the African Union. The Constitutive Act provides that the Organization will function consistently with the rejection of impunity and - quite extraordinarily - also provides for the right of the AU to intervene in a Member State in the event

of grave circumstances such as war crimes, genocide and crimes against humanity). Those provisions are unique in the founding document of an intergovernmental organisation and demonstrate a will to tackle at the continental level massive violations of humanitarian law.

The African Union decision that steps should be taken to address the issue of impunity, in the Hissene Habre case, is another example of the African will to tackle the issue of impunity. The Court needs the same commitment in each of its cases.

Ladies and Gentlemen,

Since 2003, as the Prosecutor of the ICC, I have the mandate to implement this new approach. I have the responsibility to select the most serious situations to investigate. In most instances, such situations occur in ongoing conflicts. This is why the so called dilemma between Peace and Justice is so relevant to my mandate.

I have opened investigations in 4 situations – DRC, northern Uganda, Darfur, Central African Republic – still engulfed at various degrees in conflict. In each case, we collected evidence. The Court protected the witnesses. Victims are participating in the proceedings. The Judges have issued 8 arrest warrants. Thomas Lubanga Dyilo, in the custody of the Court, is awaiting trial. The Rome system is now in motion.

But now that the Court is operational, we are faced with a new and even more complex challenge: how to ensure the enforcement of the Court's decisions and in particular how to execute the arrest and surrender of sought individuals who are often enjoying the protection of armies or militias.

The tension I see is not between Peace and Justice. It is not the decisions of the Court which undermine peace processes and conflict resolution initiatives. On the contrary, arrest warrants have brought parties to the negotiating table; have contributed to reducing crimes; exposing the criminals and their horrendous crimes has contributed to weaken the support they were enjoying.

It is the lack of enforcement of the Court's decisions which is the real threat to enduring Peace. Allowed to remain at large, the criminals are continuing to threaten the victims; asking immunity under one form or another as a condition to stopping the violence.

The Ugandan case is a good example. There is no tension between peace and justice. Securing the arrest of the four remaining LRA commanders would prevent recurrent violence and provide justice to the victims. If the top LRA commanders were arrested tomorrow, tomorrow you would have peace and justice in Northern Uganda.

Let me conclude.

The ICC should never be seen as an expedient tool on the short term, to be used when it is in the interest of one or another power, and discarded from the scene when it is seen as affecting their interest. This is why we need the support of African leaders and citizens as a guarantee to our independence and impartiality. A global criminal justice system must be a weapon to protect the weak against those wielding most power. African leadership and African civil society must take responsibility in implementing the Rome framework.

We can, we must have a privileged partnership. I am ready.



VACANCY
Executive Officer

Africa Legal Aid (AFLA) is a small Pan-African NGO devoted to promoting and protecting individual and collective rights throughout Africa and to challenging the impunity of gross human rights violators. AFLA provides leadership and support to key institutions and organizations working for the respect and recognition of human rights through legal protection. The tools of AFLA uses to accomplish these goals include capacity-building programs, research and analysis, media outreach, publications, a website, a lecture series, networking and consultation with selected organizations and individuals. AFLA has close networks with the International Criminal Court (ICC), the International Criminal Tribunal for Rwanda (ICTR), the African Commission on Human and Peoples' Rights (ACHPR) and the African Court on Human and Peoples' Rights (ACHPR). AFLA has offices in Accra (Headquarters), The Hague, and has registered an office in South Africa. For more information, visit www.africalegalaid.org

JOB STATION: AFLA HEADQUARTERS, ACCRA

FUNCTIONS:

- Manage the execution of programs and projects, including
- Organizing the conferences, training programs and lectures
- Development of promotion material and the website
- Publication of AFLA's Flagship Journal
- Supervise and coach the Program Assistant, Administrative Associate and Administrative Assistant
- Advise and prepare project proposal and budgets
- Find and develop new fundraising opportunities
- Ensure the visibility of the organization
- Main contact person for accountants and consultants
- Coordinate general administrative activities
- Establish work procedures and schedules for the office
- Other duties as assigned

QUALIFICATIONS AND EXPERIENCE

- Must be a Lawyer with a minimum of three years experience in human rights and international justice
- Self-motivated and interested in human rights in Africa
- Perfectly organized
- Excellent people and communication skills
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P.O. Box PMB TUC, Accra-Ghana

OR

Email: admin@africalegalaid.org

Application deadline is 15 March, 2008. Please note that only short listed applicants will be contacted.

National Peace and International Justice

H.L. Justice Georgina T. Wood
Chief Justice, Republic of Ghana

I count it a privilege to be invited to make a statement at this most important occasion. I am particularly glad that many persons occupying key positions in the International Civil Service, key institutions in Africa and very important positions in Ghana have made it to this colloquium. This occasion does indeed present us with another opportunity to learn from the many and varied experiences that this gathering brings together.

Peace and International Justice in Africa, in the last one and half decades, have become closely related concepts. Yet the two concepts are not intuitively much related. It is easier to conceptually relate International Peace to International Justice than it is to relate to National Peace to International Justice. Yet, in Africa, National Peace is becoming much related to International Justice, real or potential, in a way.

In many African countries, the actuality or the prospects of International Justice has had a real and tangible impact on the nature of National Peace; the character of civil strife; the integrity of peace deals and so forth. Indeed, all the complex variables necessary to achieve or maintain National Peace in many African countries depend on the character of real or anticipated International Justice.

As already noted, National Peace and International Justice are not conceptually far apart. The absence of National Peace portends the absence of National Justice. This is because Justice Systems are either non-existent, inefficient or ineffective in places where there is no National Peace. In such situations of chaos and in an independent world, it is immediately conceivable that International Justice will immediately fill the void created by the absence or ineffectiveness of National Justice Systems.

This brings me to the first critical issue I will like to raise in this statement: the role of International Justice in filling the vacuum created by unavailable or ineffective National Justice Systems in unstable countries and in complementing National Justice Systems in stable countries. I believe that it is not enough for us to simply see International Justice

Systems where the latter falters and to accept same without question. We must together as a community of nations, assess the operations of the International Justice Systems into national domains:

1. When is it legitimate for the International Justice System to be deployed in a particular setting and context?
2. How exactly may this be done?

3. How may we ensure that this process is not used by various interests for selfish geopolitical and economic interests?
4. How may we ensure that the international justice systems deliver the peace, security and justice that the populations in the countries in strife yearn for?

These and other questions beg answers and I will like to leave them with you today and in the coming days during the colloquium.

Distinguished participants, the second and last point I will like to make in this statements in this: there is a real challenge in reconciling the tenets, principles and real needs of populations in conflict situations and those of international Justice Systems. The quite recent efforts to end the civil conflict in northern Uganda have brought to fore this challenge.

In 2003, Ugandan president, Yoweri Museveni, invited the International Criminal Court (ICC) to conduct investigations onto the atrocities committed by the rebel's Lord's Resistance Army (LRA), which is notorious among other things, for abducting girls and boys and forcing them to be child soldiers, workers and sex slaves. The ICC issued arrests warrant against the LRA leader, Joseph Kony and five of his lieutenants. The attempts to apply international Justice procedures, however, did not receive unanimous support. There are some who would prefer to have justice applied according to National and traditional laws, and President Museveni himself is reported to have indicated that if Kony asked for it, he would be forgiven!

Underlying President Museveni's words is the second concern I wish to raise. Understandably, the needs of leaders and populations in civil strife is first to have the civil strife end and only second to have justice done. The needs of the international Justice Systems usually appear to be the other way round. Thus the International Justice Systems would risk the break down of peace talks, the withdrawal of warring factions to the bush and the continuation of fighting, rape etc. in the pursuit of International Justice. International Justice Systems must be extremely sensitive to the needs of population affected by strife and war and for whose benefit they are working.

Related to the above issue is the inclusion of antecedents deals and pacts made with warring factions in the matrix of issues that must impinge on all decisions in the International Justice fora. When Liberian President Ellen Johnson-Sirleaf asked Nigeria to extradite former Liberian leader,

Charles Taylor to the Special Court of Sierra Leone, the then Nigerian President, Olusegun Obasanjo argued that the Africa Union and the Economic Community of West African States must be consulted as the groups that assisted in organizing Taylor's exile. President Obasanjo was obviously thinking of the various deals and pacts that were made with President Taylor in the context of securing his "voluntary" exile to Nigeria and his own position as his host. This was not a chief concern of International Justice Activists.

I am aware that the Rome statute of the International Criminal Court (ICC) affirms "that the most serious crimes of concern to the international community as a whole must not go unpunished and that their effective prosecution must be ensured." I am aware that the same statute recalls "that it is the duty of every State to exercise its criminal jurisdiction over those responsible for international crimes." These and other provisions appear to foreclose States parties from adopting amnesties to the extent that they prevent punishment of crimes that are committed to the jurisdiction of the ICC, and in any case enable the ICC to exercise jurisdiction over crimes that cannot be prosecuted locally by virtue of an amnesty. Yet, we must remember ICC's own early cases have clearly raised the question, under what circumstances can the Prosecutor decline to exercise jurisdiction if doing so would undermine an amnesty that might end a brutal armed conflict? It may therefore be important to begin to identify in the Rome statute, avenues for accommodating alternative models of justice whose legitimacy rests upon the claim that they are likely to facilitate the restoration of peace. This must be guided in part by the experience of the ICC.

In countries from Uganda to Colombia, South Africa to Sierra Leone, governments and international organizations are grappling with

how to reconcile demands for justice with the need to ensure stable transition and post-transitional governance. In many of these conflicts, justice and amnesties have been seen to be in irreconcilable conflict and states have perceived a need to make a choice between two goals. I suggest that an alternative framework is to think about transitional justice as a process that develops over time and involves multiple layers of governance institutions: traditional/customary justice practices; domestic courts, international tribunals and so on. In all this, it is important to conceive of International justice not as an event but as a process that ends with the consolidation of peace and the restoration of livelihoods, human rights and human dignity.

I will like to end my statement by reminding us all that whether in Yugoslavia, Rwanda, Sierra Leone, Liberia, Uganda, Democratic Republic of Congo, or Sudan, International Justice has been a reaction to a reaction. The International community started considering seriously the antecedents of the conflicts they react to by way of providing International Justice. These antecedents include geopolitical and economic interests of powerful states; weak governance systems inherited from centuries of colonial rule; and weak economies that raise the stakes over limited resources and create conflicts over these resources; and a general sense of despondency among many populations that automatically devalues the dignity of the human being.

We in Ghana will forever work to commit to ensuring that the National Justice system in Ghana will work so efficiently that there will be no need for receiving intervention from International Justice Systems.

Peace and International Justice: The Contribution of the African Union (AU)

Hon. Nana Addo Dankwa Akufo-Addo
Minister for Foreign Affairs, Regional
Integration and NEPAD, Republic of Ghana



Hon. Nana Addo Dankwa Akufo-Addo

I am grateful to the organisers for the opportunity to participate in this important colloquium which has brought together several distinguished persons to deliberate on the critical issue of peace and justice for Africa and her peoples. I am particularly happy to see in this distinguished cast the presence in our capital of the Prosecutor of the International Criminal Court, a renowned human rights champion, who has dedicated his life to the struggle against tyranny and impunity both in his native Argentina and across the world. Segnor Luis Moreno-Ocampo, you and your associates are very welcome to Ghana.

The holding of this conference here in Accra is timely. Ghana has once again been given the honour and responsibility of chairing the AU, its Assembly, Executive Council and Permanent Representatives Committee. In the next few days, leaders from 52 African Countries will converge in Accra to deliberate on the future direction of the AU and how its functions can be improved. I cannot speculate on the outcome of the so-called grand debate, but looking at the preparatory work that has already been done, I am hopeful that our leaders will find a formula for the Union best suited to Africa's peculiarities, and under which Africans can realise their vast potentials. There are some who are determined to view the AU as merely a continuation of the OAU in another guise. The scale should fall from their eyes. The OAU, brought into being to spearhead the struggle for the liberation of our continent from imperialism and colonialism, achieved its purpose when the inhumane, racist system of apartheid was dismantled in South Africa. The AU has a different purpose-to facilitate the political and economic integration of Africa. Not

only is it different in purpose, the AU is working on a very different basis from its predecessor. Let me give you some examples which I think are also related to this conference's theme:

Take NEPAD, the New Partnership for Africa's Development. Some have sought to criticise this initiative, the AU's development agenda, because of its perceived weak powers and the non mandatory nature of its Peer Review Mechanism. I beg to differ. NEPAD has set in motion a development plan involving African States that are willing to subject themselves to each other's supervision and scrutiny on internal issues concerning economic policy, democracy, constitutional structure, human rights, protection of minorities, etc. Ghana was the first state that demonstrated her willingness to be reviewed, and we see the recommendations of the panel as a significant contribution to the resolution of the problems we have to address. We do not see it as an unwarranted intrusion in our internal affairs. NEPAD is evidence that the alleged "rule" of non interference or indifference and internal affairs no longer applies, an evolution will lead to greater transparency and accountability. No one, in my view, can dismiss the significance of this development which can only help to promote justice.

Consider further the evolving peace and security policy of the African Union. The end of the cold war had great destabilizing effect for Africa resulting in various wars in which massive human rights abuses were committed. Even though it took some time, Africa has responded collectively. The AU is now working on a common peace and security policy, comprising among other things a common African Standby Force operating on the basis of the Common Defence and Non-Aggression Pact. African states have decided, uniquely to include in the Constitutive Act of the Union a right or power to humanitarian intervention allowing the organization to intervene in national jurisdiction in order to prevent or stop the commission of gross crimes. Both the war in the Darfur Region of Sudan and the war in Somalia pose clear challenges for us in this regard. We are attempting to overcome the challenges despite the complex issues involved in these two protracted conflicts.

Furthermore, there is no denying that the Peace and Security Council, unlike its UN counterparts is not hindered by the veto power, which has already proven to be a major asset to the common pledge for peace, security and justice. The guns, so loud a few years ago, are falling silent across the continent in Sierra Leone, Liberia, Guinea Bissau, Burundi, the DRC and now hopefully Cote D'Ivoire. The AU Peace and

Security Council have been prominent in leading the peace processes. Of course, more still needs to be done and financial restraint, I admit, remain a formidable problem for implementing the policies and programs already agreed upon. Yet, more than ever before, there is a common realization that our continental organization, the African Union has a direct responsibility for peace and justice in Africa. We only have to look at the European Union to realise that a common peace and security policy cannot be realised overnight.

The nexus between peace, justice human rights and development has been well established. The former Secretary-General of the United Nations, our illustrious compatriot, Kofi Annan, succinctly stated the centrality of human rights to development in his historic report, "In Larger Freedom" which outlined his far reaching proposals for the reform of the UN, when he observed thus: "We will not enjoy development without security, we will not enjoy security without development and we will not enjoy either without respect for human rights"

Mr. Moderator, Africa is making significant strides with regard to good governance and human rights. The continent is turning back, gradually and systematically, on its authoritarian past, with its unsavoury record of widespread violations of human rights, leading to killings and disappearances of entire communities and individuals. There is now among many African countries an acceptance that human rights are neither obscure nor privileged rights nor so called western rights but rights which are necessary for the existence of all of us human beings. There is also a growing recognition that for our people to enjoy fully their rights, the body politique of our nations will need to attend to the totality of all classes of rights and their citizens, whether the so called classical rights or the modern socio-economic and cultural rights. Many African countries have progressive constitutions which not only guarantee the fundamental rights of their citizens but also give recognition to international human rights instruments. In this respect, Africa is increasingly very much a part of the world democratic order. I have already referred to Africa's human rights system to make the point that human rights now matter very much in Africa. This is further illustrated by for example, the adoption of the African Charter on Democracy, Elections, and Governance, as well as the establishments of the Pan African Parliaments and the Economic, Social and Cultural Council. These two new organs may not yet constitute full democratic bodies enabling African people to decide on African politics but they do constitute a first step on the road to a more democratic Africa, which is an essential condition for justice and peace on our continent.

To make our continent a more peaceful and just place to live, we must strengthen the rule of law, further develop the African human rights machinery and support and cooperate with the ICC to end the days of impunity and to increase criminal accountability. In addition, we must continue working on African Unity.

We must intensify our cooperation and integration efforts also in areas like the economy, health, environmental protection, industrial relation and transport. Perhaps these are not the areas that we primarily think of when discussing peace and justice issues, yet cooperation in these areas is crucial for the abstention of peace and justice. One important lesson that we can learn from the European integration process is that by promoting integration in economic and related areas, States can significantly reduce the chances of war and other conflicts. Since the original EEC was founded 50 years ago, there has been no war between Member States of what is now the European Union. There has not even been a threat of war, and that is a formidable achievement for a continent whose history books contain so many accounts of bloody wars.

Mr. Moderator, the international justice system is designed in such a way that international criminal courts can only step in when national courts are unwilling or unable to investigate to prosecute gross crimes. Thus, States bear the primary responsibility for prosecuting, judging and sentencing their own criminals who are responsible for gross crimes. The record with respect to domestic efforts of punishing such criminals needs, however, to improve considerably, especially when alleged wrong doers and abusers are part of the national power structures. In many instances too, the process of bringing justice to victims can be so slow that countries have often sought their own ways of dealing with the situations. Such events can undermine confidence in war crimes, justice generally. It is my fervent hope that the International Criminal Court will overcome such obstacles. The initial steps being taken by the Court indicate clearly the Court's own appreciation of the situation.

Ladies and Gentlemen, I welcome you to Ghana, I hope you will take the time to visit Accra and other parts of the country. I trust you will enjoy the hospitality of a people who pride themselves very much on their sense of hospitality. You have come to our country at a high moment in our history, in the year we are celebrating the Golden Jubilee Anniversary of the Independence of Ghana, the event that, under the dynamic leadership of our first President, Kwame Nkrumah, lit the torch for the liberation of Africa from imperialism and racist rule.

We are doing so when our nation after predictable periods of early turbulence, has happily now committed herself fully to the construction of her body politique on the basis of the principle of democratic accountability, respect for human rights and the rule of law. The Ghanaian is rediscovering his/ her élan and sense of optimism as we confront with confidence the great challenges of our era for we are determined to make our own unique contribution to the growth and flowering of a new African civilization, the African renaissance which the outstanding South African leader, Thabo Mbeki, has spoken about and thereby enhance the quality of a world civilization where

freedom, openness, tolerance, solidarity and creativity
are its hallmarks.

Akwaaba is our famous word of welcome. I am sure
your deliberations will be rich and rewarding for us
all. I have the honour to declare this conference open.

Peace, Security and International Justice in Africa

Prof. Shadrack Gutto

Director, Centre for African Renaissance Studies (CARS), University of South Africa, Acting Chair, Governing Council of AFLA



Prof. Shadrack Gutto

Moderator Adama Dieng, H.E. Luis Moreno Ocampo, Prosecutor of the International Criminal Court (ICC), Honourable Chief Justice Georgina Wood, Honourable Minister Akufo-Addo, Executive Director of Africa Legal Aid, other Judges present, especially H.E. Hassan Jallow, Distinguished participants

Globalisation, the International System and Impunity for Perpetrators of Serious Crimes against Africa and Africans

Let me begin with a brief historical journey.

Modern scientific studies analyses, not only or mainly Africans have established beyond reasonable doubt that Africa is the cradle for all humanity. The sites so far discovered are in Ethiopia, Kenya, Tanzania and South Africa. Humanity's evolution and development then saw Africa become one of the leaders in the building of civilizations evidenced by highly developed states, kingdoms and empires on the one hand and development of science and art writing, philosophy, medicine, mathematics, architecture, cosmology, amongst others. Southern Europe that interfaced with Africa at the time borrowed a lot from Africa, without acknowledging it. (C. A. Diop, *The African Civilization: Myth or Reality*: 1994; M. Bernal, *Black Athena*, Vols. 1&2, 1987 and 1991). Such contributions and leadership were undermined and systematically destroyed from the middle of the 15th well into the 21st centuries.

From about the middle of the 15th until the end of the 19th centuries, it is approximated that close to 20 million able-bodied Africans were captured or abducted, tortured, gang raped, treated cruelly and

inhumanely, enslaved, sold, transported, resold and made work without pay in the Americas. Additional 4 million were transported across the Sahara and exported via the Red Sea and another 4 million from East African coast to the Arab world.¹ But even in Slavery in far lands, the displaced Africans throughout resisted and in some cases, like in Haiti in 1804 they able to defeat the military might of the slave owning colonial European powers and to establish an independent Republican State (C. L. R. James, *The Black Jacobins*: 1982). When issues of acknowledgement and expression of remorse as well as consideration of payment of reparation by descendants of those who perpetrated and benefited from such crimes was raised at the World Conference Against Racism, Racial Discrimination, Xenophobia and Related Intolerance in Durban, South Africa, in 2001, walk-outs were quickly organized by the so-called civilised states of North America and Europe.

The colonial phase of Africa's captivity that superseded slavery witnessed the destruction of states, kingdoms and empire; imposition of alien spiritualism and religions, systematic plunder of minerals, plant, animal and other resources using cheap labour, and imperial state sanctioned commission of serious crimes and massive and gross violation of human rights all over the continent and its islands. Perhaps, the genocide by King Leopold of Belgium that killed close to 10 million Africans in what is to-day the Democratic Republic of Congo between 1897 and 1910 typifies the criminality of the civilizing mission of European colonialism in Africa (A. Hochschild, *King Leopold's Ghost*: 1999). The British tried to imitate the Belgians in Kenya in the 1950s by committing war crimes and crimes against humanity against the national liberation forces and innocent civilians (C. Elkins, *Britain's Gulag: The Brutal End of Empire in Kenya*: 2005). It should be noted that in the 1950s the United Nations was in existence, the Universal Declaration of Human Rights and European

¹ Paul E. Lovejoy, *Transformations in slavery*, Cambridge University Press, 2000; Ralph Austen, *African Economic History*, James Curey, London, 1987; Elikia M'Bokolo, *Afrique noire-Histoire et Civilisations*, Vols. 1, Haïter-Aupelf, Paris, 1995; Joseph E. Inikori (ed.) *Forced Migration: The impact of the export slave trade on African societies*, Hutchinson, London, 1982; and P.D. Curtin, *The Atlantic Slave Trade. A Census*, University of Wisconsin Press, Madison, 1969

Convention of Fundamental Rights were also in place. The London Charter of 1945[5 UNTS 251, (1945) 39 AJIL Suppl. 257] which established the Nuremberg Tribunal was already history.

Between 1948 and 1994 the white minority practised apartheid in South Africa and Namibia. To its credit the international community declared apartheid to be crime against humanity and proceeded to a supposedly binding convention in 1973 which entered into force in 1976 following the Soweto student uprisings.² Not a single person has ever been indicted and tried for the crime even in countries that had universal jurisdiction. No special criminal tribunal was ever considered even by countries that had established the Nuremberg and Tokyo tribunals.³ When the democratic government of South Africa opted less for the prosecution and more truth, amnesty and reconciliation in 1994, it was in the context of a world that had demonstrated limited commitment to justice – that is, if for a moment we were to define justice narrowly to mean prosecution. It is difficult to escape the conclusion that when whites commit serious international crimes against black people, it is the exception rather than the rule that the perpetrators are prosecuted. All that can be claimed as positive is that the suffering of Africans and other black peoples in South Africa and Namibia led to the normative progressive development of international law. Apartheid has been re-affirmed as a crime against humanity in the Rome Statute of the International Criminal Court (Article 7)

Given such historical experiences that Africa and Africans have had with Europeans and people of European descent in Africa and Americas, it would be difficult for any moderately right thinking African not to reach a conclusion that impunity for perpetrators rather than international peace, human security and justice for African and Africans has defined the modern world.

Looking to the Future: African Renaissance, the African Union, the Regional Economic Communities and the Pursuit, Security and Justice:

Determining our own destiny

Because we have developed amazing resilience and proven over centuries that we shall never abandon yearning for and pursuing justice, peace and security in a world that been and continue to be hostile to Africa and Africans wherever they may be, Africans and the African Diaspora must determine their own destiny and only welcome mutually beneficial partnerships and support from those prepared and ready to change the current global order so that the

future is different from the past. The NEPAD Document of 2001 is explicit on this (paragraph 7 and 44)

Reform of institutions of global governance

As part of the international community it is only just and fair that we demand for democratization of institutions of global governance such as the United Nations – starting with its Security Council that unrepresentative of all peoples and regions of the world but which is entrusted with the maintenance of international peace and security. As for the Security Council, Africa's Ezulwini Consensus of 2005 which calls for 2 African states to be given permanent membership with all the rights of permanent membership should be non-negotiable. The SC makes law and establishes tribunals, it makes referrals to the ICC- even though the latter is strongly hated by some of the big powers with permanent status – and it decides situations where interventions are required and forms of intervention. Since global governance is also driven by financial and economic relations and interactions, institutions such as the World Bank, the IMF and WTO need to democratize their governance and rules of engagement.

AU: new resolve, values, objectives and principles

Objectives and Principles

African Court of Justice and Human Peoples' Rights

Peace and Security Council:

- A principal organ of the AU established by Protocol (2002) Common African Defence and Security Policy, including High Command
- Already active in Darfur region of the Sudan (was first in, to evolve into an AU/UN Hybrid Force
- DRC
- Been active diplomatically in Ivory Coast, Liberia, DRC

Pan – African Parliament:

- Each national legislature represented by 5
- Advisory and Oversight

Financial Institutions

NEPPAD and the APRM

- Departure from foreign designed development models such as the SAPS that devastated the economies of many African countries and contributed to the spread of poverty, escalation of department, intensification of dependence of donor funding and the weakening of state capacity to promote development.

- Changing relations to accountable and negotiable partnerships

² International Convention on the Suppression and Punishment of the Crime of Apartheid, adopted on 30 November 2973. entered into force on 18 July 1976, 1015 U.N.T.S. 243

³ Garth Meintjes, "If Apartheid is A Crime, Why Has No One Prosecuted?" **AFLA Quarterly**, October – December 2002, 19-20

- The APRM and the connectivity of the political and socio-economic (Ghana, Rwanda, Kenya and South Africa have taken the lead; another 22+ are on the way)

Regional Economic Communities (Not only “Economic”)

- 8 Sub-regional treaty bodies, some with judicial and military/defence mandate, e.g. ECOWAS and SADC
- ECOMOG in Sierra Leone and SADC in Lesotho
- IGAD and the CPA between Southern Sudan and the Khartoum Government resulting in a 2-in-1 State
- SADC’s mediation of the Zimbabwean crises
- EAC has expanded from 3 to 5 members (Kenya, Tanzania and Uganda +Rwanda and Burundi)
- AU policy to reduce them to 5
- Pillars to the building to an African Union Government

Special Challenges

The ICC and Africa: Contradictory relations and meanings for Africa

- Africa’s participation: The making; the operations; the “favoured” clientele?

- The African cases: Uganda (state party referral); DRC (state party referral); Darfur (UNSC Referral)

- The USA is a permanent member of the UNSC that makes referral to the ICC (the Sudan/Darfur 2) but remains violently against the ICC

Aggression

- Delayed definition in disingenuous – it is a ploy the perennial unilateralists and aggressors, especially the USA
- Chagos Islands and its peoples – colonialism, occupation and genocide: USA, Britain, Mauritius
- Military Bases in Africa and the planned American African Command

Economic, environmental, cultural and social crimes

- Cairo-Arusha Principles
- Blood Diamonds – Beyond Charles Taylor: Where are the non-African principal partners?

The meaning of “justice”: unity and contradictions

Interface between the varieties of African and other cultural value systems on the one hand and the common/universal on the other. Where is the balance?

Peace and International Justice: Competing or Complementary Principles

H.E. Fatou Bensouda

Deputy Prosecutor, International Criminal Court (ICC)



H.E. Fatou Bensouda

Your Excellencies, Ladies and Gentlemen

It is my pleasure to be here today to discuss with you the work of the Court and some of the challenges we face, in particular how to implement the Rome Statute where conflict-resolution processes are ongoing.

As we have heard from the Prosecutor this morning, the Rome Statute's entry into force represented the culmination of massive international effort to address impunity. The international community including notably, African countries, played a significant role in the negotiation of a comprehensive and robust treaty which lays the foundations for an effective international strategy for the prosecution of the most serious crimes of international concern, namely genocide, war crimes and crimes against humanity, and for the attainment of justice for the victims of these crimes.

Brief summary on investigations

Before I address you further on the question for discussion by this panel, let me outline briefly the work of the Court to date. The Court is currently investigating the situations in Uganda, the DRC, CAR and Darfur. The Office of the Prosecutor is also analyzing the situation in Center for Defense Information (CDI) with a view to determining if an investigation should be opened. With the exception of Darfur, all of these situations were referred to the OTP by the governments of the countries concerned. In Uganda, the Court had issued arrest warrants for four of the senior commanders of the Lord's Resistance

Army; we are in the process of prosecuting Thomas Lubanga, a (former) militia leader, for his part in the conscription and use of children for purposes of taking part in the armed conflict in the Ituri region of the DRC; we have also issued warrants of arrest for a serving minister in the Sudanese Government as well as a Sudanese militia leader on allegations that they committed war crimes and crimes against humanity during the ongoing conflict in Darfur.

Challenges faced by the Court

The Court faces various challenges as it conducts its investigations, such as the challenge of operating in situations of protracted instability, the need to secure the necessary support for its work from the international community at the political as well as the operational levels, logistical and administrative problems; and the challenge of implementing the legal framework of the Rome Statute where the governments concerned are engaged in conflict-resolution processes. For the purposes of our discussion today, I would like to focus on these challenges.

In this regard it is important to bear in mind that the crimes which tend to attract the attention of the Court will often have been committed during an armed conflict. The Court is already involved in an investigation involving such a situation in Northern Uganda and it is inevitable that similar situations will arise in the future. The Court then has to consider the implications that any conflict resolution process may have on its approach to an ongoing investigation. It is clear that peace is of vital importance and so, too, is justice. The international community settled this debate in Rome; the international community effectively decided that justice would always be a component of any conflict-resolution process by holding to account all those who bear the greatest responsibility for serious crimes. The only issue which is open for discussion now is how justice and peace will or should work together. I should say, nevertheless, that we, as the Office of the Prosecutor, recognize that the relationship between the two imperatives will almost always be an uneasy one and it is certainly an issue with which the Court is grappling.

Having said that let me discuss the role of the Court. The mandate of the Court is to dispense justice for the victims of the crimes which fall within its jurisdiction. As I have indicated, it is now clear that the victims are entitled to both justice and peace. What is important is that justice should be sought without undermining ongoing peace processes. Consequently, what the OTP seeks to find is a solution which is compatible with the

Rome Statute, local and traditional cultures and national laws so that accountability is ensured and justice and peace work effectively together.

It is often said that the Court's intervention is negative as it may potentially limit the ambit of peace negotiations; one of the instruments used by governments in the past for the conclusion of successful peace negotiations was the provision of immunity, often through amnesty agreements, for persons accused of having committed serious crimes during the conflict. We have repeatedly stated that such agreements are not binding on the ICC, and indeed amnesties and impunity for those bearing the greatest responsibility for serious crimes are not consistent with the Statute. In this context, it is frequently argued that the ICC is an obstacle to peace. In particular, it is pointed out that it is precisely those bearing the greatest degree of responsibility who will normally be key players in peace negotiations. However, I would suggest that it is not the case that the Court is an obstacle to peace. On the contrary, the intervention of the Court presents new opportunities that can be maximized in the context of negotiations. In this regard, there are several important and related considerations which I can offer as examples to bear in mind when considering the peace-justice dynamic.

First, the intervention of the Court, contributes to focusing the attention of the world on the horrific crimes committed. The Court has played a key role in focusing international attention on the tragedy in Northern Uganda. It has become clear to those observing the events in Uganda that, although it seems that the conflict has all but disappeared from international awareness, serious crimes continue to be committed on a large scale.

Secondly, the Court can help reduce political or economic support for those who perpetrate serious crimes. It is a known fact that weapons and other resources are supplied to groups taking part in conflicts by third parties. By exposing the scale and nature of the crimes whose commission is facilitated by these weapons and resources, the Court's intervention can help reduce support for those who commit crimes.

Third, the issuing of warrants, or indeed the threat of the Court's intervention, can help to bring belligerents to the negotiating table. In Northern Uganda, for instance, as a result of the warrants issued against the LRA's senior commanders, the LRA felt able to take part in the peace process. That being said, warrants are not mere tools to bring parties to the negotiating table there must be a follow-up in Northern Uganda and we

would want the solution agreed upon, in the end, to be compatible with the Rome Statute.

Fourth, and in addition to drawing certain parties to the peace process, the Court can help to marginalize those who bear the greatest responsibility for serious crimes and put them out of the negotiating frame. This happened, for instance in the case of the UN tribunal set up to deal with persons suspected of committing war crimes and other serious crimes in the former Yugoslavia. Two of the individuals against whom warrants were issued by the ICTY (Generals Mladic and Karadzic) were effectively marginalized during the peace process which resulted in the Dayton peace accords. Consequently, the Courts involvement may, in some circumstances, eliminate criminals from the peace process which in turn, can assist the legitimacy of the negotiations themselves. It is possible, considering the issues from that perspective, that the political isolation of such individuals has the potential to pay substantial dividends for peace.

Conclusion

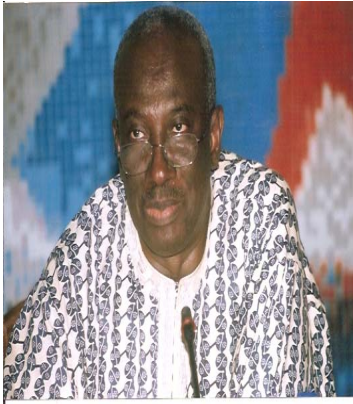
Accepting that some may feel that the ICC's intervention may have both positive and negative consequences, the challenge is to try to take advantage of the opportunities created by the Rome Statute because what we have now is a legal regime which most of the international community has accepted. As I indicated earlier, the Rome Statute establishes a new framework where victims are entitled to both justice and peace and where impunity is no longer an acceptable option. The Court will apply the law, but it depends on other partners to contribute their efforts to a holistic approach to justice and conflict resolution. Since we are discussing the interface between peace and justice in Africa today, I would like to recall the advice of His Excellency President Kufuor, whom we met with two days ago. The President underlined the importance of cooperation between the Court and African countries to ensure the proper coordination of our work in Africa with the efforts of other actors to secure peace. The Court therefore recognizes the importance of remaining engaged with our interlocutors here in Africa including the African leadership, civil society and the communities affected by crimes committed in the context of armed conflicts.

Let me conclude by emphasizing that our role as the ICC is to continue to implement the legal norms set out in the Rome Statute and to show through our work that peace and justice – far from being incompatible – are, in fact, mutually reinforcing.

Peace and International Justice: Competing or Complementary Principles

Justice B. Hassan Jallow

Chief Prosecutor, International Criminal Tribunal for Rwanda (ICTR)



Justice B. Hassan Jallow

On the 2nd of September 1998 the ICTR delivered its first judgment in the case of Prosecutor vs Jean Paul Akayesu. Since then, following its establishment by the U.N. Security Council by Resolution 955 of 1994 to prosecute those persons responsible for serious violations of international humanitarian law in Rwanda and neighbouring countries between 1st January and 31st December 2004, the ICTR has concluded the prosecution of 34 accused persons. Six of these were acquitted and the rest convicted and are mostly serving long terms of imprisonment.

There are currently 22 accused persons standing trial. Some of them in five multi-accused cases and 8 accused are in custody at the U.N. Detention Facility in Arusha awaiting trial. Eighteen inditees are currently at large as fugitives.

As you are aware the ICTR is now operating under a Completion Strategy approved by the U.N. Security Council in Resolution 1503 of 2003 which set three bench marks for the ICTY and the ICTR. Although conceived initially as ad hoc tribunals neither the ICTR nor the ICTY had initially been provided with timeframes for completion of their respective mandates. Resolution 1503 did so by requiring the ICTR, and the ICTY to conclude investigations into new cases by the end of 2004, conclude all trial activities at first instance by the end of 2008 and all appeals by the end of 2010. That is envisaged to terminate the ICTR mandate. Whilst the remaining workload is by no means inconsiderable we are confident of achieving these target dates and hence successfully and properly conclude the mandate from the international community.

The case of Akayesu is memorable for other reasons. It was the first in which the crime of genocide had been litigated in a criminal court and the provisions of the Genocide Convention judicially interpreted. It was the first case as well to make the legal link between sexual violence and the crime of genocide. The case is thus a landmark for jurisprudential reasons as well.

The case is also memorable for the response it elicited from the world community. In welcoming the landmark Akayesu judgment, the then Secretary General of the U.N. His Excellency Kofi Annan declared:

“There can be no healing without peace; there can be no peace without justice; and there can be no justice without respect for human rights and the rule of law.”

That statement has so eloquently captured the theme of this conference and highlighted the linkage between peace and justice. Peace and justice are complimentary; not conflicting or competing principles. A lasting and sustainable peace can be built only on the secure foundations of justice. Peace and justice are mutually reinforcing principles.

How can the administration of justice impact upon and contribute to a lasting peace? Justice is a broad concept and I believe in the course of the next session we shall have the opportunity to reflect on its various forms.

In a post conflict situation in which international criminal justice is called to play a role, the expectations of the community go beyond legal justice to encompass social justice by way of compensation for those who have been wronged, the need for recording of the truth in order to preserve memory as well as to use truth as a basis for reconciliation and finally, the need for reconstruction of a community which may have been truly traumatised and devastated by conflict.

For the moment however I confine my concept of justice to legal justice. How can the legal system contribute to peace?

It can and does so in a number of ways. Clearly the process of holding to account before a criminal court persons who enjoyed leadership positions has the potential for deterrence and hence restoring or maintaining peace at two levels. For Rwanda the arrest by the ICTR of the cream of leadership of the regime which planned and implemented the genocide – the Prime Minister, Cabinet Ministers, Senior military officers, leaders of the MRND former ruling party, local government leaders, religious leaders, etc..

clearly neutralised a segment of the Rwanda population which if it had remained at large, had the potential to destabilise Rwanda, if not the entire region of the Great Lakes.

Only international criminal justice with its long reach had the capacity to ensure the arrest and trial of such a large powerful group which had found refuge in different countries. If their apprehension and trial had been left to Rwanda to pursue bilaterally under extradition arrangements, the result could have been considerably different and perhaps not so successful.

Across the border from Rwanda into the DRC a number of the top level fugitives sought by the ICTR have found refuge in inaccessible areas. Their freedom to operate there at will with personal militias destabilises not only that country but the Great Lakes region as well. The impact of the success of the international criminal justice system on prospects for peace and stability is clearly evident here.

But holding to account in a court of law such persons is of deterrence value not only to Rwanda but hopefully to the rest of the leadership in the member states of the U.N. The message the ICTR sends out to all persons in positions of leadership is that they will be held accountable for gross violations of human rights and previous status grants no immunity against prosecution.

The satisfaction of the expectations of victims and survivors for legal justice is a powerful factor for restraint and avoidance of revenge and retaliation. It has always struck me so much how many persons I have met in Rwanda, survivors of the genocide who had lost all members of their families, had trust and confidence in the legal process and the willingness to let the law take its course rather than seek the course of revenge and retaliation. Indeed the legal process represents to the survivors a beacon of hope.

The legal process by dealing with individual personal guilt of offenders avoids a perception of collective guilt of the 'other side'. There is no issue of legal determination of guilt or innocence of groups but only of individuals. The legal regime is based on individual criminal responsibility. The potential therefore for peace and reconciliation between groups whose conflict result in the commission of these serious crimes becomes real and possible.

The legal judicial process in a post conflict situation provides a strong model of the possibilities of the rule of law as an alternative means of conflict resolution. All these factors seem to demonstrate how the legal judicial process can be a factor for peace, in addition to its primary function of delivering justice.

Legal justice is of course not perfect. It has its shortcomings in dealing with post conflict situations. We need to recognise that it is a necessary tool for resolving post conflict solutions; but it is not a sufficient tool by itself. It needs to be combined with

other mechanisms in order to be able to meet the diverse expectations which arise in such a situation.

As a Prosecutor one is essentially concerned with effectively prosecuting and securing a conviction in particular cases. Understandably so, the process of justice requires legal accountability and determination of guilt or innocence. The objective of securing a conviction can never be far from the Prosecutor's sights. It is indeed central to his broad objectives. Yet the prosecutorial role also offers the prospect for the Prosecutor to inject considerations of peace and reconciliation into his prosecutorial strategy. I have in mind particularly the exercise of prosecutorial discretion whether to prosecute or not, how and for what offences. The international justice system cannot and is not equipped to prosecute all the cases that arise from a particular situation. Time, resources and other factors make this impossible. Not even a domestic jurisdiction, as we have learnt in Rwanda, can deal with all such cases through the legal process. A process of selection, based on objective and transparent criteria must be identified and utilized by the Prosecutor to select the cases that need prosecution. But this drawback can be turned to advantage as well. From our experience at the ICTR, we find that a combination of criteria such as the status of the individual, the nature of the offence, the extent of participation of the person and geographic distinction of targets enable us to focus on those who played a leading role in the genocide of 1994 and hence facilitate peace and reconciliation in Rwanda.

The perception of "fairness" or "even-handedness" in the selection of cases is vital to securing the peace in post-conflict situations. The conflict situations which result in these serious crimes of genocide, war crimes and crimes against humanity always put groups against each other. It is important that there is no perception that post-conflict justice is merely victors' justice; that the legal process is being used by the victors against the vanquished. Despite its invaluable standard-setting in the field of international criminal justice, Nuremberg has not escaped the accusation of being victors' justice. Fortunately, the Special Court for Sierra Leone (SCSL), the ICTY and the ICTR have all been investigating allegations against what may be perceived as victorious parties and in some cases, prosecutions have been instituted against their members. Appearances of prosecutorial or even judicial, bias against a group involved in the conflict or unfairness to it can only undermine the prospects for peace in post-conflict situations.

The case therefore is strong. That the nature of the criminal legal process, as a whole and through the proper exercise of the prosecutorial discretion, can cement that complimentary and mutually reinforcing relationship between peace and justice.

The interface between international justice and peace is evident in another sense, particularly in relation to the maintenance of international peace and security. The impact of massive violations of human rights

involving the offences of genocide, war crimes and crimes against humanity can rarely be contained within national frontiers. The Rwanda genocide of 1994 led to the exodus and death of hundreds of thousands of refugees in the DRC, conflict between Rwanda and the DRC and instability in the Great Lakes Region. The region is still reeling from the consequences of the horrific genocide. The conflict in Sierra Leone extended to Liberia and its neighbours. It became a sub-regional conflict. The events in the former Yugoslavia led to an international armed conflict. The tragedy unfolding in the Darfur region of the Sudan has led to conflict between that country and Tchad. The events which give rise to the crimes which attract the long arm of international criminal justice not only disrupt national peace but lead to serious breaches of international peace and security.

The logic of recognition of that link should and must lead us to the imperative of collective preventive and remedial action. The failure of the United Nations to act in the case of Rwanda led not only to the genocide but grave breaches of international peace. The delay in acting in Darfur, Sudan is giving rise to a similar situation.

It is said, and it is trite that an ounce of prevention is better than a ton of cure. We need to set up early warning mechanisms to monitor potential conflict situations to enable the international community to take timely preventive action. We should seek to deal globally with the root causes of such conflicts. At the heart of these conflicts lie bad governance, disregard for fundamental human rights, injustice, poverty, corruption and lack of accountability by persons in positions of leadership. Effective preventive action therefore in actively seeking to create an environment of good government and respect for fundamental rights and the rule of law in each member state of the United Nations.

Where preventive action fails, we must be ready for collective international intervention to halt atrocities. The United Nations provides us with the opportunity to do so through the enforcement mandate granted to the Security Council under Chapter 7 of the Charter. The African Union Charter commitment to intervene within member states in cases of genocide, crimes against humanity and war crimes provides Africa with the opportunity for collective regional action. We

must strive to make these mechanisms work. To do so, we must overcome the obstacles of indifference, or hostility to action often fuelled by a narrow and selfish view of national strategic interests on the part of states to which the international community looks for leadership. The fact that Africa is the setting for many of the world's conflicts which give rise to these serious crimes imposes a duty on the African leadership to ensure that the African Union Charter promise of effective action becomes a reality. The ECOWAS action in Sierra Leone and Liberia demonstrates the potential for Africa to help itself. The A.U. has had a modest start through its peacekeeping force in Sudan and more recently in Somalia. The lesson to be drawn from these welcome interventions is the need to enhance the capacity of the A.U. mechanism for effective action.

In the wake of the peace that follows collective intervention, we must be ready and willing to ensure that the process of legal justice and accountability in national or international systems is set in motion.

But alongside it must exist effective mechanisms for the compensation of victims, the reconciliation of antagonists and the reconstruction of the community. I must say with regret that the international community's response to the plight of the surviving victims – the orphans, the sick women, and the widows – of Rwanda could have been considerably better.

On the occasion of the 10th anniversary of the Rwanda genocide in 2004, the U.N. Secretary General Kofi Annan, launched the United Nations Action Plan to Prevent Genocide. That Action Plan highlighted measures that the international community needs to take, including some of those I have mentioned, in order to ensure that we enjoy national and international peace with justice. The Action Plan also provides us with an opportunity and a framework for collective action. Let us make that opportunity a reality.

Peace and / or Justice: The Dilemma of Power-Sharing

Dr. Jeremy Levitt

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Dr. Jeremy Levitt

Presently there are 5,000 African-Americans living in Ghana and we have been here since Ghana's Independence. Many of us migrated here with W. E. B. Du Bois when he came in 1957, after Ghana's Independence. In fact, during this time, there were more African-Americans living here than Africans from other countries. And, as we celebrate Nkrumah I want to remind the group of one thing, that Nkrumah was educated in the United States under the tutelage of black American revolutionaries. He went to Lincoln University and was schooled by some of our finest intellectuals and scholars. In fact, in his own words, his political awakening came from his academic experience in America at that time when it was under apartheid rule. Something we do not talk about often, when we talk about apartheid we speak of South Africa. But until 1965, black Americans were under apartheid rule. We live with that legacy today in America. So when we talk about Pan Africanism and those African-Americans that came here, I want to be very clear in saying that Ghana has been the pinnacle country on the African continent to receive African-Americans and our relationship with Ghana is very old, among the oldest in the Diaspora. Among them we have W. E. B. Du Bois, Martin Luther King, who came here, who was with Nkrumah during independence, Malcolm X, Adam Clayton Powell, Justice Thurgood Marshall, and a host of others. So as a member of that community, I can say I am very pleased to be here.

The title of my presentation today is *Peace or Justice: the Dilemma of Power-Sharing* and as Professor Gutto mentioned, I don't have to be politically correct. I don't come here representing any of the institutions I represent. I come here in my individual capacity.

So I want to talk to you about power sharing and something that I call *Illegal Peace*. Giving the proliferation of internal challenges to democratically elected governments in Africa this lecture is limited to an analysis of power sharing between democratically constituted regimes and warlords and rebels that violently seek to overthrow them. I am not looking at it in the context of the legality of power sharing between illegal or undemocratically constituted regimes and warlords because the arguably normative status of the right to democracy in Africa engenders different legal questions, especially as they relate to the right of self determination which some may argue is a **jus cogens** norm. So I ask you: When warlords and rebels use violence to coerce democratically constituted governments to share power, does sharing power simply become an euphemism for "guns for jobs?"

Which legal rules, if any, govern peace agreements in internal conflicts? Specifically which rules govern or regulate power sharing? Are the aims of peace, security, justice and adherence to the rule of law attainable, let alone compatible, with coerced political transitions where warlords force democratically constituted or legitimate regimes to share power? So consider this common scenario: a rebel group through brutal force coerces a democratically elected government into a power sharing arrangement that not only refashions the constitution of order but confers on the rebels unconditional amnesty, key government positions and other privileges. Although the incumbent government prefers to punish the rebels rather than negotiate with them, it shares power out of political necessity and expediency. Why? Because the government lacks the muscle to defeat the rebels on the battlefield and the status or legitimacy to mobilize international action to support its efforts against the rebels. So, in this sense, the failure to negotiate inevitably would result in a prolonged conflict, anarchy, and the eventual toppling of the government itself, so it shares power to save itself.

Governments that have been violently and successfully challenged from within, but are still recognized as the *de jure* representative of the state, are faced with a quandary of how best to negotiate peace, maintain security and survive politically, and manage future uncertainties. It is forced to make strategic choices that often create normative friction between what is legal on the one hand and what is politically necessary and expedient on the other. To date, political scientists and poor decision makers have been proponents of power sharing and seem to ignore the rule and role of law in political transitions—they have controlled the debate over the legitimacy of power sharing, which unfortunately has slipped under

the radar of international lawyers. So my position here is inspired by the apparent disregard for the sanctity of the rule of law, both in practice and the scholarly literature. In this case, the relevance of power sharing and those who are most responsible for negotiating agreements such as the Accra and Lome accords need to be called into question, why, because they prescribed illegal peace, power sharing that did not consider long term social costs. To what extent, if any, does and should the rule of law influence the character of peace negotiations, agreements and political transitions? Is there a lawful way to share power that does not breach fundamental human rights? I question the dominant logic that political power sharing is lawful, legitimate and unequivocally serves the public good, particularly when high crimes have been committed. Rather, I argue that power sharing deals that ignore controlling rules are too often unlawful and unfortunately not viable in the long term.

I am particularly concerned with power sharing between democratically constituted regimes and warlords and rebels who have committed or participated in the commission of international crimes, which raises the question whether or not the violent seizure of power itself should be considered an international crime. If you look very closely at AU Law, the amendments to the AU Constitutive Act of 2002, the ECOWAS Treaty, the ECOWAS Conflict Protocol, its very clear that the African Union and ECOWAS have already said that illegal seizures of power irrespective of whether there is mass human rights violations can form the basis for military intervention, yet, African decision-makers are still willing to share power with those who commit serious high crimes of international law. I focus on power sharing as opposed to, for example, amnesty because power sharing is more expansive and arguably has a greater impact on sustainable peace than amnesty. Amnesty, here being conceptually and practically more narrow and typically a lesser but necessary included element of sharing power. In other words, amnesty maybe given without sharing power, but power-sharing without amnesty is atypical. Amnesty applies to certain individuals and /or groups whereas power sharing directly affects a state's entire population, as it reconstructs or reorders the framework of governance and its future dispositions.

Power sharing arrangements are typically long term and systematic and they determine who will have a seat at the table of power, in what capacity, and for how long. This type of peace raises vital questions about the governance in developmental challenges faced by war-torn states. And the logic behind power-sharing assumes that rebels and warlords will behave and act as good citizens once they are given authoritative positions. It presupposes that warlords can become democrats once sanctioned with state authority. We need not have a poll to find out whether that is the truth. Power sharing with warlords and rebels also sets a negative precedent, it sends a dangerous message to would-be insurrectionists that violence is a legitimate means to effectuate change

and obtain political power. For these reasons, the subject of power-sharing deserves distinct attention, analysis and policy inputs, separate and apart from the question of amnesty - particularly concerning its impact on the rule of law in post conflict societies.

I believe that when democratically constituted regimes are forced to share power and choose between negotiating peace and being violently dislodged from power, peace agreements based on the rule of law should prevail. They should protect fundamental rights and extralegal arrangements should be secondary to political expediency and necessity. This is so because legal peace has less adverse impacts on the political order and is more viable and sustainable over the long term than illegal peace. Those deciding to share power should consider not simply political variables but also legal ones, as the law has important regulatory role to play: it must constrain the political aspirations of decision makers and ensure the lawfulness of peace deals. The point is that rules governing the legality of peace agreements must be adhered to, particularly when the beneficiaries of power sharing acquired power undemocratically and unlawfully, and again, are likely responsible for committing human atrocities.

The logic underlining this position raises several difficult questions. I do not purport to have answers to all of them. Who is responsible for internal disorder, repression and post-conflict justice? Is it immoral for a government to allow deadly conflict to continue until legal peace is reached? This position raises several questions about when, if ever, leaders should accept illegal peace. Should individual responsibility for repression be excused for the perceived collective good? Should power-sharing and amnesty take precedence over retributive justice? Should the political prerogatives of warlords and rebels supersede the fundamental civil, political and human rights of their victims?

I take a victims based approach. Those who argue for power sharing say it is an effective way to give up parties at stake than stay in governance. The underlining goal of it is to give warring factions political legitimacy in decision making authority in government with the hope that they will stop fighting and take a vested interest in the vitality of the state. Can a warlord really take an interest in the vitality of the state? Power-sharing proponents believe that power sharing neutralizes violent conflict by opening the political process and that it serves the public good and makes a contribution to lasting peace? The logic follows that power sharing is necessary in states embroiled in war and is often the only way to forestall conflict, restore the rule of law, strengthen societal support for government and create the political space for democratic elections and transitions where warlords can be elected into office. It is believed that without power sharing rebels and warlords may have no incentive to negotiate peace, and if embattled governments do not do as they say, the rebels will return to the bush. The arguments continue that governments share power to stop unwinnable wars.

Well there is truth to this. This assertion supports the popular notion that peace without power sharing may not be realistic. It may not be attainable. Well, we certainly know that if the international community, namely the UN, were to do its job by maintaining international peace and security, perhaps, governments would not have to take this type of position.

The arguments against power sharing are very clear. The most fundamental arguments against power sharing appears in domestic, regional, sub-regional and international law and policy: rebels, warlords and other abusers who have sponsored or directed atrocities or sought to capture state power violently and undemocratically for economic rewards or political power, have committed domestic and international crimes. It follows that peace agreements irrespective of amnesty should not empower these individuals to rule over their victims or wreak further havoc on the civilian population of state with the sanction and legitimacy of state authority. It rejects the ludicrous assumption inherent in the practice, that warlords and rebels are intent on becoming practicing democrats. Power sharing sends the signal to other would be rebels that violence is a viable way to obtain political power. And power sharing in post war contexts connotes something far more difficult than sharing power with political opponents: it perhaps unrealistically necessitates a societal psychology of forgiveness and with it the ability of citizens to live and work peacefully with one another. We are still testing this hypothesis.

Lastly, as in the case of Liberia and Sierra Leone, power sharing may generate feelings of distrust towards new governments and the political system, and encourage cynicism about the rule of law. The hurdle of legitimacy, particularly as it relates to which factions will acquire authority over which portfolios and ministries could undermine the peaceful political transition in and of itself.

And looking at these accords, specifically Lome and Accra for Liberia and Sierra Leone, respectively, each accord is composed of 37 articles. They have a similar structure in content covering cease-fire, military, human rights, and implementation of the power sharing deal etc. They make the people the subject of their concern, along with their accompaniment of mixed baskets of peace and security, human rights, and justice and the rule of law, yet they violate all of these principles. These two accords violated no less than 30 provisions of domestic law and dozens of human rights conventions that are binding on the states themselves. And in doing this they offer no legal basis for their authority--no legitimizing authority for what they are doing i.e. empowering peace accords to suspend their constitutional orders. And the accord in Liberia removed the judiciary and suspended the entire bureaucratic class including the executive branch. Under what authority can it do this? Because the political elites, stakeholder decision-makers, NGO sector, national organizations, the warlords and the embattled government went to Accra to craft a peace

accord without the consent of the three million people whose rights it curtails? If that is conflict resolution or democracy in action, we need a new strategy. The legitimizing authority for power sharing seems to have rested solely on the accords themselves. Both the Accra and Lome agreements permitted rebel groups to transform themselves in political parties and compete for and hold political office. In this sense and to different degrees the accords provided a legal platform for warlords and their cohorts to attain political power through illegal peace. They conflicted with domestic, sub-regional, regional and international law yet, the moral guarantors of those agreements including, the AU, and to my regret ECOWAS, even signed on indicating that, despite law and policy to the contrary, political necessity and expediency trumps the rule of law.

The accords violated well settled human rights principles, put in power people who are not even qualified to be in government under the constitution of their countries. In Sierra Leone there is a provision for a parliamentarian to be sane. Well, Foday Sankoh was permitted to be vice president, so you tell me if this constitutional rule was followed. Self determination means that the people are supposed to be informed about and participate in government. How can that be the case when peace is negotiated in countries they cannot travel to and leaders they did not elect are appointed to rule over them? The accords also stifled fundamental rights to seek civil and criminal remedies.

This is an insane practice because just as there are calls for the rule of law political elites create peace that violates it, so much so that war victims have no redress within the domestic system. There is no venue to challenge the state itself on the legality of the peace accords. In Liberia they suspended the Supreme Court, so if I am a citizen of Liberia how can I challenge the legality of a peace agreement. There is no venue for me to do so. Who is going to help me? The ICJ, the ICC or maybe now the African Court on Human and People's Rights. Well let's pray.

In order to make legal peace decision makers need to adhere to several principles, foremost among them, the rule of law. They have to take stock of all of the governing rules before entering into peace negotiations. Can you just enter into any peace? If you can then the rule of law means nothing, treaty law means nothing. If we are saying the rule of law should stand up to political prerogatives then we should be universal in our approach and application. These agreements allow governing rules no status, yet governing rules should shape and influence the character of peace negotiations. They should determine what is legally permissible and what is not. The accords should work within and not outside of the existing legal framework, using governing rules as the minimum standard of acceptability. Mediators have to be unswerving and try to abide by the rule of law. And when you seek international support, it should be based on a rule-based approach using affirmative inducements. Affirmative inducements such as

recognition, aid, trade, and support in reforming the security sector.

The realization of the protection of human rights and democracy is integral and not contrary to security, and in peace talks it should be stated from the onset that international law prevails over domestic peace accords when there is a conflict of law, not the other way round. It's the concern over security and resumption of war that provides the best rationale not to share power with warlords and rebels who undoubtedly inject criminal and predatory behavior into the political culture of the country in which they govern. We need not look far for this, we are surrounded by it.

International donors, I think perhaps are the most liable here, particularly, the multilateral organizations. The UN Security Council has a poor track record of authorizing peace keeping or enforcement missions to save African lives. Let me not mention the stark distinctions between its efforts in Kosovo and Sierra Leone where the UN spends eleven cents per day for a refugee in Rwanda and a dollar fifty per day for a refugee in Kosovo when the situation in Sierra Leone was far worse—people were being exterminated in Sierra Leone. The UN claims to want a strong rule of law in African states but then turns around to become the morale guarantors of peace agreements that breach and destabilizes the rule of law itself. Why, because the international community does not want to spend the political and military capital to enforce peace and the rule of law. Then when the African Union says, we are going to codify and adopt **4H** so that we can lawfully intervene militarily to save suffering Africans, based on the experiences of ECOWAS in Liberia, Sierra Leone and Guinea Bissau, vested interests in the international communities oppose this strategy. So they want you to live and die by the rules as they determine them. Unfortunately too many of us

play into this tragic game. Need I mention that the African Union in all its wisdom and consistent with the UN, failed to declare genocide in Darfur.

The international community must not only curb the practice of power-sharing by sanctioning it by utilizing international precedent and doctrine from international bodies, for example, the UN Credentials Committee, which has taken bold stances against accrediting regimes that come to power unconstitutionally. They did not in Haiti, Sierra Leone and Liberia. They said if you come to power unlawfully we will not recognize you. That is a public sanction, a multilateral public sanction, it is the right decision.

In conclusion, states in multilateral institutions that sanction peace deals have a positive duty to protect human rights and democracy and not subvert them by sanctioning unlawful agreements. The international community need not be moral guarantors of peace but rather legal guarantors. It is most unfortunate that, in today's world, these two aims seem to be antithetical.

The abhorrent practice of power sharing raises the question of whether those that make illegal peace actually commit public crimes or crimes against the state and whether those that enable such crimes are conspirators irrespective of the capitols where they reside.

In closing, if the ICC, regional courts and commissions have decided that certain offences are prosecutable under international law, how can we support peace agreements that empower the perpetrators of those violations?

Power-Sharing with Warlords and other Devils: The Limits of the Rule of Law

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Dr. Anne Pieter van der Mei

In his contribution to this Conference (and Quarterly) Prof. Jeremy Levitt strongly argues against peace agreements offering warlords, rebels and the like posts in new, post-conflict governments. His message: do not conclude such a pact with the devil; it is not only unlawful, but in the end also counterproductive. The devil will remain the devil and it is only he who benefits from power-sharing. Peace will only be sustainable when the law is observed and the law does not leave much, if any, room for power-sharing.

Prof. Levitt is one of the first, if not the first, academic who has tackled the issue of power-sharing from the legal perspective.¹ Virtually all of the other literature on this topic is written by political scientists, who generally appear to support power-sharing arrangements. The rule of law indeed is given insufficient weight and it would seem that most politicians and political scientists view the rule as one of many factors that can be subject of peace negotiations.

I think most of us will agree: as a matter of principle, the law is or should not be seen as a tradable commodity. Rather, legal norms should serve as boundaries within which peace negotiations ought to take place. Yet, does this mean that power-sharing, as Prof. Levitt suggests, should always and in all circumstances be rejected?

Before going into this question, let me briefly address a preliminary issue: what precisely is power-sharing? As such, the term is neutral and unobjectionable. Politics is about sharing, balancing, distributing and/or preserving power. So is constitutional law. So is international law. So, what makes power-sharing in the context of peace agreements unique, problematic and objectionable?

Prof. Levitt speaks of democratically elected or legitimised governments that give in to the gun-power of opponents by offering them governmental posts. Questions arise. What is a democratically elected government? In theory, answering this question may not be too difficult, but translating theory into practice is far more difficult. Particularly in Africa, there are various governments that have come or stayed in power through elections that have formally been labelled as 'democratic' but that do not seem to have been truly objective or transparent. What constitutes a 'legitimised' government? Does this include the government of a President who through dubious constitutional amendments managed to get an additional term for office? Furthermore, should there be a concrete, actual fear for resumption of war and violence? Can we also speak of objectionable power-sharing when a newly elected government voluntarily, contrary to expectations of its electorate, suddenly decides to offer some posts to the military simply because it considers it wise to minimize the chances of having future conflicts with military? Does it make a difference whether the soldiers who occupy the posts in question have committed crimes in the past? Is the setting aside of constitutional or human rights norms an inherent element of power-sharing? If so, is power-sharing by definition unlawful? Further, should the threat that the power-sharing government faces necessarily consist of war and physical violence or can we possibly also include in our discussion the threat of, and fear for, economic power and the political tensions that come with it? Do we speak about objectionable power-sharing in case a government offers a post to a representative of the business sector because it fears that enterprises might relocate to another country? Could the decision of Mandela to offer governmental posts to apartheid criminals possibly be regarded as an objectionable form of power-sharing? Was Mandela's rainbow coalition an unlawful, illegal one? What precisely is the difference, if any, between the governmental sharing of power with political opponents in South Africa, on the hand, and Liberia and Sierra Leone, on the other hand? In essence, what distinguishes normal, acceptable forms of power-sharing from objectionable forms of power-sharing? How far do Prof. Levitt's conclusions reach? Are they limited to the power-sharing deals concluded

¹ See also J. Levitt, 'Illegal Peace? An Inquiry into the Legality of Power-Sharing with Warlords and Rebels in Africa,' 27 *Michigan Journal of International Law* (2002) 495-578.

in Sierra Leone and Liberia or can they be extended to other less-clear situations?

Let's return to the afore mentioned question of whether the rule of law should be regarded as an absolute norm that cannot or should not be negotiable. A lawyer looks at the details of peace agreements and power-sharing deals, reviews these under a series of existing constitutional and international rules, and then will probably indeed conclude there are many infringements or incompatibilities. The lawyer concludes that the peace in question is illegal, unlawful. Yet, does this mean that the peace and power-sharing agreements is also immoral, unjust or wrong? Should, for that reason, formally illegal peace agreements always be rejected? Without amnesties, power-sharing and other illegal political awards, the rebel criminal might veto the peace agreements with the result that war and violence may resume and hundreds, thousands of lives will be lost. Law is aimed at achieving justice and peace. But strict adherence to the rule of law might lead to situations which, by any standard, ought to be regarded as unjust.

The domain of justice is not reserved for lawyers. Political scientists and representatives of other disciplines have a role to play too. In the topic under consideration, the political scientists do have a claim that certainly cannot be dismissed right away. In fact, they have a particularly powerful claim. The rules, norms and principles that lawyers defend have all been drafted, adopted or recognized with the aim of achieving on a structural, long-term basis justice and sustainable peace. Yet, do we say to people who fear to be murdered tomorrow that they have to sacrifice themselves for peace and justice in the long-term? Do we tell these people that for the sake of the future, hopefully positive, effects of the rule of law we cannot help them out today? Yes, peace must be sustainable and, yes, justice must be pursued structurally with the long-term in mind. Yet, justice must also be done today, on the very short-term basis.

Truth is that lawyers so far have not developed any rules on how to achieve immediate peace and justice today. The constitutional norms, human rights treaties etc. they defend have been developed and shaped with the long-term in mind, but those who developed them have never placed themselves in the specific, urgent and unique position of a government that is confronted with threatening warlords. So far, lawmakers have never seriously addressed the issue of how to choose the need for immediate peace and stopping of violence, on the one hand, and adhering to previously adopted legal norms, on the other hand.

This is not to say that the governments that decide to share power with warlords and other devils are necessarily right. For example, it simply is rather naïve to think, as some political scientists seem to do, that power-sharing might help to heal Charles Taylor and other lunatics and transform them into democrats acting in the public interest. The devil is and will remain the devil. Power-sharing cannot and should not

be seen as a means to achieve enduring peace and justice. Yet, the political scientists do have a claim when they say that the existing rules of constitutional, human rights and criminal law do not lead to just results in all situations.

So the core question is this: how should one combine the compelling long-term claim of lawyers for justice with the equally laudable claim of political scientists and sincere politicians for immediate peace and justice? Prof. Levitt does not answer this question. He does not even address it. He has set in motion a particularly important inter-disciplinary discussion, but he has not, or at least not yet, given us any hint as to how to solve the issue under consideration.

So far such a discussion has not taken place and this conference thus gives us the unique platform for addressing this issue. My thoughts have not yet crystallized out, but I do believe that the solution to the problem under consideration must be an international one. It is up to the international community to take responsibility and for as long as it does not, power-sharing deals, for reasons that cannot be easily dismissed, will continue to be made. When one puts a gun against the head of a person to force him to promise or to do certain things, that person might give in, even if he knows that it breaches rules of loyalty or law. That person gives in because he is isolated, hopeless, because he lacks outside support. We may say that that person ought to be stronger and should not give in, but, given the situation he finds himself in, we cannot truly blame him or say that he acts immorally, wrongly. Governments involved in peace negotiations may find themselves in such a weak, isolated position. On their own, they may not be strong enough to withstand the violent pressure of warlords and to do what the rule of law demands. We may say that they should do so, but in a setting that adherence to the formal rule of law may lead to mass-killings, we are perhaps asking too much from the government in question. Without external support such a government simply may have no other choice than to share power with enemies, criminals and devils. To enable the government in question to respond differently, to straighten its back and to fully defend the rule of law, international assistance is required. The Charles Taylor's and Foday Sankoh's of the world may be strong enough to stand up against the Liberian, Sierra Leonean or other individual governments, but they cannot beat the international community.

Thus, for the rule of law to be effective and enforceable in situations in which peace negotiations take place, it is not enough to tell the government in question not to give in to the pressure of warlords and the like demanding government posts and amnesties. That is too easy and unrealistic. What is necessary is a framework supporting and backing that government. That framework can only be set in place by external actors, such as the African Union, Regional Economic Communities and/or non-African States and organizations. The African Union certainly is

empowered to act accordingly. Thus, among the principles that the Union adheres to are respect for democratic principles, human rights, the rule of law and good governance as well the condemnation and rejection of unconstitutional changes of government (Art.4, sub n and p Constitutive Act). The Assembly may declare that a power-sharing arrangement infringes these principles and may impose economic and political sanctions as it deems fit (Art.23 (2) Constitutive Act). Furthermore, the African Charter of Democracy, Elections and Governance of 2007 stipulates that *any* replacement by a democratically elected government by armed dissidents or rebels shall be regarded as an unconstitutional change of government and this imposes on State Parties the duty to take appropriate measures (Art.23 of the Charter). It is submitted that, in the light of the objective and spirit of the Democracy Charter, this can be extended to power-sharing agreements with warlords and rebels. The African Union has accepted a responsibility for ensuring the constitutionality of government. The organization holds the power to participate in or influence peace negotiations in individual States and by threatening to impose sanctions the AU can provide the government in question the support necessary to withstand the pressure to accept power-sharing deals. If the Protocol on Amendments to the Constitutive Act were to enter into force, the sanctions could possibly even consist of military intervention. At present, the African Union's right to humanitarian intervention only applies in grave circumstances in which genocide, war crimes or crimes against humanity are committed, but the afore mentioned protocol extends it

to situations in which a 'serious threat to legitimate order and stability to the Member State' in question exists.

It is submitted that the African Union (and/or other members of the international community) should use powers such as the above to provide a setting in which one can legitimately expect and demand from a government involved in peace negotiations to be firm and reject any claim for government posts in combination with amnesties. Arguably, the international community should even send out the stronger message that warlords should not have the illusion that they escape the wings of justice and will be held criminally accountable. Collective, international efforts are needed to ensure that the rule of law is observed. In the absence of such efforts and external support, one simply cannot expect from individual, isolated governments not to give in to the gun-power of the bedevilled warlords. In fact, depending on circumstances, one might even strongly encourage them to do so and to opt for concrete short-term justice in stead of vague and uncertain long-term justice. Prof. Levitt is right in saying that power-sharing deals breach the rule of law and the peace they bring are illegal. The rule of law, however, is not sacrosanct and an illegal peace may very well be just.

Peace and / or Justice: The Dilemma of Power Sharing

Phakiso Mochochoko

Senior Legal Advisor, International Criminal Court (ICC)



Phakiso Mochochoko

The theme of this afternoon's discussion raises the important issue of the relationship between peace and justice. For many of us, the premise for starting this debate is that impunity for serious crimes must come to an end. This means that the quest for justice must remain central to the establishment and maintenance of order at the inter-state and intra state levels. For many of us, the relevance of justice for international peace and security is self evident and cannot be overstated. Justice and peace are therefore not mutually exclusive, but must be regarded as complimentary requirements. The problem is thus not one of choosing between peace and justice, rather it is one of finding the best way to interlink one with the other in the light of specific circumstances, without sacrificing the duty of justice.

Complex questions that may need to be answered in a specific situation include;

- 1) should we relentlessly pursue justice even when its pursuit may be an obstacle to peace?
- 2) should we at all times and at all places insist on punishing perpetrators even when doing so would continue the bloodshed and loosing of innocent lives?
- 3) should we always and everywhere insist on uncompromising standards of justice even at the expense of jeopardizing a delicate peace
- 4) should we ignore the demands for justice simply to secure an agreement even when the fragility of such agreement is evident and could indeed set a bad precedent?

While it is clear that there are no easy answers to the moral, legal and philosophical dilemmas that this relationship poses, it is also clear that in each given

situation, the challenge is to balance the demands of peace and justice, conscious of the fact that the two may often compete and aware that there may be times when they cannot be fully reconciled.

Many a times, the goals of justice and reconciliation compete with each other, hence the need for each society to form a view about how to strike the right balance between them. However, in striking that balance, certain international standards must be adhered to, in particular, there can be no amnesty for genocide, crimes against humanity, war crimes and other serious violations of human rights, neither can the rights of the accused be violated.

Experience has shown that where justice is delayed, lasting peace is denied and that justice is a handmaiden of true peace. The challenge is to ensure that justice and the values for peace prevail wherever crimes against humanity, genocide and war crimes have been committed, bearing in mind that the duty of justice will always be an important building block for peace. Restoring peace does not only mean the silencing of weapons of war, it is also about accountability, restoring dignity to victims and enforcing respect for human rights.

The answer to bringing about a world of peace, stability and justice mainly lies in closer international cooperation, a multilateral approach to democracy and the rule of law. Our goal is to build a better global village where there is no poverty or hunger and where all humanity enjoy development and dignity. In this regard, the establishment of international institutions such as the ICC guarantee objectivity and impartiality in trials conducted against criminal defendants.

The ICC has undoubtedly emerged as an affirmation of the common conviction that justice and peace are indispensable for human development. The establishment of the Court is a lasting contribution to the maintenance of international peace and security and the promotion of the rule of law and respect for human rights and fundamental freedoms throughout the world. The Court is an important step towards global civilization, it serves international justice, the rule of law and the fight against impunity. It can take on those very serious crimes which states fail to prosecute. The main pillar of justice however, remains to be national judicial systems. Complementarity, which is an underlying principle of the Court, facilitates the institutional division of labour between national and international justice systems.

In conclusion, let me emphasize that a world of peace assumes nothing more than justice, respect for human rights and better living conditions for all. African countries and the international community have put in place a comprehensive set of international legal instruments designed to prevent impunity and

atrocities. These instruments have reaffirmed the dialectic relationship between justice, law, peace and respect for human rights.



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Gender Crimes

Brigid Inder

Executive Director, Women's Initiatives for Gender Justice



Brigid Inder

Thank you for the opportunity to address this colloquium and congratulations to Africa Legal Aid and the ICC for convening this important meeting.

One of the more recent developments in the interface between peace and justice are truth commissions which have been both innovative and controversial as alternative mechanisms for establishing the truth, addressing perpetrators responsibilities and accountability, and creating spaces for victims and survivors. As the genre of truth commissions emerged in the early 1990's each one developed its own approach to peace building and reconciliation with varying successes and different strengths. I'm going to highlight a few examples of truth commissions and the strengths and challenges of these in relation to outcomes of justice for women.

In Timor Leste, a special research team on women and conflict was formed as part of the Commission for Reception, Truth and Reconciliation (CAVR), the Commission also held a national public hearing for women and worked with women's organizations which led to the identification of rape and other forms of sexual violence as crimes to be addressed by the Urgent Reparations Program. Despite the work of the Commission only 23% of those to benefit from the Reparations Program were women. The experiences in Timor-Leste led the Commission at the end of its work, to recommend the establishment of a gender quota for future reparations programmes to ensure that at least 50% of resources would be earmarked for girls and women victims/survivors.

At the Sierra Leone Truth Commission women demanded that the Commission include amongst its recommendations the need for wide-ranging law reform to recognize and advance women's rights

specifically in relation to the ownership of land. Three bills have been prepared and are in the parliamentary committee process.

In Peru one of the strengths of its Truth and Reconciliation Commission was the establishment of a justice division within the Commission itself which looked at the most serious cases of human rights violations and in some instances recommended further investigation and prosecution by domestic courts. This led to two landmark cases on sexual violence, however the Commission elected not to address issues of law reform despite restrictive laws in Peru which appeared to compound rape-related injuries.

In Morocco, the Equity and Reconciliation Commission, the first and to date only commission to be established in the Middle East and North Africa, carried out a number of gender specific strategies including providing women with the option of testifying in both closed and open hearings; the Commission gathered documentation to quantify and classify the violations committed against women; they conducted research of a random sample of female and male victims/survivors to better understand and develop a gender classification of violations; the Commission also held meetings with women's organizations to elaborate recommendations for reparations.

Despite these examples, in many ways Truth Commissions have replicated the pre-existing discrimination of women, indigenous peoples and others and have failed to adequately include and respond to the gender dimensions of conflict and peace.

Currently in the Peace Talks on Northern Uganda being held in Juba to end the 20 year conflict, there are no women's organisations present, amongst the few members of civil society in attendance there are no women's groups represented although some applied 3 months ago for authorization to attend, no representatives of women from the communities most affected by the conflict are able to observe the proceedings, there are no gender advisors for either of the negotiating parties, and no gender technical team for the negotiation process. Despite the presence of the United Nations, EU and AU states as observers, and in spite of UN Security Council Resolution 1325 on *Women, Peace and Security*, there is no one mandated to represent women negotiating, informing, advising, monitoring and infusing the peace process in northern Uganda.

Amongst the features common to communities emerging from conflict are the necessity for truth telling; decommissioning and surrendering of weapons for the prevention of further violence; and gender-

inclusive accountability in multiple and complementary forms.

Gender Provisions

In the past 5 years a new and permanent form of accountability has emerged with the establishment of the International Criminal Court (ICC). A unique feature of the Rome Statute is the gender provisions integrated into the statute.

For the first time rape, sexual slavery, enforced prostitution, forced pregnancy, enforced sterilization, gender based persecution, trafficking and other forms of sexual violence are recognised as Crimes against humanity; War Crimes and although not explicitly mentioned in the provision, these crimes can be prosecuted as Genocide

This codification gives the ICC not only the jurisdictional basis to include these crimes but establishes a positive obligation on the Court to prosecute gender based crimes where there is evidence of these acts in the situations where it is conducting investigations.

Despite the millions of women historically who have been victims of gender based crimes during conflicts, there have been less than 40 convictions for these crimes. In fact they have only been taken seriously in the past 10 years through the work of the ICTR and ICTY which account for almost all of the convictions. I would like to take the opportunity to acknowledge those at this colloquium whose work at the tribunals has contributed to the prosecution of gender based crimes. The expectation on the ICC to end this historical impunity and advance the jurisprudence in this area is therefore high and justified as women seek accountability through an international judicial process mandated to prosecute such crimes.

Situations before the ICC

In the situations before the ICC – 5 of the Lord's Resistance Army (LRA) commanders in northern Uganda face 33 counts of war crimes and crimes against humanity. Amongst them the 2 top LRA commanders are charged with gender based crimes – the charges include inducing rape as a war crime; rape and sexual enslavement as crimes against humanity¹;

With respect to the Democratic Republic of the Congo (DRC) there are no charges for gender based crimes in the first case before the Court. In the case against Thomas Lubanga, the founder and president of the UPC militia group based in Ituri, eastern DRC, the accused is charged with 3 counts of war crimes – the enlistment and conscription of child soldiers and forcing them to actively participate in hostilities.

At the time of the confirmation hearing in November 2006 only 4 victims out of thousands of victims of the militia group were recognized by the court to participate in the first case. Unfortunately no victims of gender based crimes were recognized by the court and no girl soldiers were recognised as victims with the right to participate in the first case.

For the Darfur situation, evidence has been presented against 2 suspects including for the first time a government official, for 51 counts of war crimes and crimes against humanity. Both suspects are charged with rape as a war crime and crime against humanity, rape is also charged as other forms of violence including persecution and outrages upon personal dignity. Although the charging of gender based crimes in Darfur and Uganda could be considered relatively narrow in that there were a wider range of gender based crimes committed for which there are no charges, nevertheless the charging of rape as a crime in itself *and* as other forms of violence reflects the multi-faceted character of sexual violence and the widespread and systematic nature of the commission of sexual violence in these conflicts.

Gender Dimensions:

To understand gender issues in relation to peace we first need to consider the gendered aspects of conflict which are far reaching and complex – they encompass the gender dimensions of all the types of violence that occur in conflict as well as some specific forms of violence for which women are targeted. There are economic consequences for women. Women are displaced and there are more female-headed households. Girls are recruited and conscripted as are boys into militia groups and in some instances into armed forces. In addition girls are often assigned to commanders for the purposes of sex. Women are expected to sustain themselves, their families and their communities in times of crisis and conflict creating additional burdens. Women are abducted as are men, while enslaved women are assigned to perform domestic duties. Women are often required to play new roles in the community which may be met with resistance and resentment. But most often during conflict, women are targeted for particular types of gender based crimes, more specifically sexual and most commonly rape.

Since May 2006, my own organization, the Women's Initiatives for Gender Justice has conducted 4 documentation missions in Eastern DRC in collaboration with local women's rights and human rights partners.

Together we have documented 117 interviews with women victims/survivors of gender based crimes and we have now begun our analysis of the patterns of crimes and violations committed against women. This analysis is important for moving beyond the critique of individual instances of rape towards demonstrating the systemic nature of the crimes committed against women, the specific types of harm suffered and the

¹ Kony- inducing rape as a war crime, rape and sexual enslavement as CAH; Otti got inducing rape as a war crime and sexual enslavement as a CAH.

particular forms of violence for which women are targeted.

The preliminary analysis of our 3rd mission where we interviewed 44 victims/survivors in the Ituri region shows that:

96% interviewees were raped – 40% were gang raped; the average number of perpetrators of gang rape was 5. 66% were aware of others raped. 84% were abducted. 57% enslaved in militia camps. 57% knowledge of militia camp commanders. 73% knowledge of local village, district commanders.

40% of those interviewed were attacked on their way to and from the market and 23% were attacked while performing domestic duties in villages and homes. In other words 63% of women were attacked whilst carrying out their gendered roles. 55% knew the direct perpetrators. 39% ‘Low level militiamen’. 16% ‘Senior commanders’.

But not only are some of the types of violence committed against women different, but the purpose for which the violence is committed against women and men can also be different. For example in Morocco the research conducted by the Equity and Reconciliation Commission found that the methodology of torture was different for women and the purpose of the torture was different – women were tortured for information about the political activities of their family members (not for their own political activity, it was assumed women were not political activists).

Women were subjected to specific types of torture – they were forced to be naked in the snow; threatened with rape and also raped; monitored and watched when using the bathroom; subjected to body searches; women had their new born babies taken from them; perpetrators would threaten the lives of their children or torture their children in front of their mothers in order to get women to divulge information about their family members which they may genuinely not know.

Complementarity

One of the primary functions of any form of accountability and justice including the ICC is to deter the commission of future crimes by prosecuting those who have already committed those crimes. The principle of complementarity under the Rome Statute provides a strong impetus for the Court to investigate and prosecute gender based crimes – because of the unwillingness or inability of States to genuinely carry out the investigation or prosecution.

In many of the situations within which the ICC is exercising or could exercise its jurisdiction, women have limited human and legal rights especially in relation to physical integrity and the prevention of violence. The absence of relevant or effective legislation, the existence of laws which condone violence against women, the requirement of corroboration in relation to rape and sexual violence,

the issue of consent, inclusion in a trial of information regarding prior or subsequent sexual behaviour of the victim/survivor, inadequate police investigations, the stigma associated with rape and the lack of support for women all conspire to create a state of unwillingness and inability to genuinely prosecute gender based crimes.

For example in the Central African Republic where the ICC has just announced the opening of a formal investigation - marital rape is not illegal, the law does not afford women the right to inherit, there are very few convictions for rape and women do not have confidence in the police nor the judicial system regarding gender based crimes, domestic violence is commonplace and considered acceptable and female genital mutilation is still widely practiced especially in the northern parts of the country.

The prosecution of rape and other forms of violence against women by the ICC in these contexts is particularly significant because it would demonstrate that the Court recognises the human and legal rights of women even when these rights are denied by the laws and practices of their own country. Given the limited legal status of women and the few convictions for sexual violence in each of the countries where the court is conducting its investigations, prosecution of these crimes is a justifiable priority and will assist in future domestic prosecutions of non-conflict related rape and other forms of violence by the national judiciary.

National Challenges

It is clear women face many barriers in seeking justice and accountability for gender based crimes. The failure to effectively investigate Violence against women, the lack of charges or the under-charging of rape and other forms of sexual violence are features common to both international and national jurisdictions. There are also many other barriers for women and challenges for national jurisdictions to hold perpetrators of gender based crimes accountable:

Such as:

The automatic suspicion of rape victims by police because of the prevailing belief in some societies that women are unreliable witnesses or bearers of truth especially as there so often is a delay between the time of the incident and the time of the complaint.

In some jurisdictions there is an unreasonable burden on the woman to prove she was raped – e.g. requiring the corroboration of witnesses, in some instances 4 male witnesses to the rape and if the victim / survivor cannot provide these witnesses then she can be prosecuted for adultery; The lack of access to legal aid or a legal representation. The cross examination of the victim/survivor by defence counsel specifically regarding the victims previous and subsequent sexual history, as a way of challenging the non-consensual nature of the rape.

The Rome Statute provides a framework for addressing some of these gender discriminatory practices. The ICC can make a significant contribution to advancing women's human rights- a critical component of both peace and justice- by establishing international gender standards for the investigation and prosecution of gender based crimes; by contributing to accountability for perpetrators of violence against women; and by demonstrating the value of the Rome Statute and its applicability to domestic law and local judicial proceedings.

For countries ending conflict, the interface between peace and justice is difficult and challenging. Whatever the timing and proportions of these twins, it is clear both processes need to involve women to ensure a new, inclusive, equality-based, human-rights respecting society has a chance to emerge.

“Tokyoisation” of the ICTR’s Gender Jurisprudence

Patricia Viseur-Sellers

Gender Expert, United Nations High Commission for Human Rights, Geneva



Patricia Viseur-Sellers

I would like to speak about loss of memory. When discussions arise about international justice in Africa, I maintain that there exist, either a loss of memory of Africa’s concrete accomplishments, or a denial or refusal to accord it recognition. My thirteen year tenure as a prosecutor and legal advisor for gender at the International Criminal Tribunal for the former Yugoslavia¹ allowed me to undertake several working assignments with colleagues in Kigali and Arusha at the International Criminal Tribunal for Rwanda.²

Upon returning to “the North” one often only heard references to the ICTY and the Nuremberg Tribunal as the constructors of international legal justice. I came to realize that there was a “Tokyoisation” of the international justice occurring in Africa, in particular in relation to the jurisprudence of the gender-based crimes of sexual violence.

“Tokyoisation” captures the devolution of the International Military Tribunal for the Far East,³ commonly called the Tokyo Tribunal, to second class judicial status in relation to the International Military Tribunal held at Nuremberg. As a result, lawyers and scholars rarely cite to the Tokyo Tribunal or its jurisprudence, or, on singular occasions, cite to it ambiguously or disapprovingly. That the Nuremberg process, and especially the Nuremberg Judgment, continuously overshadows the existence of the Tokyo Tribunal is compounded with irony.

The seldom invoked Tokyo Tribunal rendered a judgment that is a detailed historical, factual, and evidentiary-based recounting of the war crimes and crimes against the peace committed by the Japanese political and military leaders. It is five times longer than the Nuremberg Judgment. Chapter eight of the Tokyo Judgement documents war crimes and describes numerous acts of rampant sexual violence inflicted by the Japanese troops upon both men and women. The Tokyo Tribunal prosecutors explicitly indicted the rapes of occupied civilian inhabitants and internees, and military prisoners of war, such as female nurses.⁴ The judges at the Tokyo Tribunal forthrightly weighed the plethora of evidence of wartime rapes and other cruelties⁵ and rendered express convictions for rape as a war crime. Contrastingly, the Nuremberg prosecutors entered evidence of sexual violence on the record, but the Nuremberg Judgment amalgamated all physical abuse, including evidence of rapes in occupied France, and placed them under stealth pronouncements that led to convictions for the war crimes of murder and ill treatment against the civilian population,⁶ with sexual violence subsumed under the latter category. Minor war criminals were tried by the Allied Forces in military proceedings subsequent to the Nuremberg and

¹ The act of the establishment of the International Criminal Tribunal for the former Yugoslavia is found in the Statute of the International Criminal Tribunal for the former Yugoslavia, *attached* to the Report of the Secretary General Pursuant to Paragraph 2 of the Security Council Resolution 808, U.N. Doc. S/25704, Annex (1993), reprinted in 32 I.L.M. 1159 (1993).

² The act of the establishment of the International Criminal Tribunal for Rwanda is found in the promulgation of the Statute of the International Criminal Tribunal for Rwanda, *attached* to Prosecution of Persons Responsible for Genocide and Other Serious Violations of International Humanitarian Law Committed on the Territory of Rwanda and Rwandan citizens responsible for genocide and other such violations committed in the territory of the neighbouring States, between 1 January 1994 and 31 December 1994, S.C. Res. 955, Annex (8 Nov. 1994), reprinted in 33 I.L.M. 1598 (1994). (hereinafter ICTR). The ICTR and the ICTY are often referred to as the *ad hoc* Tribunals.

³ Charter of the International Military Tribunal for The Far East, Tokyo, 19 January, 1946, Art. 17T.I.A.S. 1589, as *amended*, 26 Apr. 1946. (“Tokyo Charter”).

⁴ Tokyo trial documents reprinted in *The Tokyo War Crimes Trial: The Complete Transcript of the Proceedings of the International Military Tribunal for The Far East*, 22 Vols. (R. Pritchard & S. Zaide eds., 1981) (IMTFE Docs), *see*, vol. 1, at 13, and vol. 20 at 49 and 605.

⁵ IMTFE, vol. 1 at 1029.

⁶ For further examination and comparison of the Nuremberg and Tokyo Tribunals’ jurisprudence consult, Sellers, *The Context of Sexual Violence: Sexual Violence as Violations of International Humanitarian Law*, in *Substantive and Procedural Aspects of International Criminal Law*, McDonald and Swaak eds., Kluwer Law International (2000) pp. 277-293; Askin K.D., *War Crimes Against Women: Prosecution in International War Crimes Tribunals*, Dordrecht: Martinus Nijhoff Publishers (1997); Anne-Marie L.M. de Brouwer, *Supranational Criminal Prosecution of Sexual Violence: The ICC and the Practice of the ICTY and the ICTR*, School of Human Rights Research Vol. 20, Insertia (2005).

Tokyo Tribunals. The “subsequent trials” held in post-war Asia, contrary to their counter-parts in Western Europe, often prosecuted rapes as war crimes.⁷ The Tokyo Tribunal and the subsequent trials held in Asia produced relevant jurisprudence, yet, it is the Nuremberg Judgment and the subsequent proceedings in Europe that garners the overwhelming accolades, the majority of judicial commentary and the scholarly attention. The resulting loss of memory or denial of the relevance of the two Asian-based legal processes is what I term “Tokyoisation”.

The ICTR suffers from “Tokyoisation” in spite of its consistent delivery of thoroughly stunning jurisprudence on the most heinous crime, in legal history, genocide. It especially endures a “Tokyoisation” in regard to the landmark jurisprudence of sex-based crimes delivered by its judges.⁸ The first conviction for the crime of rape at

the *ad hoc* Tribunals was not handed down by the ICTY, but rather by the ICTR in the Akayesu case⁹ in which the accused was found guilty of rape as a crime against humanity, a *de novo* holding.¹⁰ Four months after the Akayesu decision, an ICTY Trial Chamber convicted a special forces commander for the rape as a war crime.¹¹ The ICTY conviction for rape as a war crime, as welcomed and well deserved as it is for modern international criminal jurisprudence, follows Akayesu’s momentous, first instance conviction for rape as a crime against humanity. More importantly, it was preceded by the Tokyo Tribunal Judgment’s condemnation of rape as a war crime. However, since scholars and lawyers banished the accomplishments of Tokyo, the ICTY received the uninformed credit and praise as a pioneer,¹² instead of congratulations for

⁷ See, generally in the Far East, the Trial of *General Tomoyuki Yamashita*, IV Law Reports of Trials of War Criminals 1 (1946); the Trial of *Takashi Sakai*, Case No. 83, XIV Law Reports of Trials of War Criminals 1 (1946), and the Trial of *Washio Awochi*, XIII Law Reports of Trials of War Criminals 1 (1946). Since World War II, a handful of prosecutions condemning wartime rape took place. See, US Court of Military Appeals, *John Schultz* case, Judgment 5 August 1952, wherein rape was held to be a crime universally recognized as properly punishable under the law of war. The “subsequent trial” in the European theatre delivered jurisprudence that examined sexual violence, especially reproductive experiments on male and female detainees. See, The Trial of Obersturmbannfuhrer Rudolf Franz Ferdinand Hoess, VII Law Reports of Trials of War Criminals 11 (1947) (crimes committed in the Auschwitz camp); The Trial of Joseph Krametz and II 44 Others, Law Reports of Trials of War Criminals I crimes committed in Birkenau.

⁸ The author refrains from dramatizing or overstating this proposition, but insist on signaling the under-whelming scholarly examination on the breadth of the ICTR sexual assault jurisprudence, with welcome noted exceptions, including: Kelly D. Askin, The International Criminal Tribunal for Rwanda and Its Treatment of Crimes Against Women, in John Carey et al. (eds) *International Humanitarian Law: Origins, Challenges and Prospects* – Vol. II (2004) and Sexual Violence in Decisions and Indictments of the Yugoslav and Rwanda Tribunals: Current Status, *American Journal of International Law*, 93(1), 199, 97-123; Anne-Marie L.M. de Brouwer, Supranational Criminal Prosecution of Sexual Violence: The ICC and the Practice of the ICTY and the ICTR, *School of Human Rights Research* Vol. 20, Insertia (2005); C. Eboe-Osuji, Rape and Superior Responsibility: International Criminal Law in Need of Adjustment, 20 June 2005, The Hague, www.icc-cpi.int/library/organs/050620; L. Green, Gender Hate Propaganda and Sexual Violence in the Rwandan Genocide: An Argument for Intersectionality in International Law, *Columbia Human Rights Law Review*, 33, (2000) 733-776. A. Jones, Gender and Genocide in Rwanda, *Journal of Genocide Research*, 4(1) 2002, 65-94. R. Haveman, Rape and Fair Trial, in *Supranational Law*, Maastricht Journal of Comparative Law. 9(3), (2002), 263-278; Catherine MacKinnon, ‘Defining Rape Internationally: A Comment on Akayesu’, (2006) *Columbia Journal of*

International Law 941; A. Miller, From the International Criminal Tribunal for Rwanda to the International Criminal Court: Expanding the definition of Genocide to Include Rape, *Penn State Law Review*, 108, (2003) 394-373. K.C. Moghalu, International Humanitarian Law from Nuremberg to Rome: The Weighty Precedents of the International Criminal Tribunal for Rwanda, *Pace International Law Review*, 14, (2002) 273-305; P.V. Sellers, “The Appeal of Sexual Violence”: Akayesu/Gacumbitsi, in *Gender-based Violence in Africa*, ed. Karen Stefisyn, University of Pretoria, (2007).

⁹ *Prosecutor v. Jean-Paul Akayesu*, Judgment, Case No. ICTR-96-4-T, 2 September 1998. The rape conviction as a crime against humanity was affirmed on appeal. *Prosecutor v. Jean-Paul Akayesu*, Judgment, Case No. ICTR-96-4-A, 1 June 2001 Judgment.

¹⁰ The conviction for rape as a crime against humanity was *de novo* for an internationally constituted tribunal. Neither the London nor Tokyo Charters, the governing instruments of the Nuremberg Tribunal or the Tokyo Tribunal incorporated provisions for rape as a crime against humanity. The Control Council No. 10 Law (Allied Control Council No. 10, Punishment of Persons Guilty of War Crimes, Crimes Against the Peace and Against Humanity, 20 Dec. 1945, Official Gazette of the Control Council for Germany) that governed the Allied “subsequent proceedings” in Europe incorporated rape into its provisions for crimes against humanity.

¹¹ *Prosecutor v. Anton Furundzija*, Judgment, Case No. IT-95-17/1-T, 10 December 1998. The conviction was under the war crime of “outrages upon personal dignity” that encompassed rape. The conviction was affirmed on appeal. *Prosecutor v. Furundzija*, Judgement Case No. IT-95-17/A 21 July 2000.

¹² For the watershed initial legal achievements of the sexual assault jurisprudence delivered by the ICTY, and later affirmed on appeal, refer to: *Prosecutor v. Tadic*, Judgement, Case No. IT-94-1-T, 7 May 1997 (conviction for cruel treatment as a war crime for male sexual assault); *Prosecutor v. Delalic et al.*, Judgement, IT-96-21-T, 16 Nov. 1998 (the conviction for torture as a war crime based upon evidence of rapes and conviction cruel treatment as a war crimes for male sexual assaults, including rape); *Prosecutor v. Anton Furundzija* (the conviction for rape as a war crime for female rapes and for torture as a war crime for female rapes and of a male prisoner being forced to watch a woman be continuously raped); *Prosecutor v. Dragoljub Kunarac, Radomir Kovac and Zoran Vukovic*, Case No. IT-96-23-T. (the conviction for

commencing the second generation's jurisprudence of rape as a war crime.

In addition to the crime against humanity of rape, the *Akayesu* case handed down convictions for sexual assault conduct, including rapes that have fulfilled the legal criteria for genocide.¹³ This groundbreaking ruling deservedly garners jurisprudential attention. Nonetheless, Akayesu should be understood more broadly as the initiator of a legal legacy in which ICTR judgements normalized submissions of sexual assault evidence to substantiate the crime of genocide¹⁴. The ICTR jurisprudence confirms sexual violence as proof not only of genocide, but of the paramount legal element of intent to commit genocide,¹⁵ as well as proof of direct and public incitement to commit genocide.¹⁶ The ICTR jurisprudence also bequeaths subsequent pronouncements of rape as a crime against humanity¹⁷ and sexual assaults as probative of inhumane acts¹⁸ and persecution,¹⁹ both, enumerated provisions of crimes against humanity. Furthermore, the ICTR sexual assault jurisprudence, like that of the ICTY contains factual and legal holdings on evidence of male sexual assault, still a mostly "taboo" subject of legal analysis.²⁰

enslavement as a crime against humanity based on the basis of rapes and other sexual assaults).

¹³ *Prosecutor v. Jean-Paul Akayesu*, Judgment, Case No. ICTR-96-4-T, 2 September 1998.

¹⁴ See, *Prosecutor v. Laurent Semanza*, Judgment and Sentence, Case No. ICTR-97-20-T, 15 May 2003; *Prosecutor v. Laurent Semanza*, Judgment and Sentence, Case No. ICTR-97-20-A, 20 May 2005; *Prosecution v. Muhimana*, Judgment, Case No. ICTR-95-1B-T, 25 April 2005. *Prosecution v. Muhimana*, Judgment, Case No. ICTR-95-1B-A, 21 May 2007; *Prosecutor v. Gacumbitsi*, Judgment, Case No. ICTR-2001-64-T, 17 June 2004; *Prosecutor v. Gacumbitsi*, Judgment, Case No. ICTR-2001-64-A, 7 July 2006.

¹⁵ Absent the establishment of the specific "intent to destroy in whole or part" a designated genocide group, the liability of a perpetrator might be for extermination, murder or persecution as crimes against humanity, but not the crime genocide. Infliction of sexual violence has been held to be evidence of the intent to commit genocide. See, *Prosecutor v. Eliezer Niyitegaka*, Judgment and Sentence, ICTR-96-14-T, 16 May 2003, wherein the Trial Chamber held that "the killing of Assiel Kabanda and his subsequent decapitation and castration" and the sexual violence to a dead woman's body sufficed to prove the factual basis of the legal requirement for intent to commit genocide. paras. 316, 416. The factual and legal findings were affirmed on appeal. *Prosecutor v. Eliezer Niyitegaka*, Judgment, ICTR-96-14-A, 9 July 2004.

¹⁶ *Prosecutor v. Ferdinand Nahimana, Jean-Bosco Barayagwiza and Hassan Ngeze*, Judgment, Case No. ICTR-99-52-T, 3 December 2003 (Media Case).

¹⁷ *Prosecutor v. Semanza*; *Prosecutor v. Muhimana*; *Prosecutor v. Gacumbitsi*; *Prosecutor v. Niyitegaka*.

¹⁸ *Prosecutor v. Eliezer Niyitegaka*.

¹⁹ *Prosecutor v. Ferdinand Nahimana, Jean-Bosco Barayagwiza and Hassan Ngeze*.

²⁰ *Prosecutor v. Niyitegeka*. "The witness then saw Mika cut off Kabanda's head with a machete, and castrate him" para. 271.

Moreover, little heed is given to the ICTR's initiation of proceedings against accused representative of different segments of Rwandan society. Members of the clergy, both protestant²¹ and catholic,²² members of the media,²³ as well as politicians in the commune,²⁴ councilmen,²⁵ or government ministers,²⁶ the prime minister,²⁷ and civilian businessmen²⁸ have faced charges of genocide and crimes against humanity, some replete with evidence of sexual violence. High level members of the military and other members of the government are presently being tried for genocide that encompass sexual assault evidence. The ICTR jurisprudence, thus, evinces the legal confrontation of the broader range of actors in the genocide and crimes against humanity, while discussion continues to rage in Europe over the participation of the Catholic Church and of individual members of clergy in facilitating the Nazi crimes.

The accomplishments of the ICTR in Africa must be situated into a global context. In Spain even though a civil war of terror with Basque separatists has been waged for decades, there has been no move to establish an international tribunal nor any other international justice mechanism. Similar lack of international legal processes became the norm in Northern Ireland, even at the height of the IRA's internal war with Great Britain. The quandary of justice or peace, which comes first, has not been uniformly applied. Granted, the occurrence of the Rwanda genocide demanded international intervention, even an international justice mechanism, yet, compared to the stalling and wrangling to establish the Extraordinary Chambers in the Courts of Cambodia,²⁹ the ICTR's operation, replete with flaws is remarkable.

²¹ *Prosecutor v. Eliaphan Ntakirutimana and Gerard Ntakirutimana*, Judgment and Sentence, Cases No. ICTR-96-10-T and ICTR-96-17-T, 21 February 2005.

²² *Prosecutor v. Athanase Seomba*, Judgment and Sentence, Case No. ICTR-2001-66-1, 13 December 2006.

²³ *Prosecutor v. Ferdinand Nahimana, Jean-Bosco Barayagwiza and Hassan Ngeze*. Nahimana was the founder of the RTLM Radio, Barayagwiza was a member of the Steering Committee of RTLM Radio and Ngeze was the founder and editor-in-chief of the newspaper, Kangura.

²⁴ *Prosecutor v. Laurent Semanz*. Semanza, like Akayesu and Gacumbitsi was a burgmestre in one of the communes in Rwanda.

²⁵ *Prosecutor v. Muhimana*. Muhimana was a councilman.

²⁶ *Prosecutor v. Niyitegeka*. Niyitegaka was the former Minister of Information in the Rwandan government.

²⁷ *Prosecutor v. Kambanda*, Judgment and Sentence, Case No. ICTR 97-23-S, 4 September 1998.

²⁸ *Prosecutor v. Musema*. Musema was the Director of the Gisovu Tea Factory, was indicted for crimes that occurred in the Bisesero area in the prefecture of Kibuye. Musema's conviction for rape as a crime against humanity, was overturned on appeal. *Prosecutor v. Alfred Musema*, Judgment, Case No. ICTR-9613-A, 16 November 2001.

²⁹ Law on the Establishment of the Extraordinary Chambers in the Courts of Cambodia for the Prosecution of Crimes Committed During the Period Democratic

Serious mistakes have plagued the ICTR's adjudication of sexual violence. A fundamental omission can be found in the case of Jean Kambanda, the former Prime Minister of Rwanda, who pleaded guilty to genocide and was sentenced to life imprisonment.³⁰ While admitting to killings and exterminations of the Rwandan Tutsi population he neither acknowledged nor admitted direct or indirect criminal responsibility, for the countless rapes and sexual mutilations committed during the Rwanda genocide. Did the prosecution forfeit their duty to demonstrate Kambanda's full liability? This omission of ultimate legal responsibility is ingenious given the pervasive instigation, commission and condoning of sexual terror by politicians condemned in other ICTR cases. The top Rwandan politician, regrettably, bears no responsibility for the sexual violence inflicted as an integral component of the genocide.³¹

An unfortunate ICTR judicial result relates to the Kajelijeli case.³² In its judgment, the three judge ICTR trial chamber unanimously found the existence of widespread sexual violence, yet diverged along gender lines, as to whether the accused, Juvenal Kajelijeli, was liable for those sexual assaults. Judge Ramaroson, the only female on the bench, vociferous dissented from the majority's acquittal for the sexual violence, arguing that the rapes, undifferentiated from the killings, were attributable to the accused.³³ The Trial Chambers' gender laden view was compounded by the Prosecutor's failure to file a timely notice of appeal of the acquittal.³⁴ The Appeals Chamber exercised their discretion and rejected the late filing that the Prosecutor had pleaded in the interest of justice. The Appeals Chamber's undue procedural strictness thus allowed a divisive Trial Chamber's holdings to remain intact, even though the failure to convict for the sexual violence rested upon a split in the factual interpretation of the liability standard.³⁵

Further gender injustice resides in the prosecution's mishandling of sexual assault charges and evidence in the Cyangugu case,³⁶ and it's the decision not to

appeal the acquittal of sexual assaults-based charges in the Kamuhanda case.³⁷ These mistakes, oversights and errors compromises the ICTR's record of international justice. The Tokyo Tribunal's overlooked legacy too must admit to a glaring error - redress of the Japanese crimes of military sexual slavery inflicted upon the so-called Comfort Woman.³⁸ Likewise, the ICTR, irrespective of its rich jurisprudence of sexual violence, will be chastised accordingly for its actual faults.

Taken at its apex, the ICTR sexual assault jurisprudence illuminates a full(er) blown image of the Rwandan genocide. The Gacumbitsi trial chamber judicially recognized that the Rwandan genocide consisted in significant part by neighbours killing and raping neighbours. The assertion correctly summarizes a body of international case law started by the judicial observations in the Akayesu judgment. The ICTR sexual assault jurisprudence, by erasing the mistaken legal incongruity of sexual violence within genocide aided in revealing the true nature of past genocides. Now, legal historians can more precisely characterize the holocaust from WWII, recognizing its sexualized component of destruction, namely forcefully sterilized, forced abortions, and reproductive experiments, conducted on non-Aryan persons, including persons of mixed-African descent, Jews and the Roma population. Similarly, the genocide committed in Namibia, by the German colonial authorities in the early twentieth century wherein the Herrero endured separation of the sexes, prevention of birth, and their decimation can be better comprehended as a sexualized genocide. The ICTR sexual assault jurisprudence crystallizes the legal conception of current genocides and genocide-like situations. In Darfur, when commentators report that "people were killed and they raped the women" because of the ICTR sexual assault jurisprudence, it is now, more readily understood that the bundle of the illicit conduct, the killings and the rapes, would predict and substantiate the existence of a genocide.

A few specific words about the cutting edge ICTR appellate sexual assault jurisprudence. The Gacumbitsi appellate decision, reviewed the legal status of "lack

Kampuchea, 10 August 2001, NS/RKM/0801/12, 1 supplemented and superseded by the Agreement between the United Nations and the Royal Government of Cambodia Concerning the Prosecution Under Cambodian Law of Crimes Committed During the Period Democratic Kampuchea, 6 June 2003.

³⁰ *Prosecutor v. Kambanda*.

³¹ *Prosecutor v. Kambanda*, Judgment, Case No. ICTR 97-23-A, 19 October 2000

³² *Prosecutor v. Kajelijeli*, Judgment and Sentence, Case No. ICTR 98-44A-T, 1 December 2003.

³³ *Prosecutor v. Kajelijeli*, Dissenting Opinion of Judge Arlette Ramaroson, paras. 1-100.

³⁴ *Prosecutor v. Kajelijeli, Notice of Appeal*, Case No. ICTR 98-44A-T, 5 January 2004.

³⁵ See, Binaifer Noworojee, 'Your Justice is too Slow' Will the ICTR Fail Rwanda's Rape Victim? Occasional Paper 10, Untied Nations Research Institute for Social Development, pp. 18-19, www.unrisd.org/publication/opgp10.

³⁶ *Prosecutor v. Andre Ntagerura, Emanuel Bagambik and Samuel Imanishimwe and Yussuf Munyakazi*, Notice of

the Prosecutor to Withdraw All Pending Motions, Case No. ICTR-99-46-T, 14 February 2000; *Prosecutor v. Andre Ntagerura, Emanuel Bagambik and Samuel Imanishimwe and Yussuf Munyakazi*, Transcript Case No. ICTR-99-46-A, 14-13 February 2001. The case is commonly called the Cyangugu case.

³⁷ *Prosecutor v. Kamuhanda*, Judgment, Case No. ICTR-99-54, 22 January 2004.

³⁸ Regrettably, the Tokyo prosecutors did not indict, nor present evidence on the systemic military sexual slavery conducted by the Japanese Army against tens, if not hundreds of thousands of Korean, Indonesian, Chinese, Burmese, Japanese and other women from conquered and occupied territories in Asia. See, Civil society trial conducted to "try" the perpetrators of military sexual slavery that rendered a substantive judgment evaluating criminal conduct and civil liability. "Comfort Women Judgment," 4 Dec. 2001, Women's Caucus for Gender Justice, <http://www.icc.org/archive/tokyo/summary.htm>.

of consent” as an element of rape under international criminal law. The Tokyo Tribunal did not hand down the precise elements of the war crime rape. Until 1998, a definition of rape under international criminal law did not exist. Akayesu became the first case to pronounce the elements of rape under international criminal law, followed by the ICTY cases of Furundzija and the Kunarac. Akayesu and Furundzija eschewed the requirement of “lack of consent” of the victim. However, the Kunarac³⁹ appellate judgment, delivered the prevailing definition of rape that bound both *ad hoc* Tribunals. It recognized a “lack of consent” as a pertinent element.

The Gacumbitsi appeals chamber affirmed Kunarac, observing that “lack of consent” was an element of rape under international law. It held:

*The Prosecution can prove non-consent beyond a reasonable doubt by proving the existence of coercive circumstances under which meaningful consent is not possible. As with every element of any offence, the Trial Chamber will consider all the relevant and admissible evidence in determining whether, under the circumstances of the case, it is appropriate to conclude that non-consent is proven beyond reasonable doubt. But it is not necessary as a legal matter to, for the Prosecutor to introduce evidence concerning the words or conduct of the victim or the victim’s relationship to the perpetrator. Nor need it introduce evidence of force. Rather, the Trial Chamber is free to infer non-consent from the background circumstances, such as an on-going genocide campaign or the detention of the victim. Indeed, the Trial Chamber did so in this case.*⁴⁰

The Gacumbitsi judgment interpreted the element of “lack of consent” as sufficiently proven by the circumstances surrounding the sexual violence. The appeals judgment has enlivened a welcomed debate⁴¹ among lawyers and scholars and hopefully initiated a

broader wave of earnest examination of the ICTR sexual assault jurisprudence. I believe that the original Akayesu jurisprudence that disregards a requirement of “lack of consent” and directly examines the circumstances will prevail at the international level, notably at the International Criminal Court.⁴² This is notwithstanding the insertion of a “lack of consent element” into the definition of rape in the Special Court for Sierra Leone’s first judgment, the AFRC case.⁴³

Another cutting edge confirmation from the ICTR appellate jurisprudence assists the credibility of the survivor/victims. The recent *Muhimana* Appeals decision affirmed that survivors of sexual violence, such as rapes, are reliable, credible witness, irrespective if they suffered dementia and trauma as a result of the rapes.⁴⁴ This appellate holding facilitates the submission of witness testimony, and circumscribes unnecessary inquiries into the mental health of the on cross-examination. However, in future cases, woman and girls, the overwhelming survivors sexual violence should be able to rely upon evidence from other voices from the targeted community, such as males who witness and know of women being assaulted. Submission of evidence from civil society, advocates, historians, sociologists, or health providers also should be considered pertinent and probative and encouraged to be heard.

Convictions for sexual violence committed during wars, genocides or periods of crimes against humanity, unfortunately do not automatically deter all acts. However, these convictions, when instilled into the common societal knowledge insure an inability of future accused, especially political and military leaders, to feign ignorance or seek immunity. “I didn’t know that you could not rape during war” or “I didn’t know rape was a crime against humanity” or “Excuse me, I am not allowed to rape during genocides?” are

³⁹ *Prosecutor v. Dragoljub Kunarac et al, Judgment, Case No. IT-96-23 & IT-96-23/1-A 12 June 2002, para.128.* The Kunarac Appeals Judgment was the first appeals judgement at either *ad hoc* Tribunal that directly raised grounds concerning the elements of rape as a crime against humanity and as a war crimes. Neither the Akayesu Appeals Chamber nor subsequent ICTR Appeals Chamber directly hear challenges to the elements of rape. The respective appellate bodies did not, *proprio muto*, review the Trial Chamber’s elements of rape as a matter of general significance. These two factors paved the judicial leeway for the *Kunarac Appeals Judgment* to deliver the first appellate ruling on the elements of rape which resulted in binding law for both *ad hoc* Tribunals.

⁴⁰ *Gacumbitsi Appeals Judgment, para. 153.*

⁴¹ See, W. Schomberg and I. Petersen, ‘Notes and Comments on Genuine Consent to Sexual Violence Under International Criminal Law’ 101 *American Journal of International Law* 128, (2007); Sellers, ‘The ‘Appeal of Sexual Violence’: Akayesu/Gacumbitsi, in *Gender-base Violence in Africa*, ed. Karen Stefisyn, University of Pretoria, (2007).

⁴² The ICC elements of rape combines Akayesu, Furundzija and Kunarac definitions and with provisions from the ICTY/ICTR procedural Rule 96.

(1)The perpetrator invaded the body of a person by conduct resulting in penetration, however slight, of any part of the body of the victim or of the perpetrator with a sexual organ, or of the anal or genital opening of the victim with any object or any other part of the body. (2) The invasion was committed by force, or threat of force or coercion, such as that caused by fear of violence, duress, detention, psychological oppression, or abuse of power, against such a person or another person, or by taking advantage of a coercive environment, or the invasion was committed against a person incapable of giving genuine consent.

ICC Elements of Crimes, UN Doc. PCNICC/2000/1/Ass 2(2000).

⁴³ *Prosecutor v. Alex Tamba Brima, Brima Bazzy Kamara, Santigie Borbor Kanu, SCSL-04-16-T, 20 June 2007* (Commonly called the AFRC case), para. 694. On 22 February 2008, Special Court for Sierra Leon will render the appeals judgment of the AFRC case.

⁴⁴ *Muhimana, Appeals Judgment, paras. 138-140.*

ridiculously absurd assertions that are legally indefensible. Examining, using, critiquing, and developing the jurisprudence of the ICTR by other international judges, serious scholars, practitioners, feminists and non- feminists alike will serve to perpetuate international justice, not only in Africa. It will serve to guard against the Tokyoisation of the ICTR.

I conclude on two separate thoughts. I would like to ask, what is peace? Isn't peace the absence of injustice? And if in the coal mine the canary signals us as to the quality of the air, I would assert that in our societies, especially during times of war and genocide, the condition of women, and in particular girls, signals us as to the presence of injustice.

Thank you.



“AFLA seeks a new African dawn in which the rights of all shall be respected and promoted”

Gender Crimes: The International Criminal Tribunal for Rwanda (ICTR)

Nana Oye Lithur

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Nana Oye Lithur

Gender crimes constitute violent crimes that are committed against a certain gender that is mostly women. Gender-based violence is a form of discrimination that seriously inhibits the ability of women to enjoy their rights and freedoms on a basis of equality with men.¹ These crimes include mass rapes, sexual violence, forced pregnancy, sexual slavery, forced prostitution, persecution and genital mutilation.² Such crimes are predominant during war than in peaceful times. These categories of atrocities are on average committed against women who by their very nature are portrayed as vulnerable people facing abuse, gross mistreatment and exploitation at the hands of their male counterparts.³

Armed conflict in itself is a gendered activity where fighters are men and women suffer disproportionately.⁴ The pattern of abuses indicates

that women are deliberately targeted just as another weapon of war, hence accounting for the massive scale of suffering witnessed by several innocent women simply because of their sex.

Earlier attempts at reaching justice against perpetrators of such crimes during armed conflict sidelined gender-specific crimes. However, this position has subsequently changed as the international community has acknowledged the acute nature of gender crimes and the high rate of impunity prevalent during armed conflict. Recent times have reflected a revolution integrating gender perspectives within the responding mechanisms.⁵

Ending the impunity – the normative framework

In the past despite the wide occurrence of gender violence during armed conflict such crimes were not accorded adequate treatment. This was during the trials of war criminals after the second world war, by the Nuremberg and Tokyo Tribunals where although the atrocities committed against women were widespread and systematic in nature, in practice, these crimes were delinked from those considered to be of a serious nature and therefore a threat to international peace.⁶ This biased position prevailed for centuries until the advent of human rights movement in 1945, the Universal Declaration of Human Rights. Article 27, 4th Geneva Convention, 1949 includes sexual violence as a crime against humanity although not included under grave breaches.

Progressively, the increasing prevalence of gender-based crimes has compelled the international community to acknowledge gender crimes as constituting crimes of a serious nature hence warranting explicit protection. Such protection has been incorporated especially within various statutes setting up international courts with criminal jurisdiction, also serving as vital mechanisms in achieving gender justice.⁷

The primary impetus for new developments in addressing sex crimes was the establishment of the International Criminal Tribunal for the Former

¹ United Nation's Secretary-General's Report, 'Women and Peace Security'. UN Doc. S/2004/814, 13th Oct. 2004, p16

² The ICC Rome Statute offers the most elaborate and recent list on such gender crimes, Article 7 and 8.

³ This is based on the view that war processes are inherently male-centered, premised on values which prize male aggression and devalue characteristics associated with women. Sexual violence such as rape is targeted against women as a symbol of domination and a boost to soldier's morale. Amnesty International 'Lives Blown Apart: Crimes against Women in times of Conflict'. p.6. Francis T. Pilch, 'Sexual Violence during Armed Conflict: Institutional and Judicial Responses'. Human Rights Watch, 2007, retrieved from website 11-06-2007)

⁴ 'Women and Armed Conflict', Women Watch, Information and Resources on Gender Equality and Empowerment of Women, at www.un.org/womenwatch, retrieved from website 12/06/07.

⁵ Judge Navanethem Pillay, former president of the ICTR was quoted as stressing, '.....that it is critical that women are represented and a gender perspective integrated at all levels of the investigation, prosecution, defense, witness protection and judiciary.' *Emphasis mine.*

⁶ At the time of the Nuremberg trials, sexual crimes, along with pillage, were viewed as inevitable aspects of war, and therefore unpunishable. The statute of the Nuremberg tribunal makes no mention of rape or any sexual or gender-based crimes. It is enumerated neither as a crime against humanity, nor as a war crime. Sita Balthazar, 'Gender Crimes and the International Criminal Tribunals', at www.gonzaga.edu.

⁷ The term, 'Gender Justice', implies existing inequality between men and women.

Yugoslavia (ICTY). The governing Statute also referred to as the ICTY Statute, allowed for the prosecution of crimes against humanity including rape, making it punishable as a war crime under customary international law.⁸ However, similar omissions of rape under grave breaches were reflected in the ICTY Statute, which also disregarded other categories of sexual violence suffered by women.⁹

These gaps were also manifested under the Statute adopted by the International Criminal Tribunal for Rwanda (**ICTR Statute**),¹⁰ which maintained rape as a crime against humanity when committed as part of a widespread or systematic crime against a civilian population on national, ethnic, political, racial or religious grounds.¹¹ This restricted criterion meant that rape under the ICTR Statute is not a crime against humanity when committed on grounds of gender.

In 1998, the Statute of the International Criminal Court, also known as the Rome Statute was drafted to provide the court with jurisdiction solely over 'the most serious crimes of international concern.'¹² This treaty, which has been ratified by 104 states, has been viewed as a model of gender mainstreaming based on its new standard of responding to sexual crimes and gender violence.

With the benefit of hindsight, the Rome Statute provides by far, the most comprehensive protection on gender crimes. The Statute recognized a wide spectrum of gender crimes in addition to rape, as crimes against humanity including sexual slavery, forced sterilization, enslavement, mutilation, gender-based persecution and for the first time ever, the crime of forced pregnancy was recognized under an international treaty.¹³

The broad recognition of gender crimes under the Rome Statute has been praised for promoting the non-tolerance by the international community of such heinous crimes committed against women. This sets a strong precedent that continues to augment the campaign for gender justice.

In addition, within the African context, are the **Cairo-Arusha Principles on Universal Jurisdiction in**

Respect of Gross Human Rights Offences: An African Perspective. Principle 7, mentions gender crimes, such as rape and other sexual violence as crimes subject to universal jurisdiction. This provision in effect, reinforces the status of gender crimes as *jus cogens* violations.

⁸ Article 3, Statute of the International Criminal Tribunal for the Former Yugoslavia, UN Doc. S/25704, May 3, 1993.

⁹ Article 2, 5, ICTY Statute.

¹⁰ Statute of the International Criminal Tribunal for Rwanda, Article 1, available at, www.ictor.org/statute.html.

¹¹ See, Article 3 (g) ICTR Statute.

¹² Article 1, Rome Statute of the International Criminal Court, UN Doc. A/CONF. 183.9, 17 July, 1998.

¹³ *Id.*, Article 5, 7 & 8.

Institutional response against gender crimes

With the growing recognition of certain gender crimes as crimes against humanity, this has firmly placed them within the category of *jus cogens* violations subject to persecution under the principle of universal jurisdiction.¹⁴ This position has been accorded great significance within the establishments of tribunals, such as the International Criminal Tribunal for the Former Yugoslavia, the International Criminal Tribunal for Rwanda,¹⁵ the Permanent International Criminal Court, and the Special Court for Sierra Leone. These structural mechanisms make a significant contribution in bringing the law to life through their judgments.¹⁶

Jurisprudence

Legal provisions on rape were not initially applied by courts until 1997 when the ICTR delivered its landmark judgment in the Akayesu case.¹⁷ For the first time in history, rape was explicitly reorganized as an instrument of genocide charged with twelve counts of war crimes, crimes against humanity, and genocide. Whereas none of the charges contained allegations of rape, during the trial evidence was brought forward proving that rape crimes were committed on a widespread scale in Taba, which resulted in the amendment of the charges to include rape.

As there was no definition of rape and sexual violence under international law, the Trial Chamber clarified this by providing a comprehensive definition of rape as;

...Sexual violence including rape, is not limited to physical invasion of the human body and may also

¹⁴ In the wake of recognizing such criminal acts against humanity to constitute acts against the international community, the notion of universal jurisdiction has been embraced as commanding global accountability. In specific regard to the Crime of Genocide, Article 1, The Genocide Convention obliges states to punish genocide. For specific reference authorizing universal jurisdiction for international crimes, see, Geneva Conventions I, Arts 49-50, Geneva Convention II, Arts 50, 51, Geneva Conventions III, Arts. 129, 130 and Geneva Conventions IV, Arts. 149. Also under the Geneva Conventions Additional Protocol 1, Arts 11, 85, 86, 88 (refer to 'grave breaches'). In response to the Rwandan genocide, these trials have been witnessed in states like Belgium, France and Switzerland. Also see; Principle 7, Cairo Arusha Principles.

¹⁵ The Security Council acting under Cap VII, UN Charter established the International Criminal Tribunal for Rwanda, hereinafter referred to as the ICTR, pursuant to Security Council Res. 955, UN SCOR, 49th Year, Res. And Dec., at 15 UN Doc. S/INF/50 (1994). Reasons for creating the tribunal, see also Report of the Secretary-General pursuant to Para 5 of SC Res. 955 (1994), Feb. 13, 1995, UN Doc. S/1995/134, at 2.

¹⁶ For instance, the United Nations Security Council acting under Chapter VII of the UN Charter, established the ICTY and the ICTR to prosecute crimes the category of which, was constituted as a threat to international peace and security.

¹⁷ Prosecutor V. Jean-Paul Akayesu, Judgment, Case No. ICTR-96-4-T, 2.

include acts that do not include penetration or even physical contact.

In holding Akayesu guilty of acts including rape, the trial chamber emphasized that sexual violence was used as an instrument of genocide, 'as a step in the process of destruction of the Tutsi group.' It recognized rape as a crime against humanity upon the finding that sexual violence was widespread and systematic in Taba, and committed by Hutus with intent to humiliate, harm and ultimately destroy, physically or mentally, the Tutsi group.

Akayesu was ultimately convicted of, among other crimes, rape as an instrument of genocide and as a crime against humanity. He was sentenced to life imprisonment.¹⁸ Although Akayesu was not accused of raping women himself, his charges demonstrated that he played a role in encouraging them. On the count of rape, he was sentenced to 15 years of imprisonment.

The Akayesu Judgment affirmed the principle that targeting women as members of an ethnic group can constitute genocide.¹⁹ Through this legal precedent, women are entitled to seek justice as victims of rape and other sexual crimes constituted as genocide, and reparations for state crimes.²⁰

Implications

The Akayesu judgement provided the most groundbreaking decision in advancing gender jurisprudence. In recognising sexual violence as forming part of genocide and rendering a conviction for rape as crimes against humanity, the ICTR created a powerful tool in redressing gender based crimes.²¹ It reflected a remarkable transition from the prior obscurity that surrounded the treatment of gender crimes towards explicit recognition of crimes as serious enough as not to be tolerated.

The Akayesu decision made the ICTR the first tribunal to define rape under international law, to recognise rape as an instrument of genocide, to acknowledge that rape can cause mental as well as physical harm, to recognise rape as a crime against humanity, to accept forced pregnancy as a potential crime. Similarly, its

¹⁸ Article 23, ICTR Statute stipulates that penalties imposed by the tribunal, are limited to imprisonment. The trial chambers also have to take recourse to the general practice regarding prison sentences in the courts of Rwanda.

¹⁹ Prosecutor V. Akayesu, Case No. IT-96-4-T (ICTR Sept. 2 1998), Section 6.3.1. Also see, para 126 where the trial chamber held that genocide was indeed committed in Rwanda in 1994 against the Tutsi as a group. <http://www.un.org/I.C.T.R/english/judgments/akayesu/html>

²⁰ See, International Federation for Human Rights Report, No. 329/2 (Nov 2002), 'Victims in the balance: Challenges ahead for the International Criminal Tribunal for Rwanda', available online at www.fidh.org

²¹ Dr. Kelly Askin, 'The Rwanda and Yugoslav Tribunals: Revolutionising the Prosecution of War Crimes Against Women,' in *Africa Legal Aid Quarterly*, April-June, 2001, p12.

recognition of forced pregnancy as a potential crime paved the way for the incorporation of the crime of 'forced pregnancy' into subsequent Statutes.

The trial chamber provided a broad interpretation of rape as a crime committed against both men and women. It further expanded the acts constituting rape to include, besides actual penetration, the use of external objects such as the use of a stick. The definition also ousted consent as a defence in sexual violence cases. The inclusion of rape as a constituent of genocide was particularly significant in affirming the status of gender crimes within the category of *jus cogens* violations.

Besides establishing individual culpability for gender crimes committed by the accused, the tribunal also stretched its 'iron-hand' to rightly condemn such acts by extending responsibility to third parties including superiors and abettors.

The ICTR was the first Tribunal to recognise the role of the media in inciting sexual violence against women as a means of persecution of the Tutsi. Similarly, the tribunal was the first to indict a woman for rape crimes.²²

The Akayesu decision constituted a major development that would influence subsequent decisions against gender-based atrocities. It subsequently influenced indictments of persons before the tribunal to include rape charges. After this ruling, subsequent indictments of the accused have included rape charges.²³

Similar developments were subsequently witnessed within the ICTY. In the *Kunarac* case,²⁴ the accused were charged for committing sex crimes against women and young girls. This case was entirely focused on various charges of sexual violence. The Trial Chamber expounded upon the elements of rape in previous judgments and concluded that violations of sexual autonomy determine when sexual activity becomes rape.

The ICTY emphasised that sexual violence was used as an instrument for terror and held all the accused persons guilty of rape as a crime against humanity. This was the first time the ICTY delivered a judgment acknowledging rape as a serious crime against humanity.

The ICTY's judgment in the *Celebici*²⁵ condemned acts such as sex crimes. In that case, the ICTY while addressing the crimes committed in Balans, held 3 of the 4 defendants criminally responsible for the sex

²² Prosecutor V. Pauline Nyiramasuhuko et al, Case No. ICTR-97-21-AR72.

²³ Prosecutor V. Edourd Karemera, Case No. ICTR-98-44-1. Prosecutor v. Juvenal Kajelijeli, Case No. ICTR-98-44A-1.

²⁴ Prosecutor V. Dragoljub Kunarac, et al, Judgment Case No. IT-96-23-T and IT-96-23/1-T, 12 February 2001.

²⁵ Prosecutor v. Delacic, et al, Judgment, Case No. IT-95-17/1-T, 10 December 1998.

crimes committed against the male and female detainees in the Celebici camp.

The trial chamber concluded that Mucic, as de facto commander of the camp was in a superior-subordinate relationship and thus bound to know that such acts were being committed. It also emphasized that if forced oral sex had been charged as rape, it would have convicted him of rape as a war crime. Mucic, was thereby convicted of superior responsibility for sexual violence committed against the male detainees, finding him, guilty of cruel treatment, inhuman treatment, and wilfully causing great suffering.

In the **Furundija** case,²⁶ the ICTY delivered another important judgement on gender justice. This case centred on rapes that were committed against a woman during the Yugoslav conflict. The rapes were charged as war crimes of torture and outrages upon personal dignity, both charged as violations of the laws or customs of war. Furundija, who had not committed sex crimes himself, was found criminally responsible based on the role he played in facilitating the rapes. The accused was convicted of rape crimes as war crimes, torture and outrages upon personal dignity. He was sentenced to 8 years imprisonment for rape, and 10 years imprisonment for torture.

The case also revealed another interesting issue pertaining to gender justice. This concerned the presence of one of the judges, Judge Florence Mumba, a female judge who was among the judges presiding over the case. Having previously worked as a member of the UN's Commission on the Status of Women. Judge Mumba had condemned rape as a war crime and urged its prosecution. The defendants argued that her presence on the panel had an appearance of bias.

The Appeal Chamber while upholding the trial chamber's judgment dismissed these allegations noting that her expertise in gender crimes made her exceptionally qualified to sit as a judge on cases adjudicating sexual violence. With such bold pronouncements, the tribunal achieved a few milestones in furthering gender justice.

Another historic judgment against gender crimes was the **Kvočka** case, which concerned five accused persons on charges of sex crimes committed through persecution. In that case, although there was little evidence to show that the accused knew that rapes were being committed, they were convicted for committing crimes against humanity. The Trial Chamber concluded that because the camp operated as a criminal enterprise designed to persecute, terrorise and otherwise mistreat detainees, it was wholly foreseeable that women held in the camp would be raped. It was thus held that they were liable for all crimes committed as an intended or even foreseeable consequence of the joint criminal endeavour.

²⁶ Prosecutor v. Anto Furundija, Judgment Case No. IT-95-17/1-T, December 10, 1998.

The authorities illustrated above although not the only cases that have dealt with gender crimes, provide the primary precedents in recognising rape as an instrument of genocide, crime against humanity and war crimes. They also ushered in a new trend that affirmed the status of gender crimes. Most importantly, the authorities clarified the justifiability of sex crimes as war crimes regardless of where they are committed and by whom.

Analysis on the Administration of Justice

Even with the existence of the most elaborate laws, these laws remain meaningless, unless they are enforced without prejudice. With the establishment of the courts to prosecute crimes against humanity including gender crimes, the struggle to achieve gender justice highly depends upon their effective performance in specifically investigating gender crimes, prosecuting them rigorously and providing redress to the victims. It is equally vital that these courts in administering justice must perform effectively.

The Akayesu decision having set forth a strong precedent on gender crime prosecution, its impact was left to be seen in the treatment of subsequent prosecution before the tribunals.

To start with the ICTR, which has been hailed for its pioneering role in promoting gender justice; its subsequent prosecutions indicate that despite its historical ruling the ICTR has not maintained its initial charisma in furthering the progress of gender crime prosecutions. It is rather disappointing that after the Akayesu decision, the prosecution has failed to charge rape as an act of genocide or enslavement when in so many instances they would have been able to do so.

In practice, several subsequent cases before the ICTR have demonstrated a lack of consistency. In the case of the **Cyangungu**²⁷ defendants for instance, two witnesses, one victim and another perpetrator gave evidence on crimes of multiple rapes, sexual violence in all the indictments.²⁸ (Rule 96, rules of procedure governs evidence in sexual assault cases.....the court can undertake flexible approach in evidentiary procedures and yet the trial chamber failed to draw its authority within this provision).

Several other cases dealing with gender crimes have not resulted in final convictions for those crimes.²⁹ For instance, in the **Omar Serushago** case,³⁰ where the indictment originally contained specific charges of rape, the charges were withdrawn at a plea bargain

²⁷Prosecutor V. Emmanuel Bagambiki and Samuel Imanishimwe, Prosecutor V. Andre Ntagerura, Case No. ICTR-99-46-T.

²⁸An attempt to review the evidence with a view to amending the indictment to include charges on sexual violence were dismissed by the Chamber. Betty Murungi, 'Prosecuting Gender crimes at the International Criminal Tribunal for Rwanda', Africa Legal Aid Quarterly, April-June 2001, p16

²⁹ See, Prosecutor V. Niyitegeha.

³⁰ Prosecutor V. Omar Serushago, Case No. ICTR-98-39.

that enabled the defendant to plead guilty. In 2005, a similar case happened in the **Bisengimana** case, where the charges were exchanged for a plea of guilty.

From statistical point of view, there has been a drastic fall in the proportions of indictments that include sexual violence. It has been noted that although more than half of the indictments at the ICTR have contained charges of sexual crimes, the proportions of indictments pertaining to sexual violence fell from 100% in 1999 to 35% in 2001 and 2002.³¹ As the general practice is that rape is charged alongside other crimes, the convictions entered on rape are relatively few.

Looking at the sentencing pattern adopted by the ICTR also reflects inconsistencies. Article 23, ICTR Statute provides for penalties to be imposed by the tribunal to be limited to imprisonment. Minimum punishments are left at the discretion of the trial chamber, which must take recourse to the general practice regarding prison sentences in the courts of Rwanda.

In the **Akayesu** case, the court sentenced the accused to life imprisonment. In subsequent cases, such as **Muhimana**, the accused was found guilty of rape and sentenced to imprisonment for remainder of his life. In **Gacumbitsi**, where the accused was found guilty of rape, the accused was sentenced to imprisonment for remainder of his life following the increase by the Appeals Chamber of his initial sentence of 30 years imprisonment. In **Semanza**, the ICTR sentenced the accused to 35 years imprisonment following the increase by the Appeals Chamber of his initial sentence of 25 years imprisonment³². This inconsistency reflected in the sentencing regarding gender crimes is definitely damaging to the progress of achieving justice against gender crimes an initiative that was championed by the same tribunal.

Conversely, the ICTY has undertaken a more pragmatic approach in delivering tough decisions against gender crimes perpetrators in the pursuit of justice. For instance, the **Kvočka** case,³³ where the ICTY found a conviction against the accused for sexual crimes committed in the camps, holding that it was wholly foreseeable that women held in a camp would be raped. It was thus held that they were liable for all crimes committed as an intended or even foreseeable consequence of the joint criminal endeavour. The most outstanding element about this holding is that the trial chamber was bold enough to find the conviction on a threat, amidst little evidence to prove it.

This reflects how despite the ICTY had been slow in enforcing gender-crime prosecutions, recent trends show that it has fast-paced in addressing gender crimes as its counterpart the ICTR. Indeed, although

the ICTR was the first tribunal to render rape charges against a woman, the ICTY is the first tribunal on record to convict a woman on similar charges. The ICTR is yet to deliver judgment on its case.³⁴

Another impending fear that will sacrifice gender justice before tribunals regards the issue of timeframes. As the ICTR has been slated to end all its trials in 2008, there is a grave danger that gender crimes will be sidelined in the interest of time. Indeed such cases as **Omar Serushago**,³⁵ and **Bisengimana**, where rape charges were abandoned in exchange for guilty pleas illustrates how fast rape charges seem to be the first to be dropped. This reflects the eminent challenges still evident in the campaign to achieve gender justice through mechanisms of the courts.

Yet another great challenge for the ICTR is its incapacity to award compensation to the victims. It has been noted that a natural consequence of rape crimes is that it leaves physical and mental scars long after the violence has taken place. Pursuant to Article 105 and 106 of the ICTR Rules of Procedure and Evidence however, the issue of compensation of victims is assigned to national courts. Victims of gross violations are said to suffer from long-term psychological consequence that need redress hence their entitlement to reparation becomes paramount. The ICTR Statute acknowledges the provision of such protection to the victims acting as witnesses.³⁶

The ICTR Statute and Rules provide for the compensation of the victims but in general, the ICTR is not a claims commission.³⁷ Ideally, the ICTR has made no fundamental impact in this regard. This presents a serious challenge for the tribunal when it comes to compensating victims of sexual violence. Many victims of rape in Rwanda – 70% contracted HIV as a result of rapes. For a long time, the accused in custody of the ICTR were receiving drugs, their victims and witnesses with HIV were denied access to those same drugs.³⁸ It is argued that in the struggle for justice against gender crimes, it is equally vital that the needs of the victims be redressed.

Firstly the environment within which, justice is meted must accord with the realities faced by gender violence victims. Looking at the nature of sexual violence, it generates a lot of fears and insecurity for the female victims that they risk suffering in silence unless they are encouraged to testify. Their testimonies usually provide the most authentic information, which evidence is vital for prosecution of the perpetrators. To this end, fair representation on the judicial panel plays a critical role in promoting the ICTR where the presence of certain activists for

³⁴ *Ibid.*, n. 26.

³⁵ Prosecutor V. Omar Serushago, Case No. ICTR-98-39

³⁶ Article 21, ICTR's Statute.

³⁷ See Article 23 (3), ICTR Statute and Rule 106, ICTR Rules of Procedure and Evidence. Also see, Morris and Scharf, 'The International Criminal Tribunal for Rwanda' p. 595.

³⁸ *Ibid.*, n. 36.

³¹ Sita Balthazar, 'Gender Crimes and the International Criminal Tribunals', at www.law.gonzaga.edu.

³² Source: ICTR, Office of the Registrar.

³³ *Supra*.

women rights played a catalyst role in concluding the decisions vehemently condemning gender crimes.

For instance, Judge Navanetham Pillay a female judge in Akayesu's case was instrumental in interrogating the witnesses on gender crimes such as rape committed by the Hutu against Tutsi women, which later resulted in the amendment of the charges.

Similarly, Judge Florence Mumba of the ICTY during the Foca case rejected the phraseology of 'systematic rape employed as a weapon of war' because of the danger that this would be interpreted as a kind concerted approach for an order given to the Bosnian Serb armed forces to rape Muslim women as part of their combined activities in the wider meaning. This

was the first case, the ICTY dealt separately with rape and sexual enslavement, treating them as crimes against humanity, a charge second only to genocide in severity.

The cases above illustrated demonstrate that female judges particularly those with expertise in gender crimes, are extremely useful in the prosecution of gender crimes.

Resources

'Ending impunity for gender crimes under the international criminal court', Barbara Bendont & Katherine Hall Martinez, *The Brown Journal of World Affairs*, Vol VI, Issue 1:65-85. 1999.

Alternative Forms of Justice

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Introduction

During the last decades, the world has witnessed a gradual shift in the nature of its conflicts, from mainly inter-state conflicts that characterized the Cold War era to predominantly intra-state disputes including civil wars, massive human rights violations, genocide, and other forms of large scale atrocities. In the transition towards peace following a period of such atrocities, states have been faced with crucial questions on how to deal with their past and by which institutional means.

I will discuss with you today two issues in relation to this question: on the one hand, the possibility in post-conflict situations of 'reconciliation through war crimes tribunals' and, on the other hand, the 're-organization of judicial and human rights bodies' in such situations. At the outset, I would like to stress that, in my opinion, both issues are interlinked in the sense that they constitute alternative means of reconciliation, namely:

Reconciliation through the work of war crimes tribunals, which I understand as a common term for national and/or international tribunals dealing with war crimes but also possibly genocide and crimes against humanity (which I will refer to as 'international criminal law tribunals');

Reconciliation through the activities of domestic judicial bodies; and

Reconciliation through the efforts of human rights bodies typically active in post-conflict situations, such as truth commissions, truth and reconciliation commissions, or other inquiry commissions dealing with human rights violations (which I will refer to as 'truth commissions').

The outcome of my presentation will be that in my opinion those three means of reconciliation can, and often should coexist and complement each other in order to re-establish long-lasting peace. This falls within the complementarity regime of the Rome Statute of the ICC.

Reconciliation through international criminal law tribunals

Let me start with the first but not unique means of reconciliation: reconciliation through the work of international criminal law tribunals.

In the last decade, we have seen that, the international community has insisted on the creation of these tribunals in the aftermath of most heinous and violent conflict, in order to restore peace and security.¹ These tribunals were set up with a mission to promote the prosecution, trial and punishment of those most responsible for perpetrating war, crimes against humanity and genocide.

In other words, in the most tormented post-conflict situations, the work of these tribunals has been viewed by the international community as the *condition sine qua non* for the re-establishment of peace and security, for several reasons:

First of all, by ensuring that the most responsible people are held individually responsible for the atrocities they committed, international criminal law tribunals prevent entire groups, ethnic or religious from being stigmatised by the rest of the society. As such, they ensure that individuals do not resort to acts of revenge in their search for justice.

Furthermore, by neutralising the major criminals, those criminals are being precluded from sustaining a climate of violence and hatred which will inevitably lead to future conflicts.

Also, those directly affected by the crimes, have repeatedly testified that the proper response to the most serious human rights abuses, can only be given through some criminal proceedings before a court of law duly authorised to establish judicial facts, render judgments, and –where called for- to punish the most responsible perpetrators.

Victims have continually repeated that a climate of confidence of the entire international community would be offended, should crimes of such gravity remain without a trial and the persons responsible for them would continue to enjoy impunity.

Reconciliation through domestic judicial bodies

Although all these issues certainly enhance peace and security, the scope of an international criminal law tribunal's "peace-making" ability is nonetheless limited.

International criminal law tribunals cannot and are not intended to try all the perpetrators of violations of human rights and humanitarian law committed during a certain conflict: as mentioned earlier, most often these tribunals were set up to focus on those highest

¹ Similarly, after more than 50 years of discussion, the international community has given green light to the creation of an international criminal court, competent to deal with the most serious crimes 'that threaten peace, security, and the wellbeing of the world' (See preamble, Rome Statute).

ranking military and political leaders that are most responsible for the atrocities committed. To take the wording of the preamble of the ICC Statute for example, the ICC aims at punishing ‘the most serious crimes of concern to the international community as a whole’.

Broadening the scope of jurisdiction of international criminal tribunals on the other hand would be physically impossible and, more importantly, requiring far too much time and resources. In the long term, it would risk undermining the reliability of the judgments and damage the credibility of the institution as a whole.

In this context it is crucial that the work of international criminal law tribunals is sustained by domestic courts, which can investigate and prosecute lower level perpetrators, or perpetrators of ‘less grave crimes’ (if ever one can call them as such). International criminal law tribunals could even assist domestic courts (e.g. through training, sharing of know-how and intelligence, etc.) to get them ‘on track’.

However, I believe that, in post-conflict situations, even domestic courts often have their limits, especially in situations where there was no functioning independent judiciary. In those situations, where the judiciary has to be newly established, and its personnel trained, the aspiration of investigating and prosecuting each and every crime would overburden these institutions and jeopardize their future functioning. This in turn could lead to injustices incompatible with international human rights standards.

Furthermore, after extended periods of civil war, a comprehensive prosecution would probably affect wide parts of the population. This would cause new tensions and prevent a return to normal life for a long period of time.

Finally, the focus of trials even on lower-level perpetrators leaves two categories of persons and groups largely untouched: (1) those who directly or indirectly profited from the events; and (2) the bystanders who did not actively participate in the violence, but who also did not actively intervene to stop the horrors.

Reconciliation through human rights bodies and more specifically truth commissions

I also believe it is important to reflect on a system of reconciliation which complements and reinforces the work of national and international criminal law tribunals.

Especially with regard to the following limitations inherent to national and international criminal law tribunals, I believe certain roles and tasks could be given to truth commissions which in the past have as such contributed significantly to the reconstruction of

national unity without which democracy and deep-rooted lasting peace are impossible.

Identification of the causes of the conflict

Occasionally, a court may enter into the considerations of relevant aspects related to the origins of conflict. It is not for judicial bodies however to analyse all possible events, apart from those that play a direct or indirect role in relation to the criminal responsibility of the perpetrators.

On the other hand, it is self-evident that a systematic review of such events and causes is essential for the purposes of an effective and long standing reconciliation between the people in the region concerned. Only in the light of such a review accompanied by a wide and efficient programme of information, will current and future generations avoid falling into confrontations of a similar nature as those that already occurred. A review of this kind can be effectively performed by a truth commission and would justify by itself its establishment.

Building up a collective Memory

A second area for specific competence of a truth commission, related to the one just mentioned, is to build up a collective memory events, based upon an open and transparent discussion of the facts, in which all individuals concerned can participate, especially the victims of the atrocities and/or their relatives.

The exercise of criminal jurisdiction by a tribunal will certainly play a role also in this respect, but, due to both procedural requirements (confidentiality, security, privacy, etc.), and resource constraints, it is often not the appropriate forum for an open discussion about the past. Such discussions would also never encompass the past of the whole community involved, nor would it involve those only indirectly involved or bystanders. Its contribution would therefore always be incomplete and limited to a consideration of certain events only. There is no doubt that a truth commission will provide a better forum to this effect².

Victims

A third area in which a truth commission may act more efficiently than a court or tribunal may be in

² In this context, the role to provide a forum for a dialogue is stressed by the statutes of the truth commissions established so far. For example the Lomé Peace Agreements Establishing the Truth and Reconciliation Commission for Sierra Leone declares “*I. A Truth and Reconciliation Commission shall be established to address impunity, break the cycle of violence, provide a forum for both the victims and perpetrators of human rights violations to tell their story, get a clear picture of the past in order to facilitate genuine healing and reconciliation*”. Similarly, the law of Bosnia and Herzegovina on the same subject indicates the objective of providing a forum where victims and persons with information about massive human rights violations in the past war can be heard.

providing reparation for the victims. It is true that providing reparation to victims of a crime falls normally within the judicial function of a tribunal and is frequently done by domestic tribunals in accordance with the provisions of their respective criminal procedural laws. However, while a court may provide reparation to identified victims of a specific crime, it is hardly possible for a court to achieve the same result when massive violations are at stake. This is especially the case when the casual link between victims and the armed conflict or the activities of armed groups, cannot be established, as is often the case.

The difficulty of finding a solution to the problem of providing reparation to victims of large-scale atrocities has been repeatedly underlined and the drafters of the Rome Statute of the ICC have explicitly foreseen the participation of and the reparation to victims, at least under certain conditions. However, so far, most international criminal law tribunals have failed to provide satisfactory responses at this level.

Truth commission – on the basis of the magnitude of the violations suffered by the people affected by the events – are often in a better position to propose appropriate reparations. Besides symbolic or moral reparation designed to take into account the collective nature of the harm suffered by victims, they may include other measures for the rehabilitation of the victims. For example, compensation from a fund available to the truth commission, whose decisions would not necessarily require the identification of a specific perpetrator.

Also in this respect, it has to be pointed out that the ICC has established a trust fund for the benefit of

victims of crimes within the jurisdiction of the Court, and the families of such victims. However, although the statute gives the Court the possibility to transfer money and other property collected through fines or forfeiture to the fund, the management of, and the distribution from the fund depends on criteria that have been determined by the Assembly of State Parties.

Conclusion

In conclusion, in my opinion, it should be emphasized that the discussed means of reconciliation are complementary: the institutions that I have discussed have distinct roles. On occasion, they will be called upon to examine the same facts with the common perspective of contributing to a long-lasting peace. However, both will do so from different angles: the courts from the angle of criminal justice, the truth commission from a more pedagogical and historical angle in view of reconstructing a national identity.

That there is room for such complementarity and support is demonstrated by the mixed system that was established in the context of Sierra Leone, where the Special Court for Sierra Leone has jurisdiction for those most responsible for serious violations of international humanitarian law, others being dealt with by the national Truth and Reconciliation Commission. This model was also agreed upon between the United Nations and Cambodia, to deal with atrocities committed by the Khmer Rouge. The ICC can only support this trend, which has brought a significant change in the delicate area of bringing about a reconciliation process within the post-conflict context.

Alternative Forms of Justice

Judge Dunstan Mlambo

Chairperson, Legal Aid Board, South Africa



Judge Dunstan Mlambo

Abstract:

“There is nothing more difficult to carry out, no more doubt of success, nor more dangerous to handle than to initiate a new order of things. For the reformer has enemies in all who profit by the old order, and only the lukewarm defenders in all those who would profit by the new order.”

- Machiavelli.

A. Introduction:

The African continent continues to be the theatre of violent conflicts accompanied by some of the worst violations of human rights. In some of the conflict ridden regions we have attempts at finding peace and settling the conflict as well as ensuring the maintenance of the rule of law. Integral to these initiatives is the quest for lasting peace and the realization of justice in dealing with perpetrators and victims. Indeed the context is unenviable: massive post-conflict tensions as far as the warring factions are concerned; displaced communities which have been harmed physically and have suffered massive material dispossession crying out for justice; non-existent and dysfunctional justice systems and the urgent need to maintain peace and stabilize where conventional systems are non-existent or cannot be of any assistance in post-conflict situations.

B. General observation

The traditional or conventional form of justice as we know it has one goal and that is the prosecution and punishment of identified perpetrators. We have been indoctrinated to believe that justice, particularly in the eyes of the victim, is when a perpetrator is prosecuted and sentenced to death or life imprisonment or to other forms of punishment. However our experience in this

continent has demonstrated that the need to achieve lasting peace has not always resulted in justice for victims. Indeed some perpetrators of gross human rights violations have in a number of instances not been held accountable for their crimes. The primary reason for this is that uppermost in the minds of leaders of the warring factions when negotiating to end hostilities is not justice but the attainment of political power. On the other hand victims who are sometimes inadequately represented therein hold the expectation that their tormentors will be brought to justice. Clearly it is imperative that in the pursuit of peace it is also critical to ensure that justice is also addressed. Peace and justice are complementary concepts but in my view for justice to take place peace must first be achieved. By way of example we have seen International Criminal Court indictments for certain alleged ringleaders of gross human rights violations in Darfur, Sudan and northern Uganda but these have far not been executed because hostilities continue.

It is in this context that has compelled the African Community and indeed the International Community to also look at alternative forms of justice as a means of obtaining and maintaining peace and justice in post-conflict regions. What has attracted attention to alternative forms of justice is that they have been found to embrace certain aspects such as reconciliation, healing, victim compensation and reparation which are not always implicit in conventional justice mechanisms. It has also been suggested that the inability of traditional forms of justice in maintaining peace is that punishment in itself provides guarantees for this. The single most serious challenge for post-conflict regions is that invariably the conflict would have resulted in the destruction of the justice system structurally and in manpower hence the resort to alternative forms of justice.

As already stated this presentation discusses the experience gained, advantages and down side of these alternative forms of justice and their durability. I have in mind the indigenous justice system known as Gacaca in Rwanda, Mato Oput in Northern Uganda and those of amnesty and the lessons learned from South Africa's Truth and Reconciliation Commission as well as the peace agreement in Sierra Leone and Burundi.

C. Truth Telling and Amnesty:

1. The South African Experience

It was amidst intense political discussion and debate that the decision to form the South African Truth and Reconciliation Commission was taken. The South African Constitution made special provision for legislation dealing with the establishment of the TRC. While it is correct that the Process achieved a

peaceful solution to South Africa's political turmoil, it is doubtful if victims of apartheid atrocities have realized justice. An important feature of the South African TRC is that a perpetrator was required to apply for amnesty and provide a truthful account of his actions. An applicant for amnesty has to also establish that his conduct was in pursuit of a political objective. Members of the Apartheid security forces and armed wings of the liberation movement were all required to apply for amnesty. This was based on the recognition that violations were perpetrated on both sides. There was evidence that the liberation movements had committed violations in the so-called detention camps in exile; that the targeting of so-called soft targets by the liberation fighters required amnesty applications as well as so-called black violence committed against perceived apartheid collaborators in the townships. Failure to apply for amnesty made one liable for prosecution for crimes committed during apartheid.

A peculiar feature of the South African TRC was that the South African Judicial system was intact but because of perceptions of complicity in apartheid related activities the political settlement ordained that the whole TRC process be handled through a newly created commission - an alternative form of justice so to speak. However the decisions of the commission particularly its Amnesty Committee were subject to review in the High Court. Many victims of apartheid atrocities came forward to share their experiences with the nation but there was no concomitant response by perpetrators particularly those from the apartheid security forces. Members of the liberation movements who had been convicted and sentenced before the dismantling of apartheid applied in large numbers and they were granted amnesty. Other members who had returned from exile felt that they had waged a war against an unjust regime and as a result saw no need to apply for amnesty. The Inkatha Freedom party which was part of the political settlement but opposed to the TRC process discouraged its members from taking part in the process. Unfortunately, its members were prosecuted in large numbers and convicted. They now seek blanket amnesty but because they did not apply in time and in terms of TRC process there is no hope for them. However, as far as the prosecutions of high-profile advocates of apartheid atrocities are concerned, the success rate has been somewhat less than satisfactory. I mention some of them:

1. **Eugene de Kock** – dubbed “prime evil” was successfully prosecuted and sentenced to numerous life terms. He was in charge of killer units that terrorized the civilian population by maiming and murdering sympathizers of the liberation struggle.
2. **Magnus Malan** – the last Minister of Defence of the apartheid government. He was charged with the murder of thirteen marchers it being alleged that he issued the instruction to shoot. He was acquitted.
3. **Wouter Basson** – dubbed “Doctor Death”. He is a scientist and was in the employ of the apartheid national defence force. He is alleged to have poisoned hundreds of civilians to death and was charged with

these and other offences. He was acquitted and an appeal by the State to the Supreme Court of Appeal also failed. In a further appeal to the Constitutional Court, that court ordered that he be re-tried on some of the allegations against him. The National Prosecution Authority has not done so despite the fact that a considerable period of time has now elapsed.

4. **Ferdi Barnard** – he was charged with the murder of Dr. David Webster, a well known anti-apartheid campaigner, and was convicted.

It is important to note a case involving a highly publicized bomb blast carried out by Robert McBride an Umkhonto Wesizwe operative at the time. He applied for and was granted amnesty. He however, continues to be hounded by the media and those close to blast victims. A number of well known apartheid death squad members who did not apply for amnesty have not been prosecuted and there is no media noise regarding the situation. This has not gone down well with their victims and others who seek answers about the disappearance of close relatives. This is one critical objective that it was hoped would be resolved through the TRC process. Thus, whilst the TRC provided victims with an opportunity to share their pain and suffering and find closure and possible healing, through participation in the process, there is a general feeling that the process didn't deliver justice to victims and their families. The significance however, of the political settlement is that hostilities came to an end and the political instability that bred violence has effectively been eliminated.

In a nutshell, peace was attained in South Africa but justice for victims in particular was not realized satisfactorily. As far as current public opinion on the South African TRC is concerned, a Psychological study by Branon Hamber, Dineo Nageng and Gabriel O'Malley¹ revealed that survivors of apartheid atrocities were not necessarily enchanted with the process; as those perpetrators who came forward have been granted amnesty at a suitable rate; while compensation for victims has taken longer to achieve.

Nevertheless, it is recognized internationally that truth commissions have an immense value in their ability to acquire vital information regarding human rights violations where the conventional justice system fails, namely, the nature of amnesty hearing encourages offenders to openly state information regarding atrocities that would have otherwise remained hidden from the National Prosecuting Authorities, victims, and their families.

2. Sierra Leone – blanket amnesty – no justice for victims

¹ Branon Hamber, Dineo Nageng and Gabriel O'Malley “Telling it like It is...”: Understanding the Truth and Reconciliation Commission from the Perspective of Survivors' Psychology in Society (PINS) 2000. Vol 26, pp18-42.

The peace negotiations held in Lomé in May 1999 between Kabbah's government and the rebels led by Foday Sankoh were held under circumstances where the government was in a weaker position compared to the rebels, who held the advantage in the armed conflict. The rebels were therefore in a stronger position to impose their will on the process and basically get what they wanted. A number of actors both internal and external were however, critical in bringing the government and rebels into the negotiations process. For instance, the Inter-Religious Council of Sierra Leone, a civil society organization, was actively engaged in this initiative and was trusted on both sides of the conflict. The negotiations began with signing of a peace agreement whose primary objective was an end to the violent conflict. This peace accord granted "absolute and free pardon and reprieve to all combats and collaborators in respect of anything done by them in pursuit of their objectives, up to the time of the signing of the present agreement"² this amnesty particularly for Foday Sankoh meant that he would be awarded with the vice-presidency of the country despite being the leader of the rebels that perpetrated gross human rights violations. This shows that the primary objective of this peace accord was the ending of violent conflict rather than attainment of justice. However, there was widespread outrage at the free pardon granted to combatants, some of whom had committed some of the worst recorded war crimes and atrocities against civilians. It was condemned in the strongest of terms internationally, such as the Special Representative of the United Nations Secretary General who entered formal reservations to the agreement on the grounds that the United Nations did not recognize amnesty for crimes against humanity, genocide or war crimes.³ After all is said and done it remains to state that the countless victims of this conflict have not had the satisfaction of seeing their tormentors held accountable for their deeds.

3. Burundi – lessons from Sierra Leone?

The negotiators of the Burundi peace agreement concluded in Arusha in August 2000, probably alive to the Sierra Leone debacle and also reflective of certain localized sensitivities, provided for a partial amnesty but prohibited amnesty for acts of genocide, war crimes and crimes against humanity.⁴ The agreement also provided that the transitional government of Burundi would request the United Nations Security Council to establish an international judicial commission of enquiry to investigate acts of genocide, war crimes and other crimes against humanity from 1962-2000 and further that should the investigation reveal that there were acts of genocide and war crimes, consideration should be given to the establishment of a special international tribunal to try those fingered as

² Lomé Peace Agreement, 7 July 1999, Sierra Leone, Part 3 art IX (2).

³ OY Elagab 'The Special Court for Sierra Leone: Some Constraints' (2004) 8 International Journal of Human Rights 260.

⁴ Arusha Peace and Reconciliation Agreement, 28 August 2000, Burundi Protocol 2 art 26 (1).

the prime perpetrators. It is clear therefore that in the case of Burundi the quest to attain justice was not entirely sacrificed for the objective of attaining peace. It is also apparent that victims of atrocities in Burundi were catered for in their expectation of justice as compared to the Sierra Leone situation.

D. Traditional forms of Justice

1. Gacaca - Rwanda

At the end of the 1994 Rwanda genocide between 500 000 and a million people were killed and over 130 000 were in prison upon suspicion of committing acts of genocide. Organs of government and infrastructure had virtually been wiped out particularly a justice system to enforce laws. As late as 1997 the Rwandan courts were left to function with five judges and 50 lawyers nationally. Court physical infrastructure had been destroyed and there were countless victims who clamored for justice. The justice system was therefore woefully inadequate to deal with the masses of suspected genocide detainees. Furthermore, the International Criminal Tribunal for Rwanda (ICTR), established by the international community as a response to the genocide killings, was institutionally insufficient to deal with the situation as it targeted the handful leaders of the genocide. A transitional Rwanda retributive justice was important to engender confidence in the government that perpetrators would be held accountable. Articulating this sentiment, then Vice President Paul Kagame stated in 1994 that "...there can be no durable reconciliation as long as those who are responsible for the massacres are not properly tried".

It is in view of these difficulties that the Rwandan government resorted to another form of justice system, a novel and indigenous one at that, known as the Gacaca Tribal Courts. Meaning "judgment on the grass", the Gacaca Courts were modeled along a local process developed over centuries in Rwanda, intended to "sanction the violation of rules that are shared by the community, with the objective of reconciliation" via the awarding of compensation to injured parties and via the reintegration of offenders back into the community.

About 255,000 Gacaca judges were elected and trained to preside over these traditional tribunals. In its modern context, the Gacaca Courts hold jurisdiction over categories two to four of the Ophanic Law for which the punishments vary, but do not include the death penalty. Category two to four suspects range from the perpetrators, conspirators or accomplices of war crimes and those who destroyed property.⁵

The advantages of Gacaca Courts include the community impact that Rwandans become participants as judge and jury of genocide suspects, consensus needing to be reached among the participants to either find someone guilty or allow them to be reintegrated

⁵ Government of the Republic of Rwanda. 'Genocide and Justice: Categorisation of Offences Relating to Genocide'. <http://www.rwanda1.com>.

into their society. The important effect this system had was to lift these administrative and infrastructural burdens off the conventional judicial system, whilst simultaneously meting out justice to genocide offenders and helping victims and their families come to terms with the psychological aspects of the genocide; as well as the generation of community involvement and a community based healing process.

The Gacaca system has been criticized on essentially two main premises: that no due process is recognized and that the courts were used as a form of revenge mob justice. Both points of criticism are well founded but in the context of Rwanda's situation, the Gacaca system proved indispensable in delivering justice in the eyes of the myriad of victims where there was no system capable of doing so at the time.

2. Mato Oput – Uganda

Another case supporting the need for an alternative form of justice is the traditional mediation processes of Mato Oput applied by the Acholi tribe in Northern Uganda. The Northern Ugandan conflict is in its twentieth year since 1986 with no sign of a ceasefire in sight. Mato Oput has now been increasingly bandied around in that region as a possible way in which the conflict can be resolved and justice meted out. Mato Oput can be described as a voluntary process involving mediation of the truth, acknowledgement of wrongdoing and reconciliation through symbolic acts, such as the drinking of a bitter root by the perpetrator and victim and through which there is spiritual appeasement. This system is punted as promoting community participation in the settlement of conflicts which ensures ownership of decisions reached.

This system has now featured prominently in the efforts to resolve the conflict with the Lord's Resistance Army. Apparently the view is that with usage of this system the rebels will readily identify with the system and will be prepared to negotiate an end to hostilities. What appears to give impetus to the resort to Mato Oput is that the LRA leadership will see no incentive to take part in a settlement which exposes them to prosecution by the International Criminal Court which has actually issued warrants for their arrest but which has not been executed because of the continuing conflict.

Spokesman for the Ugandan Amnesty Commission, Moses Saku, noted some time ago that the LRA will not stop fighting as they have already been branded terrorists, while it was also noted that "if the rebels – who come from the Acholi community – are to be prosecuted, it would send a wrong signal to the people of the region as they are still campaigning for a blanket amnesty...", and that "given the history of Uganda... reconciliation is the best option...at the moment".⁶ With these aspects in mind and faltering peace talks, it has been suggested that the Acholi

tradition of Mato Oput be utilized, as it is clan and family-centered reconciliation, which incorporates the wrongdoing and the offering of compensation of the offender. This presents a cleansing ritual and a truly innovative alternative to criminal prosecution in a politically and socially hostile environment.

The international community remain steadfast in its resolve to prosecute and sentence war crimes and genocide perpetrators.⁷ But with these considerations in mind, there is much support for alternative approaches on our continent especially in circumstances where the costs of humanity has been great and the need for political and social healing desperately needs to occur.

It remains to be seen how the situation develops. Mato Oput seems likely in the eyes of those closely connected to the conflict, to have the potential to be the catalyst to a peaceful settlement; it appears to be also acceptable as a process that could deliver justice to the victims.

Conclusion:

What are the lessons from the utilization of alternative forms of justice?

1. It is clear that conventional justice systems are appropriate to obtain some form of justice for victims if the institutional capacity exists. But even these conventional justice systems have in certain instances failed to deliver justice where there are large numbers of perpetrators and victims.

2. It must be recognized that in certain instances it was imperative to sacrifice the quest for justice for the attainment of peace and an end to the conflict, particularly where those in government authorities were in no position to subdue those who were against it.

3. Alternative systems of justice to achieve a measure of justice have to incorporate at least four basic elements such as:

- (i) not to provide blanket amnesty but to make provision for the prosecution of perpetrators;
- (ii) for truth telling;
- (iii) nation building; and
- (iv) reparations as far as victims are concerned.

4. The role of international tribunals has proven to be for change in attitude on war lords and other leaders of groups committing war crimes and acts of genocide. These international efforts must be supported.

It is acknowledged that there are many more poignant examples of alternative forms of justice and the pivoted role they have and can offer in attaining justice and establishing and maintaining peace and stability on the continent.

⁶ *The East African*, 16 February 2004.

⁷ Chigara (2002:20).



“At the core of AFLA’s activities is the push for progressive human rights jurisprudence”

Alternative mechanisms of Justice: The case of Northern Uganda

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Caroline Ort

Justice, in the eyes of formal, “western”, legal systems, is primarily aimed at punishment. Punitive justice aims to hold a perpetrator personally responsible for his or her acts or omissions. Any person who commits a crime is liable to being arrested, charged and tried before a court of law or a competent tribunal established by law. Offences can lead to imprisonment or fines, or, in some countries, even the death penalty. This is the notion of justice that many of us, especially those of us who are lawyers, are familiar with. Retribution has become the main objective of punishment, followed by deterrence, whilst rehabilitation is generally seen as less important.

I was asked to speak today about a different notion of justice. I will talk briefly about alternative mechanisms of justice that prevail in societies for whom reconciliation, and restoring relations, is more important than punishment. The case of Northern Uganda is such an example. I would like to stress though that, although having lived in the region for a number of years, I am not an expert on restorative justice, and having grown up and studied in the Netherlands, my personal sense of what “justice” is, is of course influenced by my upbringing and my education. One kind of justice is not necessarily better than the other. However, perhaps one is more applicable in certain situations than the other. Please note that I am talking about an immediate post-conflict, or even conflict, phase. The needs and desires of the population might be very different after a number of years.

The Conflict

The conflict in Northern Uganda has been carrying on since 1986 – for more than 20 years now. Where originally the conflict began as an armed opposition to President Museveni’s National Resistance Movement, since the mid 1990s the main targets are the civilian population. As is well known, the Lord’s Resistance Army has abducted children from IDP camps, boarding schools and villages and turned them into child soldiers who are forced to commit vicious crimes against their own people, or into sex slaves who are made to bear children for the army commanders. Approximately 1,5 million people in Northern Uganda are displaced and live in IDP camps, often in the most squalid conditions. LRA leader Joseph Kony and four of his most senior commanders were indicted by the International Criminal Court on numerous charges of war crimes and crimes against humanity. The peace talks, which started in the Sudanese town of Juba in 2006 under the auspices of the President of South Sudan Riek Machar, are believed to be the best option yet to find a solution to the ongoing conflict. Unfortunately, the talks seem to have stalled and no progress has been made in recent months. The issue of accountability has not yet been addressed, but it is clear that (with support in this case from the cultural and religious leaders of Northern Uganda) on the one side, the LRA would advocate for amnesty or reconciliatory mechanisms, whereas the international community on the other side, would advocate for a judicial process. The position of the Government of Uganda is still unclear, although having referred the case to the ICC, President Museveni has subsequently stated his intention to “withdraw the referral”.

It is not my intention to talk about the ICC indictments, or the impact they might or might not have had on the peace process. However, regardless whether the four or five LRA commanders would ever face trial here in this building in The Hague, there are hundreds, if not thousands of others who can be accused of committing crimes against civilians. Many of them are formerly abducted children. Many of the perpetrators are at the same time victims. The key question is how they can be held accountable for their deeds, without overstressing the formal legal system, and while promoting reconciliation at the same time. Criminal trials, national or international, will not be able to deal with the magnitude of cases. An amnesty law, which was promulgated at the request of the religious, cultural and political leaders and with the support of the population in Northern Uganda in the year 2000, does not contribute to truth finding, nor does it contribute to accountability or the demand for reparations. Therefore, in the end it is feared that it does not contribute to the need for reconciliation.

Increasingly, peace advocates are therefore looking at other ways that can bring justice and reconciliation to the community.

The transition from conflict to peace is a difficult and painful process. Countries that have experienced conflict have adopted different models of conflict resolution including the use of traditional justice systems to promote sustainable peace. Other countries have established truth and reconciliation commissions with the mandate of investigating human rights abuses, processing applications for amnesty, and ordering payment of reparation to victims.

Traditional system of the Acholi people

The Acholi people, the most affected tribe in Northern Uganda, have their own traditional system. Many of you will have heard of the *mato oput* ceremony, the joint drinking of a bitter root by the perpetrator of a killing and the clan of the victims.

I have taken the following quote from a recent publication by the Justice and Reconciliation Project of the Liu Institute for Global Issues of the University of British Columbia, and the Gulu NGO Forum in Uganda: "Acholi justice is executed according to oral spiritual and cultural laws that correspond to the level and intensity of a crime committed. While ritual Acholi practices differ across clans, it is possible to describe the general principles and beliefs of justice commonly shared by the Acholi people. These include: the voluntary nature of the process; mediation of truth; acknowledgement of wrong doing; and reconciliation through symbolic acts and spiritual appeasement. [...] It is both an independent and transparent process, where elders act as neutral arbitrators of disputes. Once an offence is committed, elders intervene to separate clans involved to prevent reprisals (known as a cooling down period). A period of shuttle diplomacy then occurs, where elders establish the facts of the crime based on evidence provided by witnesses on both sides of the dispute. The mediators determine the appropriate time to bring the two clans together in order to reach a consensus on events that occurred, and later, to determine the amount of compensation to be paid by the whole of the offending clan to the clan of the offended. [...] Once compensation has been paid in full, an appropriate cultural ceremony or ritual to help restore relationships between clans, nearly universally called *Mato Oput*, is held as a means of promoting reconciliation between clans of the victim and perpetrator. The two clans are then welcomed to resume their past relationship and to put the past event behind them. Proponents have urged consideration of adapting *Mato Oput* as a means of reconciling Acholi-land and promoting a lasting forgiveness."

Whether or not an adaptation of the ancient ceremony of *mato oput* is appropriate in the case of Northern Uganda is difficult to say at this stage. The system was never intended to deal with the amount of crimes as have been committed in the past 20 years. Neither was

it intended to be applied outside of the Acholi tribe, which make its use in the other parts of the north more complicated. Uganda counts at least 56 ethnic communities, each of which has their own traditional justice system. Nevertheless, studies have shown that all Ugandan traditional justice systems were largely based on the principles of mercy, love and restoration of broken relationships. The African traditional justice systems promoted community participation in the settlement of conflicts and ensures ownership of decisions reached. They also sought to rehabilitate and reintegrate the offenders into the community instead of isolating or condemning them to death sentence or life imprisonment, and sought to re-unite communities affected by the conflict.

Not wanting to over-romanticise traditional mechanisms, the basic principles are useful to determine a system that would meet the requirements of an alternative justice mechanism, aimed at reconciliation rather than punishment.

Truth and Reconciliation Commission

Another alternative justice mechanism would be the establishment of a national truth, justice and reconciliation commission. This commission would have the advantage, above the Acholi traditional system, that it can be applied country-wide, and should have the capacity to deal with the different human rights violations that have been committed throughout the course of the conflict. This means that it would be applicable in other regions of the country as well, and would have jurisdiction over other groups than only the Acholi tribe. In order to achieve sustainable peace in the region, there is a need to work out a settlement that takes into account the fears and concerns of all the stakeholders including the victims, the rebels, the communities, the government and the international community. In order to achieve that goal, it is necessary to agree on a holistic package that will involve truth-telling, acknowledgement of wrongdoing, repentance, and payment of reparation to victims of grave human rights violation.

A possible alternative justice system, which is proposed by a number of civil society actors in Uganda, including the Uganda Joint Christian Council, is anchored on six main pillars: The establishment of a National Truth, Justice and Reconciliation Commission with the mandate of investigating war crimes committed by the different parties; Documentation of crimes and injustices committed against individuals and groups for historical purposes and also as a reminder to all about the danger of conflict; Extension of amnesty to perpetrators of crimes committed in the course of the conflict provided upon the signing of a peace agreement and upon condition that they are willing to cooperate with the TJRC in the investigation of crimes committed and are also ready to show remorse or express apology to victims; Payment of reparation to victims of crimes committed in the course of the Conflict under the Victims Reparation Trust Fund; Establishment of a

programme of national dialogue at community, regional and national levels to foster the spirit of reconciliation, healing, and national unity; Participation of religious and cultural leaders in the rehabilitation, resettlement and reintegration of ex-combatants and other returnees.

The conclusions from a recent seminar at Makerere University in Kampala, are that: “when looking at possible mechanisms and structures for a national truth and reconciliation process, there was agreement that while comparative experiences and perspectives should be drawn on, Uganda *must* develop its own context-specific process. There was considerable consensus that a national process should start from the local level, including the use of traditional mechanisms, and that these would then feed into a national level independent body.”

Concluding remarks

The application of *mato oput* or the establishment of a Truth and Reconciliation Commission both would have the advantage that it would be aimed at reconciliation, and restoring the relations between groups and individuals that will have to continue to live together in the future. Furthermore, it could be an incentive to the accountability discussions in Juba. As said, whether this alternative justice system should come in the place of the ICC trials, or whether this should only be applied to the rank-and-file of LRA and UPDF, is something that could be further discussed between the Court, its State Parties and those responsible for negotiations in Juba.

Thank you for your attention.

National Courts and Complimentarity

Justice Emile Short

Ad Litem Judge, International Criminal Tribunal for Rwanda (ICTR)



Justice Emile Short

Introduction

I thank the organisers of this Conference for the invitation to participate and present a paper. My presentation, National Courts and Complementarity, will focus on the complementarity regime of the International Criminal Tribunal (The Court) established under the Rome Statute.¹ I shall make brief reference to the jurisdiction of the Court and the purpose for its establishment, examine the concept of the complementarity system, some of the relevant provisions in the Rome Statute, particularly the notions of “unwillingness” and “inability”. I shall also examine the implications of complementarity for national jurisdictions and comment briefly on how the complementarity regime has worked so far and consider whether any conclusions can be drawn from the ongoing investigations.

The Court Jurisdiction and the International Community

At the outset, it would be useful to deal briefly with the jurisdiction of the Court. The establishment of the Court demonstrated the international community’s determination to deal quickly and effectively with violations of international criminal law. The Court has jurisdiction to prosecute crimes of genocide, crimes against humanity and war crimes and aggression.² The jurisdiction of the Court is triggered by a referral by a State Party or the Security Council to the Court or by

¹ The complementarity system of the *ad hoc* Tribunals of the International Criminal Tribunal for Rwanda (ICTR) and the International Criminal Tribunal for Yugoslavia (ICTY) is not the focus of this paper. Only passing reference would be made to it.

² Article 5 of the Rome Statute. The Court also has jurisdiction to investigate the crime of aggression but it is not yet operative.

a proprio motu investigation by the Prosecutor with the approval of a Pre-Trial Chamber.³

The expectation is that the existence of a permanent international tribunal with wide geographical jurisdiction will contribute significantly to ending impunity for the most serious crimes of concern to the international community and act as a deterrent to potential perpetrators. The complementarity regime of the Court, which imposes on States the primary responsibility to investigate and prosecute such crimes, reinforces these twin goals of ending impunity and promoting deterrence. As of 1st January 2007, 104 countries are State Parties to the Rome Statute of the International Criminal Court. Out of them 29 are [African States](#), 12 are [Asian States](#), 16 are from [Eastern Europe](#), 22 are from [Latin America and the Caribbean](#), and 25 are from [Western Europe and other States](#). As more States ratify the Statute and implement legislation to enable them prosecute the crimes covered by the Statute, in addition to the power of the Security Council to refer a situation to the Court, it is hoped that a safe haven for perpetrators of these grave crimes would be difficult to find. It must quickly be observed however that this dream of denying safe havens for such perpetrators has been undermined by the United States which has entered into bilateral agreements with over a hundred countries (known as ‘98 agreements) under which such countries have agreed not to hand over to the Court U.S. citizens who commit crimes under the Statute.

The Principle of Complementarity

By contrast with the ICTR and ICTY Tribunals, which have concurrent jurisdiction to prosecute persons for serious violations of international humanitarian law, namely, genocide, crimes against humanity and war crimes,⁴ the Rome Statute grants primacy to national jurisdictions to investigate and prosecute persons for crimes covered by the Statute. This means that The Court will not exercise its jurisdiction to investigate and prosecute these crimes where States have not shown an unwillingness or inability to do so. The primary responsibility for investigation and prosecutions rests with State Parties. This deference to national jurisdictions is based on recognition of state sovereignty and the reality that States are or should be in a better position to investigate such crimes,

³ Article 13.

⁴ For example, Article 8(2) of the ICTR Statute states: “The International Tribunal for Rwanda shall have primacy over the national courts of all States. At any stage of the procedure, the International Tribunal for Rwanda may formally request national courts to defer to its competence in accordance with the present Statute and the Rules of Procedure and Evidence of the International Tribunal for Rwanda.”

particularly those committed within their territory. The Court is therefore a court of last resort. Another underlying reason for granting primacy to national jurisdictions was the assumption that States would prefer to try their own nationals rather than have them tried by an international tribunal.

Admissibility Requirements

The concept of complementarity means that even where The Court has jurisdiction in a particular situation to investigate and prosecute crimes under the Statute, it would not exercise its jurisdiction, unless certain criteria are met. In other words, the Statute provides that a case would not be admissible before The Court except under certain conditions. It provides that a case would be inadmissible where:

- (1) the case is being investigated or prosecuted by a State which has jurisdiction over it, unless the State is unwilling or unable genuinely to carry out the investigation or prosecution;
- (2) the case has been investigated by the State but has decided not to prosecute the person or persons concerned, unless the decision not to prosecute stems from an unwillingness or inability genuinely to prosecute;
- (3) where the person concerned has been tried by The Court and convicted or acquitted or has been tried by another court for the crimes which form the basis of the case before The Court, unless the proceedings were conducted to shield the person from liability or were not conducted in a fair and impartial manner; and
- (4) the case is not of sufficient gravity to warrant any further action by The Court.⁵

The Notion of Unwillingness

Apart from the fact that The Court is not disposed to exercising its jurisdiction where a case is not of sufficient gravity, the criteria for admissibility of a case before The Court under the Statute hinges on the notions of “unwillingness” and “inability” by States genuinely to investigate and prosecute. The Statute vests in The Court the power to determine whether States have demonstrated an unwillingness and inability genuinely to investigate and prosecute. The Court is therefore the arbiter of not only its own jurisdiction but also the admissibility requirements. States wishing to raise objections as to whether these admissibility requirements have been met have to do so before The Court. In this regard, it exercises supervisory jurisdiction over national courts. Undoubtedly, this is an area for potential conflict between States and The Court. Under the notion of “Unwillingness”, the Statute provides that The Court may make a determination as to whether the proceedings were or are being undertaken or the

national decision was made for the purpose of shielding the person concerned from criminal responsibility for crimes within the jurisdiction of The Court; there has been an unjustified delay in the proceedings which in the circumstances is inconsistent with an intent to bring the person concerned to justice; the proceedings were or are not being conducted independently or impartially, and they were or are being conducted in a manner, which in the circumstances, is inconsistent with an intent to bring the person concerned to justice.⁶ If these factors exist in a particular case, the Court may find that the State is “unwilling” to genuinely investigate and prosecute and that the case is therefore admissible.

While these criteria are stringent, they are also broad and have the potential of getting the Court involved in intense and complex litigation between the Prosecutor and States. The burden is on the Prosecutor to produce evidence to support the allegation that a State has undertaken proceedings for the purpose of shielding an accused, or to demonstrate unjustified delay or impartial or independent proceedings which manifest an intent not to bring the perpetrators to justice. Obtaining such evidence would in some cases be free from difficulty but in other cases could be a big challenge for the Court. It can be assumed that the Court will only make such a finding in clear cases to avoid causing embarrassment to a State Party. The factors that the Court should take into account into making these findings are not stated but it is commendable that the ICC itself has caused to be developed for its OTP an informal expert paper which contains comprehensive indicators that would be taken into account to determine “unwillingness”. However, it cannot be taken for granted that States would not challenge such findings as so many factors have to be taken into account.

For example, the question of “unjustified delay” is one that could lend itself to controversy. Given the serious nature of the crimes covered by the Statute, and the concern of the international community to bring to justice perpetrators of such crimes, States would be expected to give priority to such cases. At the same time, the Court would likely have to consider, among other things, the length of the delay at the various stages of the proceedings, the cause of such delay, the complexity of the case, the nature of the judicial system of the State, the average length of criminal trials, and efforts that have been made by the authorities to investigate and prosecute the crimes in question. In a recent case decided by Chamber III of the ICTR entitled *The Prosecutor v. Casimir Bizimungu* and 3 ors, the Court held that the fact that the Accused has been in custody for ten years and the trial had only reached towards the end of the case for the 2nd Accused was insufficient to find that there had been undue delay in the trial. Citing jurisprudence of the Appeals Chamber, the Court held that a determination of whether an Accused person’s right to

⁵ Article 17(1).

⁶ Article 17(2).

be tried without undue delay has been violated must necessarily include a consideration of, *inter alia*, the following factors:

- The length of the delay;
- The complexity of the proceedings, such as the number of charges, the number of accused, the number of witnesses, the volume of evidence, the complexity of facts and law;
- The conduct of the parties;
- The conduct of the relevant authorities; and
- The prejudice to the accused if any.

The Notion of “Inability”

For a case to be admissible on the ground of a State’s “inability” to investigate and prosecute, the Statute requires the Court to consider whether, there has been a total or substantial collapse or unavailability of the State’s national judicial system or the State is unable to obtain the Accused or obtain the necessary evidence and testimony or otherwise unable to carry out its proceedings.⁷ Making a finding of “inability” as opposed to “unwillingness” should present less difficulty since it involves the application of more objective and easily verifiable factors.

It is clear from the Statute that partial collapse of the judicial system in a particular area of a State where conflict is raging would not relieve the State of the obligation to investigate and prosecute. However, here again, it is interesting to note that the question as to whether the Rwandan judicial system had collapsed to such an extent as to make it impossible to try anyone for the crimes committed during the genocide in Rwanda in 1994 is one of the hotly contested issues before the ICTR.

Presumably also, the fact that the judicial system of the State is overburdened with a backlog of cases would not preclude a finding of “inability”. However, as would be discussed below, where a State Party has not passed the appropriate legislation to enable it prosecute persons who have committed crimes under the Statute, the Court could make a finding of “inability”. The inclusion of the last criteria for admissibility before the Court on the grounds of “inability”, namely, “otherwise unable to carry out its proceedings” is interesting as it gives the Court discretion to consider other factors not mentioned in the Statute. It should be made clear that in determining unwillingness or inability the Court does not seek to set itself up as an appellate body of the national court nor is it intended to subject the national judicial system to strict international standards of fairness or human rights standards.

⁷ Article 17(3).

Challenges to Jurisdiction and Admissibility

An important objective of the complementarity principle is the avoidance of conflict between the Court and a State Party in the investigation and prosecution of crimes under the Statute. The Statute and Rules of Procedure therefore make provision for certain steps to be taken when the Prosecutor decides to investigate a case, for dialogue between State Parties and the Court and the opportunity for State Parties, an accused and any State having claimed to have jurisdiction over a case to make objections before the Court on issues of jurisdiction and admissibility. Where the Prosecutor decides to initiate an investigation on his or her own initiative he or she must decide whether there is a reasonable basis to proceed and one of the factors to be taken into consideration is whether the admissibility requirements discussed above have been met. If the Prosecutor decides there is a reasonable basis to proceed, he or she must seek authorization from the Pre-Trial Chamber which must also satisfy itself that the admissibility requirements have been satisfied before authorizing the Prosecutor to continue the investigation.⁸ Where there has been a State referral or even after the Pre-Trial Chamber has authorized the Prosecutor to proceed with a *suo motu* investigation, the Prosecutor shall notify all State parties and those States which, taken into account the information available, would normally exercise jurisdiction over the crimes concerned. Any such State may inform the Court that it is investigating or has investigated the case in question and may request the Prosecutor to defer to its investigation, unless the Pre-Trial Chamber, on the application of the Prosecutor, authorizes the Prosecutor to proceed with the investigation.⁹ Such a notification by the State amounts to a challenge to the admissibility of the case which has to be considered and determined by the Pre-Trial Chamber, subject to a right of appeal by the Prosecutor or the State. However, the applicable Articles of the Statute and Rules of Procedure have been designed to ensure that while States are provided with an opportunity to challenge the Court’s jurisdiction or admissibility of a case, the proceedings are conducted expeditiously to avoid any delay in the investigation or make the obtaining of evidence of the accused more difficult.

Implications of Complementarity System for State Parties

The complementarity principle has several implications for national jurisdictions, some of which do not find an answer in the Statute itself. Not all of the implications can be considered here due to time constraints.

First, what is the obligation, if any, of State Parties to enact legislation incorporating all the crimes, elements

⁸ Articles 15 and 53, and Rule 48 of the Rules of Procedure and Evidence.

⁹ Article 18

of liability, defences etc. contained in the Rome Statute? There is divided opinion among States and academic writers as to whether there is a legal obligation on State Parties to adopt implementing legislation establishing jurisdiction over all the crimes and general principles of law of the Rome Statute.¹⁰ There is no express provision in the Statute imposing such an obligation on State Parties. However, some language in the Statute and the underlying objective and purpose of the complementarity system favour an implied obligation. For example, in the Preamble of the Statute it is stated that States Parties “recall that it is the duty of every State to exercise its criminal jurisdiction over those responsible for international crimes”. More importantly, since the primary responsibility for achieving the objective of ending impunity and creating a deterrent is imposed on States, an obligation to create the necessary legislative framework to enable States undertake the investigation and prosecution of the crimes under the Statute is a compelling inference. Any other interpretation would severely undermine the complementarity regime established under the Statute. The Court complements the efforts of State Parties and not vice versa. Moreover, State Parties run the risk of the Court finding that it is unable to investigate and prosecute such crimes because of the absence of the necessary legislation as part of the domestic law.

It follows, therefore, that State Parties must review their existing legislation to determine whether it is consistent with the substantive law of the Statute. It has been pointed out that current “substantive implementing legislation ... ranges from general rules of reference to detailed enumeration of the crimes, either by adopting the definitions of the crimes incorporated in the Statute verbatim or by rearranging and /or redefining them.”¹¹ Other States have relied on “ordinary” domestic offenses. On the latter issue, it has been argued that, in considering whether a national jurisdiction has satisfied the complementarity requirements, a “State trying and convicting a person for an ordinary crime without the intent of shielding that person from criminal responsibility for crimes within the jurisdiction of the Court is not unwilling to carry out the investigation or prosecution if there is no unjustified delay and the proceedings are conducted independently and impartially. Nor could it reasonably be argued that the classification of conduct as an ordinary crime renders the national system unable ‘to carry out its proceedings’.”¹² It is questionable whether

this interpretation of the Statute will find favour with the Court. It must be appreciated that the crimes under the Statute are international crimes which by their very nature threaten the peace and security of not only the State concerned but the international community as a whole. Treating them in the same manner as ordinary domestic crimes fails to reflect the gravity of the crimes, irrespective of whether the sentence that may be imposed under national jurisdictions are the same or even exceed that under the Statute. Moreover, in the interest of developing a uniform international jurisprudence on the crimes covered by the Statute, it would be preferable to adopt legislation which criminalizes these crimes as international core crimes rather than prosecuting them as “ordinary” domestic crimes.

In this regard, it is instructive to take note of the recent Decision of the ICTR in *The Prosecutor v. Bagaragaza* delivered on 19th May 2006 where the Prosecutor had applied to transfer one of the cases pending before the Tribunal to Norway as part of its winding up process. Even though Norway and the accused had agreed to the transfer, the ICTR Court rejected the Prosecutor’s application because Norway did not have jurisdiction to try the crimes of genocide, conspiracy to commit genocide and complicity in genocide. The Court stated:

In this case, it is apparent that the Kingdom of Norway does not have jurisdiction (ratione materiae) over the crimes as charged in the confirmed Indictment. In addition, the Chamber recalls that the crimes alleged – genocide, conspiracy to commit genocide and complicity in genocide – are significantly different in term of their elements and their gravity from the crime of homicide, the basis upon which the Kingdom of Norway states that charges may be laid against the Accused under its domestic law. The Chamber notes that the crime of genocide is distinct in that it requires the “intent to destroy, in whole or in part, a national, ethnical, racial or religious group, as such”. This specific intent is not required for the crime of homicide under Norwegian criminal law. Therefore, in the Chamber’s view, the ratione materiae jurisdiction, or subject matter jurisdiction, for the acts alleged in the confirmed Indictment does not exist under Norwegian law. Consequently, Michel Bagaragaza’s alleged criminal acts cannot be given their full legal qualification under Norwegian criminal law, and the request for the referral to the Kingdom of Norway falls to be dismissed.

The Appeals Chamber rejected the Prosecution’s appeal stating, among other things, that:

In addition, the Appeals Chamber appreciates fully that Norway’s proposed prosecution of Mr. Bagaragaza, even under the general provisions of its criminal code, intends to take due account of and treat

¹⁰ For a detailed discussion of this issue, see *The Impact of Complementarity on National Implementation of substantive International Criminal Law*, by Jann K. Kleffner, Journal of International Criminal Justice 1, 1, Oxford University Press 2003.

¹¹ Jann K. Kleffner, *ibid* at pg. 95.

¹² *Ibid* at pg. 96. The writers substantiates this position by reference to the use of the word “conduct” as opposed to “crimes” in Article 20(3) of the Statute. However, the writer correctly points out that the corresponding provisions of the ad hoc Tribunals for the former Yugoslavia (Article 10(2)(a) and Rwanda (Article 9(2)(a) do permit these Tribunals to try a person who has been tried before a national court “for acts

constituting serious violations of international humanitarian law, ... if, the act for which he or she was tried was characterized as an ordinary crime”

with due gravity the alleged genocidal nature of the acts underlying his present indictment. However, in the end, any acquittal or conviction and sentence would still only reflect conduct legally characterized as the "ordinary crime" of homicide. That the legal qualification matters for referrals under the Tribunal's Statute and Rules is reflected inter alia in Article 9 reflecting the Tribunal's principle of non bis in idem.¹³ According to this statutory provision, the Tribunal may still try a person who has been tried before a national court for "acts constituting serious violations of international humanitarian law" if the acts for which he or she was tried were "categorized as an ordinary crime". Furthermore, the protected legal values are different. The penalization of genocide protects specifically defined groups, whereas the penalization of homicide protects individual lives.

... However, the Appeals Chamber cannot sanction the referral of a case to a jurisdiction for trial where the conduct cannot be charged as a serious violation of international humanitarian law. This is particularly so when the accused has been charged with genocide, an offense that -- unlike murder -- is designed to protect a "national, ethnical, racial or religious group, as such". The question has been raised as to what the position would be where a State Party conducts apparently genuine proceedings and the Accused is convicted for conduct under the Statute but "the person is later pardoned, paroled or otherwise freed after a brief or non-existent period of incarceration". Could the Court assume jurisdiction on the grounds that the proceedings were sham? It has been pointed out that during the negotiations leading to the adoption of the Statute, the inclusion of a provision to address such a situation was suggested but was opposed by many States who expressed concerns about the possibility of the Court's interference in administrative or executive decision-making. In my view, in extremely clear cases the Court's intervention would be justified. Where, for example, a person was charged and convicted of genocide and sentenced to life imprisonment or to a term of 20 years, and an executive pardon was granted after a brief period of six months or one year, it would raise serious doubts as to whether the proceedings were genuine in the first place and were carried out with the intent of bringing the person to justice. States Parties are deemed to accept that "the most serious crimes of concern to the international community" should be treated as such and that they should refrain from conduct which undermines impunity by ensuring that not only are investigation and prosecution of these crimes undertaken genuinely but that persons convicted of such grave crimes receive and serve

¹³ Article 9(2) states in pertinent part: "A person who has been tried before a national court for acts constituting serious violations of international humanitarian law may be subsequently tried by the International Tribunal for Rwanda only if: (a) The act for which he or she was tried was characterized as an ordinary crime; or (b) The national court proceedings were not impartial or independent, were designed to shield the accused from international criminal responsibility, or the case was not diligently prosecuted."

punishment commensurate with the crimes they have committed.

The issue also arises as to whether the grounds of criminal responsibility in implementing legislation should be the same as those in the Rome Statute. Would a case become admissible before the Court because a State criminalizes a narrower range of conduct than that provided for in the Statute or recognizes a defence not available under the Statute? Examples include statutory limitation for crimes within the jurisdiction of the Court or a narrower definition of responsibility based on command responsibility or superior orders. If State Parties wish to avoid the risk of being held to be unable to investigate a crime covered by the Statute because of such divergence in its general principles of criminal responsibility, they may need to review their legislation to ensure that their domestic legislation on such issues are in conformity with those of the Rome Statute.

Other issues that arise from the complementarity regime of the Court vis-à-vis national courts but which have not been discussed here are applicability of immunities granted by States in domestic legislation to its public officials such as heads of state to crimes under the Statute, as well as diplomatic immunity granted to officials of other States.

Conclusion

Even though it is probably too early to assess how satisfactorily the objectives of the complementarity regime of the Court have been achieved, it is worthwhile to examine the ongoing investigations and to see whether any trend can be discerned. The Prosecutor has decided to open investigations into four situations. They are the situation in Darfur, Sudan which was referred to him by the Security Council and the situations in three State Parties, Uganda, the Democratic Republic of the Congo and the Central African Republic (CAR) which the State Parties themselves referred to the Prosecutor. The question which one may ask is why none of the three State Parties chose to exercise its criminal jurisdiction to investigate and prosecute the crimes themselves but chose to refer them to the Prosecutor. In the case of the CAR, there is evidence that the State before the referral had undertaken investigations into the situation and preliminary court proceedings had also been under way but the CAR Court indicated that it was unable to carry out the necessary criminal proceedings, in particular to obtain the Accused and the necessary evidence. The referral was therefore not surprising. However, with regard to the situations in Uganda and the Democratic Republic of Congo, it is not clear why those States chose not to exercise their criminal jurisdiction. Undoubtedly, such referral by States is permissible under the Statute. Indeed, one distinguished writer has pointed out that "as a matter of legal policy the emergent practice of "self referrals" and what he describes as partial "waivers of complementarity" constitute laudable and perhaps

even necessary refinements of the complementary scheme under the Statute. The refinement effort reflects the fact that, in terms of international criminal policy, no rigid primacy rule in either direction can be formulated. Much depends on the circumstances of the individual situation of mass atrocities, on the individual suspect. (is it a person alleged to be among those most responsible for the alleged crimes or one of the “lower ranks?”) ...”

However, he also points out the danger of creating the appearance that a quasi-consensual exercise of the Court’s criminal jurisdiction becomes the rule. This is really the concern of many from this initial trend because the fundamental expectation under the complementarity regime of the Court is that State Parties would discharge their obligation to investigate and prosecute crimes under the Statute over which they have jurisdiction and that the Court would be used as a court of last resort. A further challenge to the complementarity regime of the Court is posed by reports that the Lord’s Resistance Army is claiming that the arrest warrants issued by the Court should be revoked as a pre-condition for laying down their arms coupled with reports that there is a strong body of opinion among Ugandan citizens that in the interest of peace, the demand of the LRA should be met. Moreover, where States refer situations to the Court for investigation and prosecution of those “who bear the greatest responsibility” for these crimes, what is the responsibility of the State as regards other perpetrators not in that category? Do they enjoy impunity or as in the case of Rwanda, the national criminal justice system would devise a system of retributive cum restorative justice for them?

Whatever position one takes on this initial trend of self referrals, it is hoped State Parties, especially in Africa, would choose to undertake the investigation and prosecution of crimes covered by the Statute, where there are no legal or practical obstacles. In this regard, let me quote the words of the Prosecutor himself who in June 2003 stated that:

As a consequence of complementarity, the number of cases that reach the Court should not be a measure of

its efficiency. On the contrary, the absence of trials before this Court, as a consequence of the regular functioning of national institutions would be a major success.

For this objective to be achieved, State Parties must endeavour to adopt the necessary legislative framework to discharge their responsibility. State Parties should be encouraged and their legal infrastructure and capacity enhanced to ensure that they can discharge their obligations to prosecute persons for violations of international humanitarian law.

In this regard, the ICC could assist, without compromising its independence, by providing technical assistance, training for law enforcement agencies in State Parties to better equip them to handle the investigation, prosecution and adjudication of mass crimes, an exercise that poses challenges not encountered with ordinary crimes at the national level. Further elaboration by the Court on the existing criteria to clarify any grey areas to determine when it would intervene because national courts are unable or unwilling genuinely to investigate and prosecute would be welcome. We all hope that in the not-too-distant future, as more States ratify the Statute and take seriously their responsibility to adopt and implement legislation to incorporate the crimes and general elements of criminal responsibility covered by the Statute and the complementarity system functions effectively, we would achieve our dream of ending impunity and deterring potential perpetrators of crimes of genocide, crimes against humanity and war crimes. I thank you.

National Courts and Complementarity

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Introduction

I begin these remarks by briefly joining issues on previous but related discussions. The first is on the meaning of justice. I define justice as rendering to everyone his/her due. In the context of criminal law, justice means punishing a criminal because he merits it, what penologists call retribution or just desert. Some think that the goal of criminal justice is deterrence, that is, sending a warning to would-be criminals that punishment awaits them, but why should we make an experiment out of a criminal if not that he deserves his fate? That will no longer be justice. Criminal justice must also seek to compensate the victim for her/his injury and restoring, as far as is humanly possible, the *status quo ante bellum*. Compensatory justice is illustrated in the ICC Victim Trust Fund.

The second issue is whether there is an African perspective on international criminal justice? My answer is a qualified yes. Traditional approaches to justice in Africa seek reconciliation and restoration of social harmony. The challenge, of course, is to ensure that grave crimes do not go unpunished while pursuing peace and reconciliation, but the traditional approaches might explain amnesties often given to end, or at the end of, Africa's nasty wars, such as Nigeria (after the civil war); Mozambique (in the late 1970s); South Africa (after Apartheid); Angola (after the death of Jonas Savimbi in 2002); and Southern

Sudan (after the forty-year civil war). The Uganda referral to the ICC is already creating tensions between justice and reconciliation. At the time

Museveni called on the ICC to indict leaders of the Lord's Resistance Army (LRA), another process was already in motion. An element of this process was the traditional Acholi way of ending disputes, with repentance and reconciliation as ends. The ICC Statute does not make allowance for such niceties, arguably because a global justice system that aims to try crimes of war and crimes against humanity have its ideas of justice informed by cultures other than our own.

The Principle of Complementarity

The discipline of international criminal law is regulated through multiple legal regimes, with domestic courts as primary legal regimes. Transnational criminal justice is primarily meted out by domestic courts, which apply domestic law based on provisions of criminal codes, special criminal laws or through the implementation of treaty provisions into domestic criminal law. National investigations and prosecutions, where they can properly be undertaken, are normally the most effective in bringing offenders to justice. States normally have the best access to evidence and witnesses and their enforcement agencies are usually at the disposal of the national prosecution system.¹

Conscious of the need to maintain a balance between national sovereignties and demands of international criminal justice, the ICC Statute enshrines the principle of complementarity. It accords primacy to national legal systems, which must have the first bite at the cherry for crimes within the Court's jurisdiction. The Preamble to the Statute states implicitly that the effective prosecution of crimes of international concern "must be ensured by taking measures at the national level and by enhancing international cooperation." It also calls on "every State to exercise its criminal jurisdiction over those responsible for international crimes." These provisions restate existing norms according to which states have obligations to prosecute and punish such crimes.² The Statute explicitly announces that the ICC "shall be complimentary to national criminal jurisdictions" (pmb). It confirms these preambular provisions in Article 1 and works out its details in Articles 17 and

¹ See ICC, *Paper on some policy issues before the Office of the Prosecutor*, ICC Doc. ICC-OTP 2003, at 1-27, available at http://www.icc-cpi.int/library/organs/otp/030905_Policy_Paper.pdf [hereinafter *Policy Paper*].

² *Cf. id.* at 5 ("[T]he principle underlying the concept of complementarity is that States remain responsible and accountable for investigating and prosecuting crimes committed under their jurisdiction and that national systems are expected to maintain and enforce adherence to international standards.").

20.³ Article 17 deals with questions of admissibility, while Article 20 deals with the *ne bis in idem* rule. The *ne bis in idem* rule protects both an accused person and the Court; an accused person from being prosecuted twice for the same conduct, and the Court from squandering its limited resources where justice has already been done.⁴ The current definition of complementarity, as set out in the Rome Statute, limits the ICC's discretion, and specifically the discretion of its prosecutor.

A vital question is whether "national jurisdictions," in relation to complementarity, are limited to states directly concerned with a given crisis, that is, the territorial or nationality states? The answer must be in the negative, since the ICC cannot be taken as a substitute for any of the existing mechanisms for prosecuting "grave crimes" under international humanitarian law (IHL).⁵ The ICC merely complements these other mechanisms, meaning that other states, including non-states Parties to the ICC Statute, can equally prosecute the most serious crimes of international concern, based on the universality principle or under obligations arising from IHL.

The ICC is, thus, a court of last resort. It is not allowed to exercise jurisdiction over international crimes where national systems genuinely investigate or prosecute such crimes. It is allowed to do so only if it considers that national authorities are unwilling or unable to carry out genuine investigations and/or prosecutions (arts. 17, 20(3)).⁶ This will be the case where proceedings before national courts are intended to shield accused persons from criminal responsibility (art. 17(2)(a));⁷ or where there has been an unjustified delay in the proceedings in order to defeat the cause of justice (art. 17(2)(b)); or where judges are not independent and impartial (art. 17(2)(c));⁸ or where the national legal system has collapsed (art. 17(3)). Evidence of shielding of criminals from justice may exist in different forms, such as legislation, orders, amnesty decrees, instructions and correspondence. Other instances that could permit admissibility by the ICC have been cited;⁹ one is where the ICC and the territorial State incapacitated by mass crimes agree

that a consensual division of labor is the most logical and effective approach; another is where conflicting groups oppose prosecution at each other's hands, preferring an impartial prosecution by a neutral ICC: "In such cases there will be no question of 'unwillingness' or 'inability' under article 17."¹⁰ A variant of complementarity is the *aut dedere aut judicare* ("either punish or let others punish") doctrine. The four Geneva Conventions and the First Protocol, for example, require states to enact legislation to punish grave breaches of IHL, to search for persons who have allegedly committed such crimes, and to bring them before their own courts or extradite them to another state for prosecution. Many African countries have domesticated the Geneva laws, with provisions for domestic trials (See Nigeria's Geneva Convention Act 1962). There are also continental treaties that tend to emphasize the primacy of local prosecutions, at least in principle. Among these are the OAU Terrorism Convention of 1999, which provides for domestic trial or extradition of terrorist suspects and provides for mutual legal cooperation; and the AU Convention on Corruption 2002, which provides for domestic trials or extradition of persons engaged in economic crimes, including money laundry.

Some argue that this "either/or" framework—in other words, 'either' the tribunals 'or' the states' judicial systems must handle grave human rights violations—indicates that complementarity, as it is presently defined, does not work effectively to provide the necessary judicial response in post-conflict states. Nor does it produce reconciliation or end impunity. With regards to the ICC, Schabas writes that the term 'complementarity' may be somewhat of a misnomer, "because what is established is a relationship between international justice and national justice that is far from 'complementary'. Rather, the two systems function in opposition and to some extent hostility with respect to each other. The concept is very much the contrary of the scheme established for the *ad hoc* tribunals [for Yugoslavia and Rwanda], whereby the international court can assume jurisdiction as a right, without having to demonstrate the failure or inadequacy of the domestic system."¹¹

Some Practical Problems

The ultimate goal of every state and the global community should be to strengthen domestic prosecutions so that the ICC's interventions are reduced to the barest minimum. There are strong arguments in favour of domestic prosecutions for grievous crimes. One is local sensitivity. The limited successes of ad-hoc tribunals in Africa show the difficulties of outsiders flying in to dispense a form of justice that would be understood by victims. One only needs to recall that, whereas the Rwanda Tribunal has managed to prosecute and convict only a handful of

³ See generally K. Hall, *The Principles of Complementarity*, in *THE INTERNATIONAL CRIMINAL COURT: THE MAKING OF THE ROME STATUTE* 41 (Roy S. Lee ed., 1999).

⁴ See John Jones & Steven Powles, *INTERNATIONAL CRIMINAL PRACTICE* 396 (2003).

⁵ See, e.g., First Geneva Convention, art. 49; Second Geneva Convention, art. 50; Third Geneva Convention, art. 129; and Fourth Geneva Convention, art. 146.

⁶ Cf. art. 20(3)(b) (allowing the ICC to retry an accused person where former proceedings were "conducted in a manner which, in the circumstances, was inconsistent with an intent to bring the person concerned to justice.")

⁷ Cf. art. 20(3)(a) (allowing the ICC to retry an accused person where former proceedings were done to shield the persons concerned from proper criminal prosecution).

⁸ Cf. art. 20(3)(b) (allowing the ICC to retry an accused person where former proceedings were "not conducted independently or impartially").

⁹ See *Policy Paper*, *supra* note , at 5.

¹⁰ *Id.*

¹¹ WILLIAM SCHABAS, *AN INTRODUCTION TO THE INTERNATIONAL CRIMINAL COURT* 67 (2001).

the 1994 genocidaires—at the cost of over \$1bn—, the domestic Gacaca courts have prosecuted thousands of persons involved in the genocide, though not without some problems.

The ICC, when acting alone, cannot accomplish anything more significant than holding a few powerful people criminally responsible for what are typically widespread abuses. That is simply because its target is the leadership, or the ‘head,’ of what is usually a large and complex body of perpetrators. The ICC is capable of removing only the head of what is a much more durable and troublesome ‘beast,’ but that beast, if not addressed along with its leadership, will continue to undermine peace and prevent reconciliation.

There are currently four referrals to the ICC (DR Congo, Uganda, Central African Republic, and Darfur), all originating from Africa. If African states believe in the primacy of domestic jurisdiction and in reconciliation as the goal of justice, why have these states failed to adopt an African solution to these cases? One obvious answer is that domestic criminal justice institutions have largely failed in these states. The independence of courts is still a problem in Africa; domestic courts are either too weak or not independent to prosecute grave crimes. The ICC also protects these governments from the domestic backlash that may occur from the likely event of selective prosecutions. It is well known that government forces have committed grave crimes even in respect of the cases currently before the ICC. Rather than prosecute their forces before national courts, where it is easier and cheaper to collect evidence, these governments chose to go to The Hague—where it is difficult and expensive to collect evidence—and that for crimes committed mainly by rebel forces.

The manner that current indictments are made also gives the impression that the ICC is encouraging governments to shy away from their domestic responsibilities. The Prosecutor announced its intervention in northern Uganda at a joint press conference with President Museveni. Warrants have been issued only for members of the LRA. The Prosecutor argues that he applies the “gravity” criteria to the alleged crimes. Yet, over 1 million people have been forced to live in dreadful displacement camps, many of them by the Ugandan army; and forced displacement is a crime under the Rome Statute. Many more have died in the camps than at the hands of the LRA; so why has no one been held to account? The Prosecutor insists that gravity criteria are linked to cases of instrumental killing and that indirect killings in displacement camps do not count. If that is so, why was a warrant subsequently issued for Thomas Lubanga in the DR Congo for enlisting children? Is that worse than murder? If so, why was it not considered so grave in Uganda, where the practice has been widespread on both sides of the conflict?

Conclusion

Adopting and adapting national implementing legislation is a pre-condition for effective domestic prosecution and/or cooperation with the ICC. It is the first step forward in retaining jurisdiction. One reason for the reluctance in adopting such legislations may be that states are not willing to follow through on their consequences. South Africa is one of the few exceptions. Its Parliament passed the Implementation of the Rome Statute of the International Criminal Court Act No. 27 on 18 July 2002.¹² The Act allows South Africa to comply with its obligations under the Rome Statute. The jurisdiction of a South African court will be triggered under the Act when a person commits an ICC crime within South Africa, and also when a person commits a core crime outside the territory of the Republic if that person is thereafter present in the territory of the Republic; or that person has committed the said crime against a South African citizen or against a person who is ordinarily resident in the Republic. When a person commits a core crime outside the territory of the Republic in these circumstances, the Act deems that crime to have been committed in the territory of the Republic.¹³ African states that are yet to adopt implementing legislation—and they are many—need to do so without further delay, otherwise recourse to the ICC will remain an attraction, with all the attendant logistic and other problems.

¹² Government Gazette, vol. 445, No. 23642, July 18, 2002, available at <http://www.info.gov.za/acts/2002/a27-02/>

¹³ See *id.* § 4(3).

Great Lakes Region Experience

Francis Dako
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Francis Dako

My name is Francis Dako, I am the Francophone Africa Coordinator with the Coalition for the International Criminal Court (CICC).

On the behalf of the Coalition for the International Criminal Court (CICC), a network of over 2000 non-governmental organizations across the world advocating for a fair, effective and independent International Criminal Court (CICC), I am honored to take the floor before this august audience and explore this important theme of interface between peace and international justice in focusing on the African Great Lakes region.

The Coalition strongly believes that peace and justice are two sides of the same coin – there cannot be sustainable peace without justice and the rule of law. A lasting and real peace cannot be achieved and cemented in Africa without a passionate commitment and respect in the application of international law as reflected in the Rome Statute of the International Criminal Court, and reiterated by the African Union Constitution and the United Nation's founding Charter. As far as peace, stability, justice and rule of law are concerned, no sub-region demonstrates the failure, successes, hope and challenges better than the Great Lakes.

Human tragedies as embodied by the Rwandan Genocide of 1994 and the devastating armed conflicts, and humanitarian crisis witnessed in the Democratic Republic of Congo (DRC) could have been prevented or at least contained by greater regional and international concerted mechanisms. The lack of rule of law, and justice, coupled with the dysfunctional

democratic institutions and ineffective economic policies at the national level is among the factors that has engendered armed conflicts, and massive perpetration of international crimes.

At the international level, the absence of alerting mechanisms aimed at identifying potential crisis that require particular attention and prevention has been dramatically reinforced by the lack of political will without which any attempt to move forward is hindered by the principle of cost versus benefit, and risks.

Indeed, preventive and curative actions applicable to armed conflicts and aimed at ensuring peace and individual security and civil liberties require multidimensional approaches including, necessarily, rule of law and accountability and peaceful settlement of conflicts. All these components are inter-dependants and must be geared toward one same goal. Invariably, there cannot be any conflict between peace and justice, but between peace and impunity, peace and extreme suffering which is continuously exploited.

The Great Lakes region experience – failure, challenges, successes and hope

After the disastrous failure of the international community as a whole to prevent the genocide in Rwanda, and the subsequent refugee and humanitarian crisis that have spread violence in the whole sub-region, firm and multifaceted efforts by stakeholders at national, regional and international levels have contributed to the stabilization of the countries in that region and continue to play a major role in the restoration of civil order and the rule of law.

In Burundi for example, consistent efforts by the United Nations, the African Union and the neighboring countries have helped bring together the Government and different armed rebel groups, an effort that has led to the implementation and achievement of a durable peace. The Burundian Government has also ratified the Rome Statute of the ICC and has adopted an implementing legislation that enables the national judicial system to prosecute crimes of genocide, crimes against humanity and war crimes.

In Rwanda, the imperative necessity to reconcile different groups within the Rwandan society has been a process consisting in bringing justice to victims, and taking bold political, and concrete economical actions aimed at reconstructing, reconciling, and healing the society as a whole. International justice has also been instrumental in the restoration of justice and order not only in Rwanda but also in the whole sub-region.

The International Criminal Tribunal (ICTR), established by resolution 955 of the UN Security Council has brought to justice those most responsible for the preparation and execution of genocide in Rwanda; and their arrest, incarceration and prosecution have contributed to the decrease of armed conflicts in the sub-region. In this regard, international criminal justice has proven to be efficient in bringing peace, fostering confidence, and restoring civil and public order.

In Uganda, while the armed conflict between the Uganda Government and the Lord Resistance Army has been going on since 1987, with the loss of tens of thousands of innocent civilians, the ICC investigations and warrants of arrests issued against LRA's top commanders have clearly prompted the return to peace negotiations by the belligerents, and most experts and observers concur that subsequent to the ICC's action, attacks on civilians by the LRA have sensibly decreased, and peace negotiations have been taken more seriously and are likely to lead to the end of the 20 years old armed conflict.

In the Democratic Republic of Congo, different efforts by all stakeholders have been deployed in order to bring to an end the devastating wars in different part of the country. The United Nations and the African Union, but also international partners such as the European Union and some individual African States, have continued to work together in order to bring peace in the DRC. These peace efforts which have culminated in the general democratic elections of 2006 have not been separated from efforts by the international community to ensure that those who have committed crimes are prosecuted in order to bring justice to victims but also to deter would be criminals. Following the DRC referral to the ICC, investigations have been launched and have led to the arrest of Mr. Thomas Lubanga Dyilo, a militia leader allegedly responsible for grave atrocities including enlisting and recruiting children under the ages of 15, and using them in armed combats. The suspect has been surrendered to the ICC, charges against him have been confirmed and he is in custody awaiting trial.

Today, the fundamental role of the International Criminal Court in preventing armed conflicts – the fertile source of the commission of international crimes, has become more evident. As an independent and permanent international criminal court founded on a law reflecting the consensus of the world's legal systems, humanity has found a credible and reliable shield to protect itself against human insanity, and to protect the future generations from the chaos at the international scene.

In Sub-Saharan Africa, and the Great Lakes region particularly, countries have found the ICC to be an invaluable backup to their national judicial systems. 29 States have ratified the Rome Statute and 3 of them have referred their situation to the Court. It is also to be remembered that Cote d'Ivoire, although it has not ratified the Rome Statute yet, has made a declaration

in accordance with the Rome Statute, to acknowledge the jurisdiction of the Court. All these are tangible signs of the acceptance and support that ICC enjoys from African countries.

While we highlight the role of international justice in peace building, particularly, the role that the ICC is playing, it is imperative to point out that in establishing the ICC, countries wanted it to be a court of last resort – exercising its jurisdiction only when there is inability or unwillingness on the part of a state to investigate and prosecute.

In this regard, it is crucial that countries adopt provisions implementing the Rome Statute in order to enable their respective national jurisdictions to prosecute the crimes of the Rome Statute. As some voices say, African countries should ensure that Africans accused of international crimes are apprehended and prosecuted in Africa, by African countries. In the meantime, Liberia and Sierra Leone have asked the international community to take Charles Taylor outside the region for trial – not for lack of jurisdiction, as he is tried by the Special Court for Sierra Leone, but for security and stability reasons.

However, it would be recommendable for justice to be seen as while being done, to have African States adopting provisions punishing international crimes, so as to be able to prosecute those who perpetrate these crimes in Africa and elsewhere. Not only will it serve as a deterrent and preventive measure, but will also contribute to the public awareness and thus, the cultivation of the culture of rule of law and the fight against impunity.

Conclusion

CIICC is very committed to the effectiveness of the International Criminal Court. We truly believe, (and it is a fact) that justice and accountability are fundamental pillars for a lasting peace.

We urge the international community to provide greater and adequate resources to AU and UN to achieve their mandates geared to peace and justice, and increased support must be provided to the International Criminal Court, and wider divulgation and implementation of the Rome Statute. States must dramatically improve how they cooperate on prevention and reaction – including enforcing the warrants of arrest issued by the ICC, on justice and peace building.

It cannot be repeated enough – Prevention is better than Cure. Not only for the Great Lakes region, but also everywhere in Africa, necessary resources must be allocated to preventive initiatives. The R2P and the RS are compatible with the letter and spirit of the AU Constitution aimed mainly at preventing conflicts and cementing peace and development in Africa. African States must make these goals possible by strengthening their national legal systems – to be able to ensure justice.



At AFLA's South–North Dialogue on “African Perspectives on International Criminal Justice”, International Criminal Court (ICC), The Hague, the Netherlands, 28 February, 2007.

Peace and International Justice: Making the Link

H.E. Adama Dieng

U.N. Assistant Secretary-General, Registrar of the International Criminal Tribunal for Rwanda (ICTR)



H.E. Adama Dieng

Introduction

The rule of law is an aspiration that has been part of the Pan African ideal from our continent's struggle for the independence in the 1950s and 60s to our quest today for the African Renaissance. It is endurance and resonance as an ideal, through various phases of Africa's development, is a positive proof of its recognition as a necessary foundation of statehood and, indeed, of the international order of which Africa is a part.

Africa's struggle against colonialism was predicated on the right to self determination, an important aspect of the international legal order that emerged in the second half of the 20th century following the creation of the United Nations in 1945.

It is important to dismiss from the outset the notion some in our continent have of the rule of law as an ideal inspired by the western world and thus of its advocates as "western lackeys".

The rule of law is today a universal notion. It is a concept that is as relevant to Africa as it is to the West or Asia. Francis Nyalali, former Chief Justice of Tanzania, speaking of the principles of the rule of law, once observed that "There is no doubt that these same principles are part of the African dream, resulting from the liberation struggle against colonial racial oppression... They are inherent to the statehood which came into being when our respective countries became politically independent".¹

But in spite of the promise and prominence of this concept in Africa's struggle for independence, we must acknowledge with disappointment that the reality of most – but no means all – of post colonial Africa has been built on anything but the rule of law.

The times we live in are turbulent and difficult in terms of our ability to uphold the rule of law in most of the African countries. We can see that we live in a continent in great need of global thinking and global solutions arising out the breakdown of the rule of law. In the wake of Rwandan genocide in 1994, the international community through the United Nations has considerably relied on international trials to pursue multifaceted objectives and goals which include, inter-alia, the need to ensure accountability among political leaders in conflict affected areas such as Rwanda and Sierra Leone, the promotion, the restoration and consolidation of peace in the affected regions (Rwanda and the Great Lakes Region, Sierra Leone and Liberia) as well as the national reconciliation in the countries affected, through the expected judicial output of the international criminal justice system that is being dispensed by both the ICTR and the Special Court for Sierra Leone.

it is also important to note that the international justice proceedings that are held in Africa have placed a fundamental focus for the prosecution on selective targets which bear the greatest individual criminal responsibilities for the crimes of genocide, crimes against humanity and war crimes committed in those countries.

Preventing genocide will require taking seriously its warning signs unlike what happened in Rwanda. Inflammatory speeches, the targeting of a particular group and all the kind must call for a quick and strong response to prevent the worse to occur.

The African Continent and the international community seem to have already assimilated, to a certain extent, lessons learnt from the Rwandan genocide, although this may go unnoticed. the Nigerian troops and thereafter, the British troops sent to stop the war in Sierra Leone, the French troops sent to Cote d'Ivoire and the Ituri region of the Democratic Republic of the Congo, are all signs of a greater sensitivity, willingness and commitment of the international community to prevent or at least limit the scope of gross violations of human rights and restore order.

¹ Francis Nyalali, "Speech on Corruption Delivered at the opening Organized by the Danish Association for International Cooperation at Mwenjo", Usa-River, Arusha,

Tanzania, November 14, 1995, quoted in Jennifer A. Widener, *Building the Rule of Law: Francis Nyahlali and the Road to Judicial Independence in Africa* (W.W. Norton & Company, New York and London 2001), p. 30.

The African Union has specifically has specifically adopted in it is Charter a provision enabling the organization to interfere with any domestic affairs when gross violations of international humanitarian law are at stake. This however, should not make us forget the longstanding chaos in Somalia, the prevailing situation in Sudan with the ongoing problem in the region of Darfur, the still volatile situation in Cote d'Ivoire, just to name a few examples. Since the international community is not unique, uniform and single-minded entity one could rely upon to prevent genocide and the like, it is vital that the African Union work out realistic mechanisms in terms of military capabilities to flesh out and give strong teeth to its resolve expressed in its Charter to prevent gross violations of human rights.

This in turn will require that at a national level, people refrain from being selfish and narrow minded. The mandate that citizens give to their political leaders should not only be focussed on national considerations. The generosity to include international affairs into the political agenda is the unavoidable price to pay to bring about peace and order for all mankind. a political agenda merely base don national considerations has led to the withdrawal of some of the scarce military forces present in Rwanda and which could have helped to diminish the level of atrocities. We should not repeat the same mistakes.

The United Nations International Criminal Tribunal for Rwanda (UNICTR)

The United Nations International Criminal Tribunal for Rwanda (UNICTR) was established for the prosecution of persons responsible for genocide and other serious violations of International humanitarian Law committed in the territory of Rwanda and Rwandan citizens responsible for such violations committed in the territory of neighbouring states between 1 January, 1994 and 31 December, 1994.

Recognizing that serious violations of humanitarian law were committed in Rwanda, and acting under chapter VII of the Charter of the United Nations, the Security Council created the ICTR by Resolution 955 of 8th November, 1994. Beside the prosecutorial main objectives, the ultimate purpose of the UNICTR is to contribute through its judicial work to the process of national reconciliation in Rwanda and maintenance of peace in the region after the genocide. By a second resolution 977 of 22nd February 1995, the Security Council decided that the seat of the Tribunal would be located in Arusha, United Republic of Tanzania.

Since its establishment in Arusha (Headquarters) in 1995 the UNICTR arrested 72 individuals out of 90 indicted persons. They were accused of involvement in the 1994 genocide in Rwanda including former Prime Minister Jean Kambanda, and 14 other members of the interim Government of Rwanda which was then composed of 19 members during the genocide as well as many military leaders. Others accused persons are former high ranking government

officials, journalists, intellectuals, religious and youthful leaders and businessmen.

At present, 33 persons have already been tried. 28 were sentenced to prison terms ranging from 5 years to life imprisonment and 5 accused persons were acquitted. 27 accused are currently on trials and judgments in their cases are expected by next year.

The Special Court for Sierra Leone (SCSL)

In response to the new violence in the year 2000, just months after the Truth and Reconciliation Commission legislation was signed into law in Sierra Leone, a proposal for a hybrid Tribunal-with both international and national judges, prosecutors, and staff-was put forward to prosecute those "bearing the greatest responsibility" for the past human rights violations.² The Court, established in 2002 through an agreement between the UN and Sierra Leone government, covers crimes back to 1996. Significant progress continuous to be made in achieving accountability for war crimes committed during the war.³ In anticipation of the complete withdrawal of the U.N. peacekeepers set for December 2005, and in recognition of Sierra Leone's continued institutional weaknesses within the security, judicial and governance sectors, the U.N. Security Council in August 2005 approved the establishment of a peace-building mission, which is called "U.N. Integrated Office for Sierra Leone" (UNISOL). The mission's mandate began in January 2006 following the complete withdrawal of the once-17,000-strong peacekeeping mission. The priorities of the UNISOL are to focus on fighting corruption, improving transparency, establishing the rule of law and assisting in preparations for the 2007 general elections.⁴

Can International Justice Prevent Conflict in Africa, Bring Peace to It or Maintain Peace in Africa

The African continent has been for the past three decades the theatre of major conflicts which have claimed hundred thousands if not millions of lives of innocent people, mostly civilians. Numerous sources of tension are lingering or even more active in different regions of Africa. The African leaders who fuel those conflicts undoubtedly do so because of the long prevailing culture of impunity in this continent.

Given the unprecedented momentum gained by the system of international justice over the course of this decade, one may assume that this will have a significant impact in eradicating the culture of impunity and prevent the recurrence of conflicts generated thereby.

² ICTJ, Case Study Series- The Sierra Leone Truth and Reconciliation Commission: Reviewing the first year 1 January 2004 @www.ictj.org.

³ Human Rights Watch, Country Summary Report, January 2006 @www.hrw.org.

⁴ Id.

The equation between the emergence of the international justice and the prevention of conflict is however far from being straightforward. Wherever the international justice has been called upon to sort a nation out, it was to punish persons responsible of serious violations of international humanitarian law rather than prevent the occurrence of a conflict. In the former Yugoslavia, in Rwanda, Sierra Leone, Burundi, the DRC or Ivory Coast, just to name a few, the idea of international justice is put across as a response to gross violations of human rights already perpetrated.

This however, ought not to lead to the hasty conclusion that international justice merely serves to punish and not to prevent. The different function generally attached to criminal justice, also applies to the international level. This is more so when one understands that international justice is often an alternative to the national justice unwilling or unable to perform its normal functions.

In the new international environment characterized by the existence of numerous international criminal jurisdictions, in addition to the concept of universal jurisdiction,⁵ all influent people and particularly faction leaders responsible of devastating conflicts must know that sooner or later they may be held accountable for their deeds.

The image broadcast over the world, of Jean Kambanda as well as Charles Taylor and Slobodan Milosevic former Prime Minister/Head of government and Heads of State, appearing before international judges and national judges in the case of Charles Taylor) to answer to grave charges of violations of international humanitarian law, is a strong signal to all leaders that they need to watch closely their behaviour. Even if they operate in a context of a collapsed state, they must bear in mind that the international justice may take over and fill the vacuum left by the chaos created by the conflict in which they are taking part.

Thanks to the international justice to fully play the deterrent role in the African environment some preconditions need to be met. They concern the sociological environment. The fitness of the legal tools used in the international environment may also be questioned.

V. The Sociological Environment Required

Justice may play its different role only if its different stakeholders trust the process. If the victims and the accused do not lend any credit to the system, then the benefit of the deterrent function might be lost. When the victims find the international justice too lenient towards those who destroyed their lives, they might be

tempted to retaliate whenever they have the opportunity to do so. When the convicted accused perceive their punishment as a mere injustice done to them after they have lost legitimate combat, they will never express remorse nor will they (and their associates) give up, unless compelled by a stronger force.

Low standards of justice and persistent denial of responsibility in Africa have led political criminals as well as their victims not to give to the international justice all the credentials it deserves. Victims are shocked in the face of the good treatment of the alleged perpetrators of their suffering. This goes to the extent that some victims, out of frustration, refuse to take an active part in the process of innocence until proven guilty. This however, may be understood in a context where the treatment received by accused in custody is far better than daily life victims, deprived of the minimum necessary for a decent life.

The poverty in Africa remains a serious issue in the sense that international standards which, in fact are standards of wealth countries, will appear as a luxury. In applying those standards to accused serious crimes, particularly regarding conditions of detention or imprisonment, one may paradoxically create an imbalance by putting the perpetrators of serious crimes in better conditions than their victims. But one needs to always recall that African leaders, and mostly those involved in serious crimes, have generally a standard of living sometimes even higher than that of their counterparts in developed countries. In depriving them of their liberty (while preserving their dignity) as they would never expect to be, the sanction as well as its deterrent function may be much efficient.

Accused persons are so focussed on the alleged crimes committed by the other side that they omit to acknowledge their own responsibility or try to justify it as a normal means to the acts of their enemies. This brings up the need for balanced prosecution not only oriented towards the vanquished.

Fair trials leading at times to acquittals in cases where strong evidence of guilt is lacking, although not often welcomed by victims, are essential to the credibility of international justice and to its trustworthiness on the part of the accused. When accused know that they may expect acquittal, they will have no case in alleging political prosecution. They will thus have no choice but to be fully involved in the process. Ultimately, they will be more willing to accept a verdict, even if it is not favourable.

Another aspect of the international justice to be reflected upon is that it may be perceived as an important justice rendered by foreigners who do not understand much about the cultural and/or political background underlying the conflict which gave rise to the conflict being adjudicated upon. This brings into

⁵ This concept is experiencing now some difficulties in its implementation since the Belgian authorities who used to have a leading role in its recognizance have decided o limit drastically the extent and scope of its application, due to numerous political constraints.

play the concept of regional justice⁶ which advocates that priority must be given to the use of regional resources, including human resources like the judges. Although the universality of the international justice ought not to be lost by focussing too much on regional resources, it would always be advisable to make meaningful room therefore so as to enable the most concerned persons to acknowledge the legitimacy of the international justice.⁷

Lastly, it is of the utmost importance to promote the awareness of the international judicial process throughout the continent. The deterrent function of the international justice can only operate if those who might be one day the target of that justice are fully aware of the possibility to be liable for any serious violations of international humanitarian law, irrespective of their political or social rank. Medias and NGO have in this regard a fundamental role to play. If the information gap currently prevailing in Africa is filled, then a new conscience and sense of responsibility may emerge and spare Africa the horrendous usual spectacle of thousand of innocent people being killed or mutilated, and their perpetrators getting away with it.

The Legal Tools of the International Justice for the Service of the Prevention of Conflicts

In addition to the inherent function of deterrence embodied in the dispensation of justice the international criminal has forged useful tools which enable it prevent the commission of serious crimes. The scope of the part devoted to prevention may be explored, as well as its limits.

a) The part devoted to the prevention in the international legal instruments: The international justice provides for the prevention of serious violations of international law by criminalizing behaviours prior to the effective commission of serious crimes. This option appears clearly in the Genocide Convention of 1948 which provides for the prevention of genocide before envisaging its repression. This is evidenced in the corpus of the Convention by the criminalization of the conspiracy of the conspiracy to commit genocide, the direct and public incitements to commit genocide, the attempt to commit genocide.

These autonomous crimes need not be followed by the effective commission of the genocide to be punishable. In successfully trying a case for acts which are at the upstream of genocide, the international justice would definitely show the wisdom

⁶ This concept does not call into question the current universal system of international justice. What it does is just to call for regional capacities when tackling an issue of universal interest.

⁷ It is emblematic in this regard to recall the reaction of an accused appearing before the Special Court of Sierra Leone. In front of a judge from the UK and Prosecutor from the USA, the accused refused to recognize their authority to adjudicate over events between people they were far from.

of its choice. Unfortunately, in the sole case the Genocide Convention has been brought into play so far,⁸ its preventive role was not at stake. One may be satisfied however, that a very workable mechanism is in place in the Convention and in other relevant statutes, and will serve, if need be, to avoid the perpetration of genocide by punishing acts which constitute warning signs of an upcoming genocide.

In this regard, the UN Secretary-General has appointed a Special Advisor on genocide prevention. The advisor will undoubtedly play a crucial role, particularly in Africa. The early reports the Special Advisor would provide about sensitive areas, could also lay the basis for further investigations and eventually prosecution of acts which, if left unpunished could lead to the perpetration of genocide.

The customary international law has also forged a mechanism of command responsibility, which devotes a large pace to prevention. Once it is established that a superior (military or civilian) has effective control over his subordinates, the former has the legal duty to prevent or punish the latter for acts he knew or had reasons to know that the subordinate was about to commit or had effectively options.⁹ "The obligation to prevent or punish is not a set of alternatives options. If a superior is aware of the impending or ongoing commission of crime, necessary and reasonable measures must be taken to stop or prevent it. A superior with such knowledge and the material ability to prevent the commission of crime does not discharge his responsibility by opting to punish his subordinates in the aftermath".¹⁰

The customary international law's construction over the command responsibility sends a clear signal as to the attitude expected from hierarchical superiors, whether de jure or de facto. They have the primary responsibility to prevent the commission of crimes by their subordinates. Failure on their part, when aware of the possibility of commission of crimes, will expose them to punishment. If this construction is understood by African leaders, including faction leaders, not necessary holding an official position, then certain gross violations of human rights might be avoided.

b) Limits of the functions envisaged in the international legal instruments: In describing the different forms of criminal responsibility, the international legal instruments apprehend not only crimes effectively committed but extend the criminal responsibility to acts of acts of planning, instigating or

⁸ The International Criminal Tribunal for Rwanda (ICTR) is the first forum before which the Genocide Convention is applied.

⁹ See articles 7 (3) and 6 (3) respectively of the ICTY and ICTR. For further elaboration in this issue see the ICTR Bagilishema judgment: *The Prosecutor v. Bagilishema* Case No Bict-95-ia-t, Motifs de l'arrêts, ICTR AC, 13 December 2002, paragraphs 50 and 51 mber 1998

¹⁰ ICTR judgment *The Prosecutor v. Semanza* Case No ICTR-97-20-T, 15 May 2003, paragraph 407.

ordering such crimes.¹¹ It has however, constantly been held since Nuremberg that, apart from genocide, no criminal liability will attach to acts of incitement, ordering or planning of other serious violations of international humanitarian law, unless the crimes have indeed been committed.¹² No convincing reason was advanced in support of this construction, save to say that the wording in the Draft Code of Crimes Against the Peace and Security of Mankind, prepared by the International Law Commission, makes reference to a crime “which in fact occurs”.

The refusal by the customary international law to make these acts inchoate offences is not to facilitate the preventive role of the international criminal justice. Besides, it creates an international regime more favourable to accused persons tried before national jurisdictions. In fact, in most national jurisdictions dealing with lesser serious offences, accused persons may incur criminal liability for attempted for offences even if they did not follow through.

The International Criminal Court (ICC) and Possible Impact on the Peace Maintenance in Africa

The beginning of the ICC judicial operations is already influencing the behaviour of key actors in Africa (Uganda, Sudan and the DRC) and will undoubtedly have a positive impact in the field of human rights, democracy and governance for the promotion of development in Africa.¹³

The decade-long experience of the ICTR and SCSL suggests that the ICC will inevitably face enormous challenges to its credibility and effectiveness. Based on ICTR experience, it is quite possible that the ICC Judges and Prosecutors will face a series of three problems areas namely:

- Cooperation of African Signatory and Non-Signatory States Parties with the ICC.
- Public Expectations in the deliberate slow pacing of investigations and prosecutions inherent in the proper administration of international justice.

¹¹ See articles 7 (1) and 6 (1) respectively of ICTY and ICTR statutes.

¹² The *Prosecutor v. Akayesu*, Case No. ICTR-96-4-T, Judgement, September 1998, paragraph 473. “The principle of individual criminal responsibility for an attempt to commit a crime obtained in case of genocide. Conversely, this would mean that with respect to any other form of criminal participation and, in particular, those referred to in Article 6 (1), the perpetrator would incur criminal responsibility only if the offence were completed”

¹³ The issuance of ICC indictments against leaders including Joseph Kony, has had an impact on the peace negotiation between the Ugandan Government and the Rebels of the LRA. ICC indictments of governmental officials and rebel leaders in the Sudan over Darfur crises are also having an impact on the ongoing situation in the Darfur.

- Legitimacy of the ICC in Africa allowing effective outreach campaigns for acceptability and exercise of ownership by the African audience vis-à-vis ICC.

For the ICC to have a positive impact on the peace maintenance in Africa, it would be required from the outset, to design and promote consistent, coherent and pro-active strategies and policies towards the African continent in order to address the identified key problems areas. The ICC will also be required to rely on all its strategic stakeholders, who are already its partners in order to ensure the following:

- Continuous support to the strengthening of the ICC and the establishment of an efficient system of the Rome Treaty in Africa; This will provide ICC with legitimacy deriving from the perception of being truly universal through the message about its significance, works and proceedings, which should reach all African audience. Moreover, it is paramount to ensure that the ICC hearings of cases or trials involving African leaders or accused persons are held, to the extent possible, in Africa, and particularly in a location where there is appropriate infrastructure for media coverage and dissemination campaigns of information of the ICC proceedings throughout the continent. Otherwise, the accused,¹⁴ victims and witnesses will find themselves in a Foreign Court at The Hague and would have to adjust to a quite different cultural environment where procedural rules foreign to their own domestic legal experiences will be applied.
- Consolidation of the system of the Rome Statute in Africa, which will enable full cooperation of African State Parties with the ICC and permit the ICC to function effectively during its investigations and prosecutions, as ICC will not have its own police forces and prisons. Focus should also be on the need to ensure the ratification and implementation processes of the Agreement on Privileges and Immunities which allow the ICC to protect its officials, staff, victims and other persons as well as documents, buildings and resources related to the Court in Africa. Being a court of last resort, which can intervene only when the African States concerned are genuinely unwilling or unable to proceed with an investigation or prosecution, ICC will benefit immensely from any effective campaigns fostering speedy development of national enabling criminal legislations in all the African States Parties;
- Enhancement of co-operation and cooperation among various African State Parties, actors working for the promotion of the ICC in African and the ICC through systematic judicial and legislative capacity

¹⁴ More recently Charles Taylor complained very much about the dietary and detention conditions that were offered to him at the ICC Detention Facility at The Hague in the Netherlands while awaiting trial before the SCSL, which is held at The Hague

building initiatives within all the States Parties concerned.

- For the ICC to properly function and impact on the African Continent, it is crucially vital that every African States Parties be empowered and equipped with the necessary legislative, executive and judicial tools and mechanisms to exercise their criminal jurisdiction over those responsible of having committed the worst war crimes, crimes against humanity and genocide. A few African States Parties have so far enacted the enabling legislations that will ensure that their national proceedings will allow for all forms of cooperation with the ICC;
- Establishment of a Neutral and Yearly Review Mechanism within African States Parties that will allow for the periodic assessment of progress made in the enactment of national enabling legislations as well as the state and level of cooperation existing between of these States and the ICC.

Conclusion

Despite the flaws mentioned, one may confidently consider that the international justice is well equipped to prevent most of the conflicts still rife over the world and in particular in Africa.

In addition to the need to raise awareness throughout the continent, it is also most important to reinforce the capacities of the international justice. Commitment and cooperation of States are in this regard vital for any success. Democratic and developed countries must take the lead by catering for the basic needs without which no meaningful steps can be taken.

It is equally important to stress that international justice is not meant to totally substitute the national justice. It merely supplements it and, at times, takes over when the municipal jurisdiction is in crises. The crises should however, not last forever. If it does, this means that the notion in question faces major issues requiring more than the sole intervention of the international justice.

The African continent must see to it that never again, in any part of the continent, genocide or any large scale gross violations of human rights are perpetrated. In this regard, the vigilance we need to observe in Africa must be at all times, given the large number of tensions prevailing in different African regions.

There will be no lasting peace if there is no reliable international justice perspective that unites on a higher level, the peoples of the various African countries, who have suffered and continued to suffer in the hands of some of their political and economic leaders. This perspective also needs to provide to all concerned citizens of Africa a shared vision of the common purpose of international justice serves, which is above all one of the ways to encourage people to overcome

the bitterness of the past, the deep wounds of the social and political strives, for a sustained healing process that can lead towards the path of national reconciliation and peace.

In Africa, the common expectations about the choice of targets for indictments as well as their speed including the scope of investigations re bound to cause disappointments and to possibly trigger adverse reactions and sustained pressure from some African States, media, NGOs, and other groups of people. Nevertheless, there is one fundamental reason why justice, local and international, must be Africa's number one priority: the current situation of out continent, with its wars and poverty, have as their root cause the impunity that thrives in a lack of accountability and the rule of law.

To move forward, African countries will have to take far more seriously the question of justice in the continent, taking a cue from the work of the Arusha Tribunal and other related developments. The recognized weakness of human rights protections at a continental level in Africa led to the adoption of the Protocol on an African Court on Human Rights at the summit of the Organization of African Unity in Ouagadougou in 1998.

In January 2004, the Protocol enters into force while the Convention establishing the African Court has so far been ratified only by a handful States. For practical and cost effectiveness, these two African courts have now been merged into one single body with two sections. As regards the ICC, 24 African States out of 104 States Parties have already ratified the Rome Treaty. It is clear that the ICC will be a step forward in accountability for human rights abuses. In order to prevent being at the receiving end of any potential abuses of international justice, African States must pass domestic legislation empowering their judicial institutions to try individuals for genocide, crimes against humanity, war crimes, and torture. There are several legitimate reservations in Africa to the new justice without borders phenomenon. Some observers query whether it will not be victors' justice or the justice of the strong against the weak (most African States fall in the latter category). Has the international community been selective in the conflicts it has chosen to address? Africans share these reservations.

The challenges facing the ICC is to ensure that its architecture of justice is established that truly enforces the rule of law without any political biases, binding the strong as well as the weak in the international system.

I wish to conclude by stressing what in my view would be the real parameters against which ICTR and the SCSL or any other international Tribunal's successes should be assessed. Despite the numerous breakthroughs in terms of ICTR's case law that are very important as we have just seen, my dream would be that they never serve again. I would want to see the deterrent function of our Tribunals fully operate,

particularly in Africa, rather than see another genocide, other crimes against humanity and war

crimes, even very well adjudicated over.



Panel Discussion, Conference on the Interface between Peace and International Criminal Justice in Africa,

From left to right:

Dr. Edward Kwakwa, Hon. Salih Mahmoud Osman, H.E. Adama Dieng, H.L. Justice Date Bah, H.E. Luis Moreno-Ocampo, and H.E. Hassan Jallow.



**THE
LAW OF THE AFRICAN (BANJUL) CHARTER
ON HUMAN AND PEOPLES' RIGHTS
(1988-2006)**

“**The Law of the African (Banjul) Charter on Human and Peoples’ Rights**” is an examination of the case law of the African Commission on Human and Peoples’ Rights. It is preceded by two introductory chapters respectively on the making of the African Charter and the implementation of international human rights obligations within the municipal legal system. The former provides a better understanding of the process leading to the adoption of the Charter, the issues which the negotiators faced and the considerations which led to them being resolved in the manner reflected in the Charter.

The second issue relating to the domestic application of international human rights standards discusses the questions regarding the status of the Charter in the municipal legal system of a State Party and the status of the decisions or rulings of the African Commission within such a system. Opinions on these two matters which can be found in judicial decisions of both national courts as well as international institutions are reflected in the text.

This book is meant to provide in a systematic way, a digest, an easy reference and a guide, hopefully on a continuing basis, to legal practitioners, judicial officers, policy makers and all those concerned with human rights promotion and protection, on the law of the African Charter as fleshed out by the Commission in its decisions on communications as well as in its mandate to lay down principles through Resolutions etc. Those articles of the Charter which have not been the subject of such decisions or resolutions are not discussed in the text.

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By
Hassan B. Jallow

Africa and the ICC: The need for a closer partnership

*Judge Fatoumata Diarra*¹

International Criminal Court (ICC), the Hague



Judge Fatoumata Diarra

Introduction

When one takes into consideration the mobilization of African States during the United Nations Diplomatic Conference of Plenipotentiaries on the Establishment of a permanent International Criminal Court² and their role in international criminal law in general,³ one wonders why much of Africa is currently apathetic towards the ICC. This apathy is reflected in four worrying developments: the slowdown in the ratification process of the Rome Statute; the lack of instruments adapting legislation to the Rome Statute; insufficient involvement in the Court's activities on the ground; and the signing of bilateral immunity agreements.

These developments call for analysis, which I propose to undertake under the following headings:

Presentation of the ICC; The role of Africa in the establishment of the ICC; The slowdown in the ratification process of the Rome Statute by certain African States; The lack of instruments adapting national legislations to the Rome Statute; The lack of support for the Court's activities on the ground; The problem of bilateral immunity agreements; Prospects for the future.

Presentation of the ICC

The Rome Statute, which was adopted on 17 July 1998 and came into force on 1 July 2002,⁴ established

an international criminal court, which is the first step in meeting the need for a permanent international criminal court, to prosecute and punish those responsible for the most serious crimes and to bring justice to victims.⁵ The crimes specifically enumerated in the Court's Statute are the crime of genocide, war crimes, crimes against humanity and the crime of aggression.⁶ The States Parties anticipate that punishment by the Court for the most serious crimes will contribute to the prevention of further crimes and the maintenance of peace, security and the well-being of the world.⁷

One of the most important features of the Rome Statute is the principle of complementarity,⁸ according to which States have the primary responsibility for the administration of international criminal justice. In comparison to the operation of the International Criminal Tribunals for the Former Yugoslavia and for Rwanda, this is an innovation. These two tribunals were created by Security Council resolution with exclusive jurisdiction over crimes falling within their purview. According to the principle of complementarity under the Statute of the International Criminal Court, States Parties have the primary responsibility for prosecuting and punishing the perpetrators of the most heinous crimes. It is therefore incumbent upon them to adapt their domestic legislation to give themselves the legal means to punish the perpetrators of these crimes and institute mechanisms for cooperation with the ICC.

The Court's experience since the entry into force of the Rome Statute has confirmed the importance for the Court of cooperation with Africa and the support of African States, especially because the situations currently before the Court are all taking place on the African continent.

The role of Africa in the establishment of the ICC

Africa played an important role in the establishment of the International Criminal Court. Indeed, the ICC was initiated with the participation of almost all African States, which actively participated in the drafting of the Statute of the Court. Moreover, 53 African States participated in the United Nations Diplomatic Conference of Plenipotentiaries on the Establishment of a Permanent International Criminal Court.⁹

¹ With the assistance of Jennifer Khurana, Associate Legal Officer.

² 53 African States took part in the Conference.

³ Ratifications of the four Geneva Conventions, among other instruments.

⁴ Article 126 provides that the Statute shall come into force after the 60th ratification.

⁵ Universality is an objective to be attained. The Court now has 104 States Parties.

⁶ According to article 5(2) of the Statute, the Court shall exercise jurisdiction over the crime of aggression once a provision is adopted in accordance with articles 121 and 123 defining the crime and setting out the conditions under which the Court shall exercise jurisdiction with respect to this crime.

⁷ Preamble; article 1 of the Statute.

⁸ Preamble; articles 1 and 17 of the Statute.

⁹ See www.un.org/icc/index.htm.

African States also played a decisive role in the Statute's entry into force on 1 July 2002: their high level of ratifications helped to attain the requisite quorum.¹⁰ Whilst these ratifications are still of value in broadening the Court's purview, unfortunately they no longer generate a lot of enthusiasm.

The slowdown in the ratification process of the Rome Statute by certain African States

After hovering at twenty-seven for a long time, the number of African States Parties of the ICC has just risen to 29 with the ratification of the Rome Statute by Chad on 1 January 2007 and the Comoros on 18 August 2006.¹¹

African States are thus the largest regional group in the Assembly of States Parties. However, this representation can be considered unsatisfactory given that the goal is to bring about universal ratification of the Statute, and that all the situations pending before the Court occurred in Africa. This slowdown appears to be due to the difficulties encountered by non-States Parties in ratifying the Rome Statute. The first difficulty arises from the Court's exercise of its jurisdiction on the territory of all States Parties to the detriment of the principle of national sovereignty. Indeed, some States are reluctant to relinquish part of their sovereignty to an international court, and dread the prospect of their citizens being tried through international mechanisms.

Connected to this concern is the problem of the Court's image in Africa. This is because the situations pending before the ICC all occur on the African continent.

This has thus given rise to a reluctance vis-à-vis the Court which has so far only dealt with crimes committed in Africa. Although three referrals before the Court were made by African countries themselves, reservations about a Court perceived as "European" exercising its jurisdiction only against Africans still persist and need to be addressed. In addition, there is the adverse impact of the apprehension that the Court could be "used" by certain States seeking to attain specific goals thus turning the Court into an instrument for their own political purposes. Another obstacle arises from the fact that the immunities provided by some national legislations are not consistent with the obligation of States Parties under the Statute to arrest and transfer suspects. The fourth problem arises from the inconsistency between the obligation to surrender the perpetrators of crimes within the jurisdiction of the Court and national legislations prohibiting the extradition of citizens by their own countries.

¹⁰ On 11 April 2002, at an official ceremony, 10 States, including Niger and the DRC, simultaneously deposited their instruments of ratification, bringing the number of ratifications to 66.

¹¹ See <http://www.icc-cpi.int/asp/statesparties.html>.

More broadly, the misapprehension of the principle of complementarity and the jurisdiction of the Court also fuels mistrust amongst certain States.¹² The fact that the Statute does not provide for the death penalty is another matter of concern for certain States.¹³ Pressure which may be internal or external generates another kind of difficulty. As an example of internal pressure, when, in October 2005, the Court made public the arrest warrants issued in July 2005 against five commanders of the Lord's Resistance Army in Uganda, some opponents of international criminal justice questioned the appropriateness of the ICC intervention.¹⁴ They raised the spectre of revolts and hostility against the Court by certain ethnic groups which at times consider criminals targeted by the ICC as heroes.

Opinion is divided in Uganda on the issue of peace and justice. On the one hand, certain religious groups, NGOs and a part of the Ugandan population support the idea that peace should be achieved by any and all means, including amnesty, an approach which would jeopardize the punishment of crimes committed. On the other hand, other NGOs and critics believe that while peace is essential, it can only be guaranteed by the punishment of crimes and by the refusal to grant amnesty to those responsible for these crimes.¹⁵

There are also certain hostile powers which blackmail African States. Threats to suspend aid to countries if they adhere to the Rome Statute adversely affect the ratification process.

The lack of instruments adapting national legislations to the Rome Statute

It is worth noting that, even with a large number of ratifications, the International Criminal Court will only be able to effectively accomplish its mission of justice if States Parties adapt their national legislation to the principles of the Rome Statute, establish a framework for cooperation with the Court and meet their other obligations under the Rome Statute.

Under article 88 of the Statute, all States Parties are required to adapt their legislation to the principles of the ICC Statute. The African continent is no leading light in this area. Indeed, although there are several

¹² Preamble, articles 1 and 17 of the Statute.

¹³ To a lesser degree, there is the fact that life imprisonment is prohibited in some States, although it is provided for in the Court's Statute. See Sao Tome and Principe (www.antstp.st), Guinea Bissau

(<http://www.idlo.int/texts/leg5579.pdf#search=%22Guinee-Bissau%20%2B%20constitution%22>) and Cape Verde (<http://capeverde-islands.com/cvconstitution.html#p2>).

¹⁴ See also Shashank Bengali, *In war-torn northern Uganda, warrants for rebels seen as threat to peace*, McClathy Newspapers, 4 October 2006, <http://intranet/sites/pressreview/> (5 October 2006).

¹⁵ See Stephen Lamony, *Peace and Justice in Uganda*, Newsletter of the CICC (Coalition for the International Criminal Court), ICC-Africa, Issue 2, September 2006 p. 4, http://www.iccnw.org/documents/AfricanNewsletter_Issue1_Sept06_en.pdf.

implementation bills in the region,¹⁶ to date, South Africa is the only African country with fully enacted legislation implementing the Court's Statute.¹⁷

Article 86 of the Statute of the Court requires States Parties to cooperate fully with the Court in its investigation and prosecution of crimes within its jurisdiction. Failure by States Parties to fulfil this obligation would inevitably paralyse the Court. The level of cooperation between a State and the Court depends on the incorporation and implementation of universal jurisdiction mechanisms in its national law. For the Court to be truly effective, national legislation must be adapted to the Statute.

The slow pace with which African States have adapted their national legislations to the Court's Statute can be explained by the socio-economic situation in many African countries, which are faced with problems considered to be crucial, such as economic underdevelopment and its corollary, poverty, famine, armed conflict, AIDS, shortcomings in the educational system, and the very low level of medical coverage. It is therefore easy to understand that for States which have ratified the Statute and which must therefore meet their obligations, priority is not given to the Court, but rather to the most basic needs of their citizens.

The lack of support for the Court's activities on the ground

Since the entry into force of the Rome Statute, three situations have been referred to the Court by the governments of Uganda, the Democratic Republic of the Congo and the Central African Republic. As for the situation in Darfur, it was referred to the Court by the Security Council. The nature of the crimes in the African cases so far brought before the ICC reinforces the need for greater African involvement in the Court in order to prevent serious human rights violations and promote peace in Africa.¹⁸

Now that the Court has started proceedings, it is faced with difficulties on the ground. Indeed, for the Court to meet the challenge of justice triumphing over impunity on the continent States Parties must fulfil their obligations under Chapter IX of the Statute, i.e. by adopting mechanisms to facilitate cooperation with the Court and mobilising their law-enforcement authorities to the benefit of the latter's actions.

For example, the five arrest warrants issued by the Court on 8 July 2005 in the case of the Lord's Resistance Army in Uganda, are yet to be executed. Responsibility for the execution of these arrest

warrants lies with States Parties on whose territory the accused may be found. Indeed, the Court does not possess autonomous forces to enforce its decisions and orders to which the need for State support is not restricted in any event. State support is also required for obtaining evidence in their possession, for investigations, questioning of persons, searches and seizures and entering into agreements on the relocation of witnesses in Africa.

The problem of bilateral immunity agreements

Bilateral immunity agreements, supposedly based on article 98 of the Rome Statute, aim to shield American citizens and military personnel from the Court's jurisdiction. These are generally reciprocal agreements. They are incompatible with States Parties' obligations under the Statute and may prevent non-States Parties from transferring American citizens under article 12(3) of the Statute which pertains to a non-State Party's declaration of acceptance of the Court's jurisdiction. Consequently, one can only be bewildered by the significant number of African State signatories of these agreements. Some African States (States Parties and non-States Parties to the Rome Statute) have entered into bilateral immunity agreements with the United States of America. Among States Parties which have entered into such bilateral immunity agreements, three have ratified the agreements: Gambia, Ghana and Sierra Leone.

Prospects for the future

The ICC can play an important role in promoting human rights in Africa. Indeed, the most serious human rights violations on the African continent are committed by non-State actors with no international legal personality. As the Court does not require an entity to have international legal personality to prosecute and sentence its members who perpetrate crimes, the ICC therefore becomes an effective instrument for the judicial protection of human rights. As such, it can play a positive role in preventing the commission of other serious crimes on the African continent. The record of the *ad hoc* tribunals proves that the conviction of the perpetrators of the most heinous crimes can play a critical role in deterring potential criminals. The jurisprudence of the ICTR and the mixed court for Sierra Leone provides relevant African examples of deterrence in practice.

Impunity can no longer shield high-ranking perpetrators of crime. Examples from the international criminal justice system which is based on national, international and mixed courts, all testify to the total rejection of impunity. The recent report of the Committee of Eminent African Jurists on the case of Hissène Habré reaffirms that the rejection of impunity is a well-established principle since World War II and is currently reinforced by the establishment of the ICC.¹⁹ The Committee stated very clearly that

¹⁶ See <http://www.iccnw.org>.

¹⁷ See: http://www.iccnw.org/documents/AfricanNewsletter_Issue1_Sept06_en.pdf?PHPSESSID=3856170dd7e22928fdebc8dd1207a648.

¹⁸ According to statistics obtained from the Registry, on 11 October 2006, 18.5% of the professional staff comes from the African group of States Parties.

¹⁹ Available on the site of the African Union at: www.africa-union.org.

impunity is no longer an option in Africa: “All need to understand that African States have to operate in a global environment and not in isolation. Africa must take account of recent developments in the international criminal law arena, such as the Pinochet, Taylor, etc., cases have demonstrated.”²⁰ In his Report on the work of the Organization, the Secretary-General stated that the establishment of the ICC was an “important step [which] demonstrated the international community’s commitment to a permanent and universal mechanism to ensure that as regards those most serious of crimes, impunity will not be tolerated.”²¹

It is important to recall that the appeal to States to fulfil their obligations under the Statute must necessarily be backed by strategies to build their judicial capacity to implement the Court’s Statute. This capacity-building includes the professional development of all those involved in the justice system, expertise in the revision of legislation and the modernisation of justice. Indeed, it can be readily observed that African States currently lack the appropriate infrastructure to prosecute and try crimes under the Court’s Statute.²² This capacity-building can either be done directly or through organisations of which the concerned States are members, such as the African Union, UNESCO, the Commonwealth, the *Organisation internationale de la Francophonie*, the West African Economic and Monetary Union, the Economic and Monetary Community of Central African States and the Southern African Development Community.

On a completely different level, considering these organisations’ commitment to the protection of human rights and their close ties with their member States, they can play an important role in increasing the number of ratifications in Africa. In addition to these structures, there are African NGOs which have a great capacity for mobilization and outreach, having played a very active role in the campaign for an independent ICC. As early as 1997, 90 African NGOs took part in the International Coalition of NGOs for an ICC.²³ NGOs can now contribute significantly to the search for solutions to the problems identified, to increasing the number of ratifications and to raising awareness in local communities so as to bring about a better understanding and knowledge of the role of the Court and its activities in Africa.

Before concluding, it is important to recall that it was an African State, Senegal, which was the first to ratify the Rome Statute of the ICC and that Africa was heavily involved at the Rome Conference and in the

ratification process. The continued support of all States, regional organisations and civil society in Africa is essential to the success of the Court. It is important that it be understood in Africa that the solution to many problems lies in the effectiveness of the Court’s work. The triumph of justice over impunity as reflected in the conviction of the guilty and reparations for the harm suffered by victims will certainly deter the commission of further crimes. This will open the door to stability and lasting peace, both of which are indispensable to economic development and social progress in Africa. Accordingly, the effective commitment of African States to the success of the International Criminal Court, rather than being a dissipation of resources to the detriment of Africa’s many priorities, is a way of solving these urgent problems.

²⁰ *Ibid*, page 3.

²¹ A/61/1, para. 108,

<http://daccessdds.un.org/doc/UNDOC/GEN/N06/461/94/PDF/N0646194.pdf?OpenElement>

²² Prof. André Klip, “The ICC and Africa: Substantive Jurisdiction”, in *Africa Legal Aid Quarterly, Conference: The International Criminal Court and Africa, Oct-December 2003*, ISSN:1384-282x at page 14.

²³ www.iccnw.org.

African Courts and Accountability for International Crimes

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The necessity to try, prosecute and sentence, if found guilty, every person accused of having committed genocide, war crimes, and crimes against humanity has increased in Africa in the 1990s and in the dawn of the 21st century.

Many major factors may confirm this trend.

- Africa was the first continent to ratify the Rome Statute and the speedy ratification by many African countries led to the required 60 ratifications, allowing the Rome Statute to enter into force only four years after its adoption in June 1998.¹
- Many African States have officially ratified international treaties providing for the legal protection and enforcement of individual rights.
- International Criminal Tribunal for Rwanda (ICTR)² and Special Court of Sierra Leone (SCSL)³ have played a strong role in the struggle against impunity for gross crimes committed in Africa and the jurisprudence of both tribunals set a major precedent in this struggle.

However the International Criminal Court (ICC), the ICTR, the SCSL even being significant tools to set up accountability for gross crimes cannot

¹ Senegal was the first country to ratify the Rome Statute on 2 February 1999, The statute entered into force on 1st July 2002.

² UN Security Council Resolution 955 of 08 November 1994.

³ UN Security Council Resolution 1355 of 14 August 2000.

tackle efficiently accountability in Africa because their resources and scope are limited.

While most African States have officially ratified international treaties combating international crimes, many perpetrators of these crimes cannot be tried and prosecuted by African courts. The main reason is that many African States still have no authority to exercise jurisdiction for international crimes. This paper deals with the problems of African Courts and accountability for international crimes by exploring the reasons which prevent African Courts from trying and sentencing the perpetrators of international crimes in Africa, and how these problems may be tackled

Why African Courts have no Jurisdiction on International Crimes.

An overview of the few major events concerning international criminal justice in Africa for the ten last years shows that several kinds of hurdles impede African courts to deal concretely with accountability for international crimes.

1. The first impediment is legal:

- It is known that while many African countries have officially endorsed international instruments providing for the legal protection and enforcement of individual rights, few of them have implemented in their domestic law such instruments.

Few of them have also in their legal system provisions dealing with universal jurisdiction for international crimes. The consequence is that it is difficult and even sometimes impossible, event though there is evidence or strong presumptions against an accused of international crimes, to try and prosecute him before an African Court for such crimes because of a lack of a legal system allowing a prosecution or investigation against him. The Habré Case is the perfect example.

When the victims lodged a complaint against Habré before Senegalese Tribunals, they found their action under the Convention of Torture of 1984 and the principle of universal jurisdiction for the crimes referred to in this Convention. The Torture Convention of 1984 which was the basis of their action had not been fully incorporated into Senegalese law. Furthermore, the legal system of Senegal did not provide for universal jurisdiction for the crimes listed in the Torture Convention. The consequence was that for the Senegalese Supreme Court,

Senegal had no jurisdiction for the crimes allegedly committed by Habré because the State had not complied with the obligation of the Convention which places a duty on all States Parties to take such measures as may be necessary to establish jurisdiction over the offences referred to in article 4 of the Convention⁴. Even though the decision was controversial, it was an illustration of international customary law which recognises that an international convention is not self executing when it obliges State Parties to implement it in their domestic law.⁵

- Another example of this lack of domestic legislation is the “story” of Mengistu Haile Maryam, former Ethiopian president currently in asylum in Zimbabwe.

Mengistu Haile Mariam went to South Africa for medical treatment and Ethiopia requested his extradition to stand trial for genocide, and other crimes, South Africa refused to extradite him because there was no extradition agreement between South Africa and Ethiopia, and even if there was, Ethiopia applies the death penalty which prevents South Africa from accepting to extradite. It was then suggested that South Africa which is a party to the Torture Convention and the Genocide Convention prosecute itself Mengistu. But there was no legislation in South Africa which allowed prosecution of such crimes under domestic law. It was suggested that it was absolutely possible to launch a prosecution on the basis that international customary law is part of South African law but this argument didn't convince South African authorities. And Mengistu returned happily to Harare after his treatment.⁶ The aforementioned examples illustrate perfectly how the lack of domestic law to implement international crimes and universal jurisdiction for such crimes constitute an impediment to accountability for international crimes in Africa.

- Another legal impediment is the question of Statutes of limitations.

As we know, even if wide opinion considers that statutes of limitation do not apply under crimes against humanity⁷, many domestic courts have a different point of view.

Political Impediment

- The question of immunity.

Most of the perpetrators of international crimes are high ranking State officials. It raises the question of immunity of such persons. The question is far from solved and the recent judgement of the ICJ in the Yerodia case⁸ reinforces the principle of immunity. This decision of the ICJ may be correctly admitted in a context of foreign relation interests, but the consequences may undoubtedly infringe the efficiency of accountability for international crimes.

The first application of this judgement in Africa was in the Habre Case when Belgium requested his extradition from Senegal. The Senegalese Court of Appeal denied the request on the basis of the Yerodia judgement⁹. Even though the motivation of the Court was very controversial, it shows that immunity often precludes the prosecution of officials in Africa for gross violations of human rights.

- The question of Amnesty.

Amnesty is more and more used as a soft method to achieve peace and reconciliation in African countries which have experienced civil wars. For example, in South Africa the Truth and Reconciliation Commission (TRC) granted amnesties for acts, offences and omissions associated with a political motive and committed in the context of apartheid.

In Sierra Leone the Lomé Peace Agreement¹⁰ granted amnesty to many of the belligerents. The question is whether amnesties granted in such context applies to international crimes. The indictment of Charles Taylor and the Birima Kamara judgement rendered by SCSL are a perfect illustration that amnesties doesn't apply to such crimes, and before others courts other than those of the country which granted the amnesty. In Uganda the indictment of the Rebels of LRA is considered as a hurdle to the peace process.

How to make Accountability a reality for African Courts:

Implement International Instruments in Domestic Law.

⁴ Supreme Court 20 March 2001, Souleymane Guengueng & others vs. / Ministere Public.

⁵ See Cherif Bassiouni, “Universal Jurisdiction for International Crimes: Historical Perspectives and Contemporary Practice”, Virginia Journal of International Law Association 5 (2001).

According to M. Bassiouni, heinous crimes may be subject to universal jurisdiction, but may be enforceable only if the prosecuting country is a signatory to an existing, relevant treaty and has incorporated the treaty in its domestic law.

⁶ See John Dugard Universal Jurisdiction for Crimes against Humanity, AFLA Quarterly, April-June 2000, p.9

⁷ Ibid.

⁸ Judgement of 14 February 2000, Arrest Warrant of April 11 2000, Democratic Republic of Congo v. Belgium,

⁹ The judgement quoted expressly the Yerodia case and justifies the immunity of M. Habré on the basis of the principles referred to in this judgement.

¹⁰ Agreement signed on 7 July 1999 in Lomé (Togo) between Sierra Leone government and RUF.

- Geneva Convention and its additive protocols;
- Torture Convention;
- Rome Statute of the ICC.

All these treaties include international crimes and many African states have ratified them. However most of them are not self executing and require incorporation into domestic law. The Rome Statute of the ICC is a golden opportunity for African States to hold perpetrators of international crimes accountable. If we consider that the Rome Statute is not a self executing treaty, there is no denying that the African countries which have ratified it must enact it in their domestic law in order to prosecute and try whoever is accused of having committed international crimes falling within their jurisdiction, or transfer them to the ICC.¹¹ However, among all the African countries which have ratified the Rome Statute¹², only South Africa¹³ and Senegal¹⁴ have up to now implemented it their in their domestic law. This score is very low.

Limit the scope of Amnesty and Immunity and exclude them when International Crimes are committed.

Since the Second World War, Sub-Saharan Africa has enacted 47 amnesty laws! This is the highest of all regions of the world¹⁵. Even though the motivation of these amnesty laws is to facilitate reconciliation and reconstruction after a civil war, their efficiency has been denied in many situations. It was argued that the Lomé Peace Agreement was signed to “reinforce peace”. However, and despite this willingness of both parties to conclude a peace and reconciliation agreement, hostilities resumed in Sierra Leone less than one year after the Agreement.

In Côte d’Ivoire the purpose of the Amnesty law enacted in 2003 was to take measures to achieve reconciliation¹⁶. Unfortunately, it didn’t facilitate the process of reconciliation. Even in South Africa, where the Truth and Reconciliation Commission was set up under the Promotion of National Peace and Reconciliation Act of 1995, required formal application of amnesty, in practice no proceedings have been initiated against those who have not applied.

¹¹ See Articles 17-2 and 88 of the Rome Statute

¹² 27 countries up to now.

¹³ The Implementation of the Rome Statute of the International Criminal Act 27 of 2002 was passed by parliament on 22 June 2002 and came into force on 17 July 2002

¹⁴ Lois 2007-02 et 2007-05 du 12 Février 2007 portant mise en oeuvre du Statut de la Cour Pénale Internationale

¹⁵ Americas (29), Asia (19), Europe and Central Asia (33), Middle East and North Africa (15). See generally, Louise Mallinder, Punishment, Amnesty and Truth: Legal and Political Approaches, paper based on a contribution to a discussion group convened in Potsdam in November 2000 by Professor Horst Fischer of the University of Bochum.

¹⁶ See Loi ivoirienne n° 2003-309 du 08 Aout 2003 portant amnistie, JOCI n°2, Numéro spécial du 18 Aout 2003.

Ensure the Independence of the Judiciary.

In many African countries, the Executive interferes with the Judiciary and weakens its independence considerably, consequently, limiting accountability. African States must take strong and efficient measures to allow judges and prosecutors to be more independent when they investigate and try international crimes.

Build Capacity of the Courts.

Collecting and gathering evidences, hearing witnesses, finding accused persons in a context of war or post conflict situation are not easy and require considerable logistics, material and financial resources. And in many situations where international crimes have been committed, the priority of the States is not to give logistics to the courts and judges, but to feed people and assist them in starting a new life. However, even though “feeding” and “healing” peoples are of high priority, it is also important to render justice in order to provide redress for the victims. And if justice must be done, those who render it must be highly qualified and well equipped.

Conclusion

This overview demonstrates that the question of accountability of international crimes in Africa is of high importance because Africa is a continent where these crimes are often committed. And there is no denying that the most appropriate fora to hold persons criminally accountable are the courts of States where these crimes have been committed or whose nationals are perpetrators or victims of these crimes.¹⁷ It is therefore crucial for African courts to be allowed legally and materially try and judge persons prosecuted for such crimes.

The hurdles which impede African Courts to do so are not insurmountable if there is a political willingness to tackle them. Civil society everywhere in Africa must push for a solution and convince governments that the future of Africa depends largely on peace and there is no peace without justice and no justice without accountability.

¹⁷ See Dr. A.P.van der Mei, Universal Jurisdiction in a Politically Divided World: International Criminal Accountability versus Harmonious Inter-States Relations, AFLA Special Book series, 2005 Volume 3, p. 29.

APPENDIX

CAIRO - ARUSHA PRINCIPLES ON UNIVERSAL JURISDICTION IN RESPECT OF GROSS HUMAN RIGHTS OFFENCES: AN AFRICAN PERSPECTIVE

PREAMBLE

The African tradition has always been to abhor gross human rights offences.

The principle of universal jurisdiction concerns the international community as a whole; it should therefore have a truly universal scope in its content, implementation and effects.

While it is generally preferable to try gross human rights offences in the State where they occurred, it is sometimes necessary, in order to avoid impunity, to make use of international tribunals or other national jurisdictions.

Most African States have accepted the principle of universal jurisdiction by becoming parties to instruments which provide for universal jurisdiction over certain crimes under international law, including under the 1949 Geneva Conventions, the 1973 Convention on the Suppression and Punishment of the Crime of *Apartheid* and the 1984 Convention against Torture. Many of those States, however, have not ensured that their courts can exercise jurisdiction in respect of gross human rights offences on the basis of universal jurisdiction.

In recognition of this, *AFRICA LEGAL AID (AFLA)* convened a meeting in Cairo from 30 to 31 July 2001 and in Arusha from 18 to 21 October 2002. The meetings brought together a number of leading experts from all across Africa and elsewhere to discuss and devise principles on universal jurisdiction from an African perspective.

The Principles are prompted, among others things, by a concern that certain offences which have particular resonance in Africa, such as the crime of *apartheid*, have so far not attracted prosecution under the principle of universal jurisdiction.

The Principles are aimed at assisting governments, in Africa and around the world, in exercising their powers and obligations, human rights organisations and legal practitioners in their attempts to pursue international justice, and advocacy and lobbying initiatives. They are also aimed at contributing to the progressive development of international law.

The starting point for these Principles is an awareness of existing *law*, as enshrined, for example, in the Rome Statute of the International Criminal Court.

In the particular context of the African Continent, however, there are additional considerations, including economic, social and cultural, that should be taken into account in trying to ensure the effective exercise of universal jurisdiction.

PRINCIPLES

1. Universal jurisdiction applies to gross human rights offences committed even in peacetime.
2. The principle of universal jurisdiction should apply not only to natural persons, but also to other legal entities.
3. States shall adopt measures, including legislative and administrative, that will ensure that their national courts

can exercise universal jurisdiction over gross human rights offences, including, but not limited to, those contained in the Rome Statute of the International Criminal Court.

4. In addition to the crimes that are currently recognised under international law as being subject to universal jurisdiction, certain other crimes that have major adverse economic, social or cultural consequences -- such as acts of plunder and gross misappropriation of public resources, trafficking in human beings and serious environmental crimes -- should also be granted this status.
5. The absence of specific enabling domestic legislation does not relieve any State of its international legal obligation to prosecute, extradite, surrender or transfer suspects to any State or international tribunal willing and able to prosecute such suspects.
6. The principle of non-interference in the internal affairs of States, as enshrined in Article 4(g) but qualified by Article 4(h) of the Constitutive Act of the African Union, shall be interpreted in light of the well established and generally accepted principle that gross human rights offences are of legitimate concern to the international community, and give rise to prosecution under the principle of universal jurisdiction.
7. In dealing with gender crimes, such as rape and other forms of sexual violence that are recognised as crimes subject to universal jurisdiction, States shall make every effort to create conditions favourable to reporting such crimes, investigate them, bring the perpetrators to justice and provide support to the victims.
8. In applying universal jurisdiction, prosecuting authorities shall avoid bias and selectivity based on race, gender, sexual orientation, ethnicity, colour, language, age, religion, political or c)their opinion, national or social origin, birth or other status of the suspect. In particular, the application of the principle of universal jurisdiction shall not be used as a pretext to pursue politically motivated prosecutions.
9. Financial and other constraints do not relieve States of their duty to carry out investigations or to prosecute, extradite or transfer for trial persons suspected or accused of gross human rights offences under international law. However, the international community should assist developing countries in the latter's' efforts in prosecuting such offences.
10. States shall provide mutual legal assistance in order to facilitate the effective exercise of universal jurisdiction.
11. Proceedings, including but not limited to, the investigation, prosecution, incarceration and/or sentencing of gross human rights offenders, shall be undertaken in conformity with internationally recognized human rights standards. These rights include the right to consular assistance under the Vienna Convention on Consular Relations, and the right to counsel, which shall include, in the case of self-funding defendants, the right to choose counsel from outside the legal profession of the prosecuting jurisdiction.
12. In proceedings based on universal jurisdiction, States shall ensure that victims and witnesses receive adequate protection.
13. A person who has been tried and convicted or acquitted of a gross human rights offence under international law before a national court may not be tried again, except where the prior proceedings shielded the person from justice.
14. The use of alternative forms of justice, including truth and reconciliation commissions, does not relieve States of their responsibility and their duty to prosecute individuals or to extradite or transfer for trial individuals suspected or accused of gross human rights offences under international law.

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15. While amnesties for gross human rights offences granted to individuals may, in certain cases, be politically expedient, such amnesties are generally incompatible with international law and do not have any effect outside the borders of the country in which they are granted; nor do they absolve other States of their responsibility and their duty to prosecute or to transfer for trial such individuals.
 16. Prosecution and sentencing of gross human rights offenders shall be guided not only by the need for deterrence, but also by the need to reconcile, rehabilitate and reconstruct the society where the offence was committed.
 17. Responses to gross human rights offences shall include a requirement for the offender or other available mechanism to make appropriate reparation to the victims of the offences, to the extent possible.
 18. Refugee status or applications for refugee status shall not relieve States of their obligation to prosecute or to extradite or transfer for trial to any other State or international tribunal willing and able to prosecute persons accused or suspected of gross human rights offences. This is without prejudice to the prohibition of *non refoulement*.
 19. A State in whose territory a gross human rights offence suspect is found shall prosecute him or her in good faith or extradite or surrender him or her to any other State or international tribunal willing and able to prosecute such suspect. The absence of an extradition treaty or other enabling legislation shall not bar the extradition, surrender or transfer of such a suspect to any State or international tribunal willing and able to prosecute the suspect.

EXCERPTS OF THE ROME STATUTE OF THE INTERNATIONAL CRIMINAL COURT (ICC)

PREAMBLE

The States Parties to this Statute,

Conscious that all peoples are united by common bonds, their cultures pieced together in a shared heritage, and concerned that this delicate mosaic may be shattered at any time,

Mindful that during this century millions of children, women and men have been victims of unimaginable atrocities that deeply shock the conscience of humanity,

Recognizing that such grave crimes threaten the peace, security and well-being of the world,

Affirming that the most serious crimes of concern to the international community as a whole must not go unpunished and that their effective prosecution must be ensured by taking measures at the national level and by enhancing international cooperation,

Determined to put an end to impunity for the perpetrators of these crimes and thus to contribute to the prevention of such crimes,

Recalling that it is the duty of every State to exercise its criminal jurisdiction over those responsible for international crimes,

Reaffirming the Purposes and Principles of the Charter of the United Nations, and in particular that all States shall refrain from the threat or use of force against the territorial integrity or political independence of any State, or in any other manner inconsistent with the Purposes of the United Nations,

Emphasizing in this connection that nothing in this Statute shall be taken as authorizing any State Party to intervene in an armed conflict or in the internal affairs of any State,

Determined to these ends and for the sake of present and future generations, to establish an independent permanent International Criminal Court in relationship with the United Nations system, with jurisdiction over the most serious crimes of concern to the international community as a whole,

Emphasizing that the International Criminal Court established under this Statute shall be complementary to national criminal jurisdictions,

Resolved to guarantee lasting respect for and the enforcement of international justice,

Have agreed as follows:

PART 1. ESTABLISHMENT OF THE COURT

Article 1

The Court

An International Criminal Court ("the Court") is hereby established. It shall be a permanent institution and shall have the power to exercise its jurisdiction over persons for the most serious Rome Statute of the International Criminal Court crimes of international concern, as referred to in this Statute, and shall be complementary to national criminal jurisdictions. The jurisdiction and functioning of the Court shall be governed by the provisions of this Statute.

Article 2

Relationship of the Court with the United Nations

The Court shall be brought into relationship with the United Nations through an agreement to be approved by the Assembly of States Parties to this Statute and thereafter concluded by the President of the Court on its behalf.

Article 3
Seat of the Court

1. The seat of the Court shall be established at The Hague in the Netherlands ("the host State").
2. The Court shall enter into a headquarters agreement with the host State, to be approved by the Assembly of States Parties and thereafter concluded by the President of the Court on its behalf.
3. The Court may sit elsewhere, whenever it considers it desirable, as provided in this Statute.

Article 4
Legal status and powers of the Court

1. The Court shall have international legal personality. It shall also have such legal capacity as may be necessary for the exercise of its functions and the fulfilment of its purposes.
2. The Court may exercise its functions and powers, as provided in this Statute, on the territory of any State Party and, by special agreement, on the territory of any other State.

PART 2. JURISDICTION, ADMISSIBILITY AND APPLICABLE LAW

Article 5
Crimes within the jurisdiction of the Court

1. The jurisdiction of the Court shall be limited to the most serious crimes of concern to the international community as a whole. The Court has jurisdiction in accordance with this Statute with respect to the following crimes:
 - (a) The crime of genocide;
 - (b) Crimes against humanity;
 - (c) War crimes;
 - (d) The crime of aggression.
2. The Court shall exercise jurisdiction over the crime of aggression once a provision is adopted in accordance with articles 121 and 123 defining the crime and setting out the conditions under which the Court shall exercise jurisdiction with respect to this crime. Such a provision shall be consistent with the relevant provisions of the Charter of the United Nations.

Article 6
Genocide

For the purpose of this Statute, "genocide" means any of the following acts committed with intent to destroy, in whole or in part, a national, ethnical, racial or religious group, as such:

- (a) Killing members of the group;
- (b) Causing serious bodily or mental harm to members of the group;
- (c) Deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part;
- (d) Imposing measures intended to prevent births within the group;
- (e) Forcibly transferring children of the group to another group.

Article 7
Crimes against humanity

1. For the purpose of this Statute, "crime against humanity" means any of the following acts when committed as part of a widespread or systematic attack directed against any civilian population, with knowledge of the attack:
 - (a) Murder;
 - (b) Extermination;
 - (c) Enslavement;
 - (d) Deportation or forcible transfer of population;

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- (e) Imprisonment or other severe deprivation of physical liberty in violation of fundamental rules of international law;
 - (f) Torture;
 - (g) Rape, sexual slavery, enforced prostitution, forced pregnancy, enforced sterilization, or any other form of sexual violence of comparable gravity;
 - (h) Persecution against any identifiable group or collectivity on political, racial, national, ethnic, cultural, religious, gender as defined in paragraph 3, or other grounds that are universally recognized as impermissible under international law, in connection with any act referred to in this paragraph or any crime within the jurisdiction of the Court;
 - (i) Enforced disappearance of persons;
 - (j) The crime of apartheid;
 - (k) Other inhumane acts of a similar character intentionally causing great suffering, or serious injury to body or to mental or physical health.

2. For the purpose of paragraph 1:

- (a) "Attack directed against any civilian population" means a course of conduct involving the multiple commission of acts referred to in paragraph 1 against any civilian population, pursuant to or in furtherance of a State or organizational policy to commit such attack;
- (b) "Extermination" includes the intentional infliction of conditions of life, inter alia the deprivation of access to food and medicine, calculated to bring about the destruction of part of a population;
- (c) "Enslavement" means the exercise of any or all of the powers attaching to the right of ownership over a person and includes the exercise of such power in the course of trafficking in persons, in particular women and children;
- (d) "Deportation or forcible transfer of population" means forced displacement of the persons concerned by expulsion or other coercive acts from the area in which they are lawfully present, without grounds permitted under international law;
- (e) "Torture" means the intentional infliction of severe pain or suffering, whether physical or mental, upon a person in the custody or under the control of the accused; except that torture shall not include pain or suffering arising only from, inherent in or incidental to, lawful sanctions;
- (f) "Forced pregnancy" means the unlawful confinement of a woman forcibly made pregnant, with the intent of affecting the ethnic composition of any population or carrying out other grave violations of international law. This definition shall not in any way be interpreted as affecting national laws relating to pregnancy;
- (g) "Persecution" means the intentional and severe deprivation of fundamental rights contrary to international law by reason of the identity of the group or collectivity;
- (h) "The crime of apartheid" means inhumane acts of a character similar to those referred to in paragraph 1, committed in the context of an institutionalized regime of systematic oppression and domination by one racial group over any other racial group or groups and committed with the intention of maintaining that regime;
- (i) "Enforced disappearance of persons" means the arrest, detention or abduction of persons by, or with the authorization, support or acquiescence of, a State or a political organization, followed by a refusal to acknowledge that deprivation of freedom or to give information on the fate or whereabouts of those persons, with the intention of removing them from the protection of the law for a prolonged period of time.

3. For the purpose of this Statute, it is understood that the term "gender" refers to the two sexes, male and female, within the context of society. The term "gender" does not indicate any meaning different from the above.

Article 8

War crimes

1. The Court shall have jurisdiction in respect of war crimes in particular when committed as part of a plan or policy or as part of a large-scale commission of such crimes.

2. For the purpose of this Statute, "war crimes" means:

- (a) Grave breaches of the Geneva Conventions of 12 August 1949, namely, any of the following acts against persons or property protected under the provisions of the relevant Geneva Convention:
 - (i) Wilful killing;
 - (ii) Torture or inhuman treatment, including biological experiments;
 - (iii) Wilfully causing great suffering, or serious injury to body or health;
 - (iv) Extensive destruction and appropriation of property not justified by military necessity and carried out unlawfully and wantonly;
 - (v) Compelling a prisoner of war or other protected person to serve in the forces of a hostile Power;
 - (vi) Wilfully depriving a prisoner of war or other protected person of the rights of fair and regular trial;
 - (vii) Unlawful deportation or transfer or unlawful confinement;

(viii) Taking of hostages.

(b) Other serious violations of the laws and customs applicable in international armed conflict, within the established framework of international law, namely, any of the following acts:

(i) Intentionally directing attacks against the civilian population as such or against individual civilians not taking direct part in hostilities;

(ii) Intentionally directing attacks against civilian objects, that is, objects which are not military objectives;

(iii) Intentionally directing attacks against personnel, installations, material, units or vehicles involved in a humanitarian assistance or peacekeeping mission in accordance with the Charter of the United Nations, as long as they are entitled to the protection given to civilians or civilian objects under the international law of armed conflict;

(iv) Intentionally launching an attack in the knowledge that such attack will cause incidental loss of life or injury to civilians or damage to civilian objects or widespread, long-term and severe damage to the natural environment which would be clearly excessive in relation to the concrete and direct overall military advantage anticipated;

(v) Attacking or bombarding, by whatever means, towns, villages, dwellings or buildings which are undefended and which are not military objectives;

(vi) Killing or wounding a combatant who, having laid down his arms or having no longer means of defence, has surrendered at discretion;

(vii) Making improper use of a flag of truce, of the flag or of the military insignia and uniform of the enemy or of the United Nations, as well as of the distinctive emblems of the Geneva Conventions, resulting in death or serious personal injury;

(viii) The transfer, directly or indirectly, by the Occupying Power of parts of its own civilian population into the territory it occupies, or the deportation or transfer of all or parts of the population of the occupied territory within or outside this territory;

(ix) Intentionally directing attacks against buildings dedicated to religion, education, art, science or charitable purposes, historic monuments, hospitals and places where the sick and wounded are collected, provided they are not military objectives;

(x) Subjecting persons who are in the power of an adverse party to physical mutilation or to medical or scientific experiments of any kind which are neither justified by the medical, dental or hospital treatment of the person concerned nor carried out in his or her interest, and which cause death to or seriously endanger the health of such person or persons;

(xi) Killing or wounding treacherously individuals belonging to the hostile nation or army;

(xii) Declaring that no quarter will be given;

(xiii) Destroying or seizing the enemy's property unless such destruction or seizure be imperatively demanded by the necessities of war;

(xiv) Declaring abolished, suspended or inadmissible in a court of law the rights and actions of the nationals of the hostile party;

(xv) Compelling the nationals of the hostile party to take part in the operations of war directed against their own country, even if they were in the belligerent's service before the commencement of the war;

(xvi) Pillaging a town or place, even when taken by assault;

(xvii) Employing poison or poisoned weapons;

(xviii) Employing asphyxiating, poisonous or other gases, and all analogous liquids, materials or devices;

(xix) Employing bullets which expand or flatten easily in the human body, such as bullets with a hard envelope which does not entirely cover the core or is pierced with incisions;

(xx) Employing weapons, projectiles and material and methods of warfare which are of a nature to cause superfluous injury or unnecessary suffering or which are inherently indiscriminate in violation of the international law of armed conflict, provided that such weapons, projectiles and material and methods of warfare are the subject of a comprehensive prohibition and are included in an annex to this Statute, by an amendment in accordance with the relevant provisions set forth in articles 121 and 123;

(xxi) Committing outrages upon personal dignity, in particular humiliating and degrading treatment;

(xxii) Committing rape, sexual slavery, enforced prostitution, forced pregnancy, as defined in article 7, paragraph 2 (f), enforced sterilization, or any other form of sexual violence also constituting a grave breach of the Geneva Conventions;

(xxiii) Utilizing the presence of a civilian or other protected person to render certain points, areas or military forces immune from military operations;

(xxiv) Intentionally directing attacks against buildings, material, medical units and transport, and personnel using the distinctive emblems of the Geneva Conventions in conformity with international law;

(xxv) Intentionally using starvation of civilians as a method of warfare by depriving them of objects indispensable to their survival, including wilfully impeding relief supplies as provided for under the Geneva Conventions;

(xxvi) Conscripting or enlisting children under the age of fifteen years into the national armed forces or using them to participate actively in hostilities.

(c) In the case of an armed conflict not of an international character, serious violations of article 3 common to the four Geneva Conventions of 12 August 1949, namely, any of the following acts committed against persons taking no active

part in the hostilities, including members of armed forces who have laid down their arms and those placed hors de combat by sickness, wounds, detention or any other cause:

- (i) Violence to life and person, in particular murder of all kinds, mutilation, cruel treatment and torture;
 - (ii) Committing outrages upon personal dignity, in particular humiliating and degrading treatment;
 - (iii) Taking of hostages;
 - (iv) The passing of sentences and the carrying out of executions without previous judgment pronounced by a regularly constituted court, affording all judicial guarantees which are generally recognized as indispensable.
- (d) Paragraph 2 (c) applies to armed conflicts not of an international character and thus does not apply to situations of internal disturbances and tensions, such as riots, isolated and sporadic acts of violence or other acts of a similar nature.

(e) Other serious violations of the laws and customs applicable in armed conflicts not of an international character, within the established framework of international law, namely, any of the following acts:

- (i) Intentionally directing attacks against the civilian population as such or against individual civilians not taking direct part in hostilities;
 - (ii) Intentionally directing attacks against buildings, material, medical units and transport, and personnel using the distinctive emblems of the Geneva Conventions in conformity with international law;
 - (iii) Intentionally directing attacks against personnel, installations, material, units or vehicles involved in a humanitarian assistance or peacekeeping mission in accordance with the Charter of the United Nations, as long as they are entitled to the protection given to civilians or civilian objects under the international law of armed conflict;
 - (iv) Intentionally directing attacks against buildings dedicated to religion, education, art, science or charitable purposes, historic monuments, hospitals and places where the sick and wounded are collected, provided they are not military objectives;
 - (v) Pillaging a town or place, even when taken by assault;
 - (vi) Committing rape, sexual slavery, enforced prostitution, forced pregnancy, as defined in article 7, paragraph 2 (f), enforced sterilization, and any other form of sexual violence also constituting a serious violation of article 3 common to the four Geneva Conventions;
 - (vii) Conscripting or enlisting children under the age of fifteen years into armed forces or groups or using them to participate actively in hostilities;
 - (viii) Ordering the displacement of the civilian population for reasons related to the conflict, unless the security of the civilians involved or imperative military reasons so demand;
 - (ix) Killing or wounding treacherously a combatant adversary;
 - (x) Declaring that no quarter will be given;
 - (xi) Subjecting persons who are in the power of another party to the conflict to physical mutilation or to medical or other procedures of a similar nature which are neither justified by the medical, dental or hospital treatment of the person concerned nor carried out in his or her interest, and which cause death to or seriously endanger the health of such person or persons;
 - (xii) Destroying or seizing the property of an adversary unless such destruction or seizure be imperatively demanded by the necessities of the conflict;
- (f) Paragraph 2 (e) applies to armed conflicts not of an international character and thus does not apply to situations of internal disturbances and tensions, such as riots, isolated and sporadic acts of violence or other acts of a similar nature. It applies to armed conflicts that take place in the territory of a State when there is protracted armed conflict between governmental authorities and organized armed groups or between such groups.

3. Nothing in paragraph 2 (c) and (e) shall affect the responsibility of a Government to maintain or re-establish law and order in the State or to defend the unity and territorial integrity of the State, by all legitimate means.

Article 9

Elements of Crimes

1. Elements of Crimes shall assist the Court in the interpretation and application of articles 6, 7 and 8. They shall be adopted by a two-thirds majority of the members of the Assembly of States Parties.

2. Amendments to the Elements of Crimes may be proposed by:

- (a) Any State Party;
- (b) The judges acting by an absolute majority;
- (c) The Prosecutor. Such amendments shall be adopted by a two-thirds majority of the members of the Assembly of States Parties.

3. The Elements of Crimes and amendments thereto shall be consistent with this Statute.

Article 10

Nothing in this Part shall be interpreted as limiting or prejudicing in any way existing or developing rules of international law for purposes other than this Statute.

Article 11
Jurisdiction *ratione temporis*

1. The Court has jurisdiction only with respect to crimes committed after the entry into force of this Statute.
2. If a State becomes a Party to this Statute after its entry into force, the Court may exercise its jurisdiction only with respect to crimes committed after the entry into force of this Statute for that State, unless that State has made a declaration under article 12, paragraph 3.

Article 12
Preconditions to the exercise of jurisdiction

1. A State which becomes a Party to this Statute thereby accepts the jurisdiction of the Court with respect to the crimes referred to in article 5.
2. In the case of article 13, paragraph (a) or (c), the Court may exercise its jurisdiction if one or more of the following States are Parties to this Statute or have accepted the jurisdiction of the Court in accordance with paragraph 3:
 - (a) The State on the territory of which the conduct in question occurred or, if the crime was committed on board a vessel or aircraft, the State of registration of that vessel or aircraft;
 - (b) The State of which the person accused of the crime is a national.
3. If the acceptance of a State which is not a Party to this Statute is required under paragraph 2, that State may, by declaration lodged with the Registrar, accept the exercise of jurisdiction by the Court with respect to the crime in question. The accepting State shall cooperate with the Court without any delay or exception in accordance with Part 9.

Article 13
Exercise of jurisdiction

The Court may exercise its jurisdiction with respect to a crime referred to in article 5 in accordance with the provisions of this Statute if:

- (a) A situation in which one or more of such crimes appears to have been committed is referred to the Prosecutor by a State Party in accordance with article 14;
- (b) A situation in which one or more of such crimes appears to have been committed is referred to the Prosecutor by the Security Council acting under Chapter VII of the Charter of the United Nations; or
- (c) The Prosecutor has initiated an investigation in respect of such a crime in accordance with article 15.

Article 14
Referral of a situation by a State Party

1. A State Party may refer to the Prosecutor a situation in which one or more crimes within the jurisdiction of the Court appear to have been committed requesting the Prosecutor to investigate the situation for the purpose of determining whether one or more specific persons should be charged with the commission of such crimes.
2. As far as possible, a referral shall specify the relevant circumstances and be accompanied by such supporting documentation as is available to the State referring the situation.

Article 15
Prosecutor

1. The Prosecutor may initiate investigations *proprio motu* on the basis of information on crimes within the jurisdiction of the Court.
2. The Prosecutor shall analyse the seriousness of the information received. For this purpose, he or she may seek additional information from States, organs of the United Nations, intergovernmental or non-governmental organizations, or other reliable sources that he or she deems appropriate, and may receive written or oral testimony at the seat of the Court.
3. If the Prosecutor concludes that there is a reasonable basis to proceed with an investigation, he or she shall submit to the Pre-Trial Chamber a request for authorization of an investigation, together with any supporting material collected. Victims may make representations to the Pre-Trial Chamber, in accordance with the Rules of Procedure and Evidence.

4. If the Pre-Trial Chamber, upon examination of the request and the supporting material, considers that there is a reasonable basis to proceed with an investigation, and that the case appears to fall within the jurisdiction of the Court, it shall authorize the commencement of the investigation, without prejudice to subsequent determinations by the Court with regard to the jurisdiction and admissibility of a case.

5. The refusal of the Pre-Trial Chamber to authorize the investigation shall not preclude the presentation of a subsequent request by the Prosecutor based on new facts or evidence regarding the same situation.

6. If, after the preliminary examination referred to in paragraphs 1 and 2, the Prosecutor concludes that the information provided does not constitute a reasonable basis for an investigation, he or she shall inform those who provided the information. This shall not preclude the Prosecutor from considering further information submitted to him or her regarding the same situation in the light of new facts or evidence.

Article 16 **Deferral of investigation or prosecution**

No investigation or prosecution may be commenced or proceeded with under this Statute for a period of 12 months after the Security Council, in a resolution adopted under Chapter VII of the Charter of the United Nations, has requested the Court to that effect; that request may be renewed by the Council under the same conditions.

Article 17 **Issues of admissibility**

1. Having regard to paragraph 10 of the Preamble and article 1, the Court shall determine that a case is inadmissible where:

- (a) The case is being investigated or prosecuted by a State which has jurisdiction over it, unless the State is unwilling or unable genuinely to carry out the investigation or prosecution;
- (b) The case has been investigated by a State which has jurisdiction over it and the State has decided not to prosecute the person concerned, unless the decision resulted from the unwillingness or inability of the State genuinely to prosecute;
- (c) The person concerned has already been tried for conduct which is the subject of the complaint, and a trial by the Court is not permitted under article 20, paragraph 3;
- (d) The case is not of sufficient gravity to justify further action by the Court.

2. In order to determine unwillingness in a particular case, the Court shall consider, having regard to the principles of due process recognized by international law, whether one or more of the following exist, as applicable:

- (a) The proceedings were or are being undertaken or the national decision was made for the purpose of shielding the person concerned from criminal responsibility for crimes within the jurisdiction of the Court referred to in article 5;
- (b) There has been an unjustified delay in the proceedings which in the circumstances is inconsistent with an intent to bring the person concerned to justice;
- (c) The proceedings were not or are not being conducted independently or impartially, and they were or are being conducted in a manner which, in the circumstances, is inconsistent with an intent to bring the person concerned to justice.

3. In order to determine inability in a particular case, the Court shall consider whether, due to a total or substantial collapse or unavailability of its national judicial system, the State is unable to obtain the accused or the necessary evidence and testimony or otherwise unable to carry out its proceedings.

Article 18 **Preliminary rulings regarding admissibility**

1. When a situation has been referred to the Court pursuant to article 13 (a) and the Prosecutor has determined that there would be a reasonable basis to commence an investigation, or the Prosecutor initiates an investigation pursuant to articles 13 (c) and 15, the Prosecutor shall notify all States Parties and those States which, taking into account the information available, would normally exercise jurisdiction over the crimes concerned. The Prosecutor may notify such States on a confidential basis and, where the Prosecutor believes it necessary to protect persons, prevent destruction of evidence or prevent the absconding of persons, may limit the scope of the information provided to States.

2. Within one month of receipt of that notification, a State may inform the Court that it is investigating or has investigated its nationals or others within its jurisdiction with respect to criminal acts which may constitute crimes referred to in article 5 and which relate to the information provided in the notification to States. At the request of that

State, the Prosecutor shall defer to the State's investigation of those persons unless the Pre-Trial Chamber, on the application of the Prosecutor, decides to authorize the investigation.

3. The Prosecutor's deferral to a State's investigation shall be open to review by the Prosecutor six months after the date of deferral or at any time when there has been a significant change of circumstances based on the State's unwillingness or inability genuinely to carry out the investigation.

4. The State concerned or the Prosecutor may appeal to the Appeals Chamber against a ruling of the Pre-Trial Chamber, in accordance with article 82. The appeal may be heard on an expedited basis.

5. When the Prosecutor has deferred an investigation in accordance with paragraph 2, the Prosecutor may request that the State concerned periodically inform the Prosecutor of the progress of its investigations and any subsequent prosecutions. States Parties shall respond to such requests without undue delay.

6. Pending a ruling by the Pre-Trial Chamber, or at any time when the Prosecutor has deferred an investigation under this article, the Prosecutor may, on an exceptional basis, seek authority from the Pre-Trial Chamber to pursue necessary investigative steps for the purpose of preserving evidence where there is a unique opportunity to obtain important evidence or there is a significant risk that such evidence may not be subsequently available.

7. A State which has challenged a ruling of the Pre-Trial Chamber under this article may challenge the admissibility of a case under article 19 on the grounds of additional significant facts or significant change of circumstances.

Article 19

Challenges to the jurisdiction of the Court or the admissibility of a case

1. The Court shall satisfy itself that it has jurisdiction in any case brought before it. The Court may, on its own motion, determine the admissibility of a case in accordance with article 17.

2. Challenges to the admissibility of a case on the grounds referred to in article 17 or challenges to the jurisdiction of the Court may be made by:

- (a) An accused or a person for whom a warrant of arrest or a summons to appear has been issued under article 58;
- (b) A State which has jurisdiction over a case, on the ground that it is investigating or prosecuting the case or has investigated or prosecuted; or
- (c) A State from which acceptance of jurisdiction is required under article 12.

3. The Prosecutor may seek a ruling from the Court regarding a question of jurisdiction or admissibility. In proceedings with respect to jurisdiction or admissibility, those who have referred the situation under article 13, as well as victims, may also submit observations to the Court.

4. The admissibility of a case or the jurisdiction of the Court may be challenged only once by any person or State referred to in paragraph 2. The challenge shall take place prior to or at the commencement of the trial. In exceptional circumstances, the Court may grant leave for a challenge to be brought more than once or at a time later than the commencement of the trial. Challenges to the admissibility of a case, at the commencement of a trial, or subsequently with the leave of the Court, may be based only on article 17, paragraph 1 (c).

5. A State referred to in paragraph 2 (b) and (c) shall make a challenge at the earliest opportunity.

6. Prior to the confirmation of the charges, challenges to the admissibility of a case or challenges to the jurisdiction of the Court shall be referred to the Pre-Trial Chamber. After confirmation of the charges, they shall be referred to the Trial Chamber. Decisions with respect to jurisdiction or admissibility may be appealed to the Appeals Chamber in accordance with article 82.

7. If a challenge is made by a State referred to in paragraph 2 (b) or (c), the Prosecutor shall suspend the investigation until such time as the Court makes a determination in accordance with article 17.

8. Pending a ruling by the Court, the Prosecutor may seek authority from the Court:

- (a) To pursue necessary investigative steps of the kind referred to in article 18, paragraph 6;
- (b) To take a statement or testimony from a witness or complete the collection and examination of evidence which had begun prior to the making of the challenge; and
- (c) In cooperation with the relevant States, to prevent the absconding of persons in respect of whom the Prosecutor has already requested a warrant of arrest under article 58.

9. The making of a challenge shall not affect the validity of any act performed by the Prosecutor or any order or warrant issued by the Court prior to the making of the challenge.

10. If the Court has decided that a case is inadmissible under article 17, the Prosecutor may submit a request for a review of the decision when he or she is fully satisfied that new facts have arisen which negate the basis on which the case had previously been found inadmissible under article 17.

11. If the Prosecutor, having regard to the matters referred to in article 17, defers an investigation, the Prosecutor may request that the relevant State make available to the Prosecutor information on the proceedings. That information shall, at the request of the State concerned, be confidential. If the Prosecutor thereafter decides to proceed with an investigation, he or she shall notify the State to which deferral of the proceedings has taken place.

Article 20

Ne bis in idem

1. Except as provided in this Statute, no person shall be tried before the Court with respect to conduct which formed the basis of crimes for which the person has been convicted or acquitted by the Court.

2. No person shall be tried by another court for a crime referred to in article 5 for which that person has already been convicted or acquitted by the Court.

3. No person who has been tried by another court for conduct also proscribed under article 6, 7 or 8 shall be tried by the Court with respect to the same conduct unless the proceedings in the other court:

(a) Were for the purpose of shielding the person concerned from criminal responsibility for crimes within the jurisdiction of the Court; or

(b) Otherwise were not conducted independently or impartially in accordance with the norms of due process recognized by international law and were conducted in a manner which, in the circumstances, was inconsistent with an intent to bring the person concerned to justice.

Article 21

Applicable law

1. The Court shall apply:

(a) In the first place, this Statute, Elements of Crimes and its Rules of Procedure and Evidence;

(b) In the second place, where appropriate, applicable treaties and the principles and rules of international law, including the established principles of the international law of armed conflict;

(c) Failing that, general principles of law derived by the Court from national laws of legal systems of the world including, as appropriate, the national laws of States that would normally exercise jurisdiction over the crime, provided that those principles are not inconsistent with this Statute and with international law and internationally recognized norms and standards.

2. The Court may apply principles and rules of law as interpreted in its previous decisions.

3. The application and interpretation of law pursuant to this article must be consistent with internationally recognized human rights, and be without any adverse distinction founded on grounds such as gender as defined in article 7, paragraph 3, age, race, colour, language, religion or belief, political or other opinion, national, ethnic or social origin, wealth, birth or other status.

PART 3. GENERAL PRINCIPLES OF CRIMINAL LAW

Article 22

Nullum crimen sine lege

1. A person shall not be criminally responsible under this Statute unless the conduct in question constitutes, at the time it takes place, a crime within the jurisdiction of the Court.

2. The definition of a crime shall be strictly construed and shall not be extended by analogy. In case of ambiguity, the definition shall be interpreted in favour of the person being investigated, prosecuted or convicted.

3. This article shall not affect the characterization of any conduct as criminal under international law independently of this Statute.

Article 23

Nulla poena sine lege

A person convicted by the Court may be punished only in accordance with this Statute.

Article 24**Non-retroactivity *ratione personae***

1. No person shall be criminally responsible under this Statute for conduct prior to the entry into force of the Statute.
2. In the event of a change in the law applicable to a given case prior to a final judgement, the law more favourable to the person being investigated, prosecuted or convicted shall apply.

Article 25**Individual criminal responsibility**

1. The Court shall have jurisdiction over natural persons pursuant to this Statute.
2. A person who commits a crime within the jurisdiction of the Court shall be individually responsible and liable for punishment in accordance with this Statute.
3. In accordance with this Statute, a person shall be criminally responsible and liable for punishment for a crime within the jurisdiction of the Court if that person:
 - (a) Commits such a crime, whether as an individual, jointly with another or through another person, regardless of whether that other person is criminally responsible;
 - (b) Orders, solicits or induces the commission of such a crime which in fact occurs or is attempted;
 - (c) For the purpose of facilitating the commission of such a crime, aids, abets or otherwise assists in its commission or its attempted commission, including providing the means for its commission;
 - (d) In any other way contributes to the commission or attempted commission of such a crime by a group of persons acting with a common purpose. Such contribution shall be intentional and shall either:
 - (i) Be made with the aim of furthering the criminal activity or criminal purpose of the group, where such activity or purpose involves the commission of a crime within the jurisdiction of the Court; or
 - (ii) Be made in the knowledge of the intention of the group to commit the crime;
 - (e) In respect of the crime of genocide, directly and publicly incites others to commit genocide;
 - (f) Attempts to commit such a crime by taking action that commences its execution by means of a substantial step, but the crime does not occur because of circumstances independent of the person's intentions. However, a person who abandons the effort to commit the crime or otherwise prevents the completion of the crime shall not be liable for punishment under this Statute for the attempt to commit that crime if that person completely and voluntarily gave up the criminal purpose.
4. No provision in this Statute relating to individual criminal responsibility shall affect the responsibility of States under international law.

Article 27**Irrelevance of official capacity**

1. This Statute shall apply equally to all persons without any distinction based on official capacity. In particular, official capacity as a Head of State or Government, a member of a Government or parliament, an elected representative or a government official shall in no case exempt a person from criminal responsibility under this Statute, nor shall it, in and of itself, constitute a ground for reduction of sentence.
2. Immunities or special procedural rules which may attach to the official capacity of a person, whether under national or international law, shall not bar the Court from exercising its jurisdiction over such a person.

Article 29**Non-applicability of statute of limitations**

The crimes within the jurisdiction of the Court shall not be subject to any statute of limitations.

Article 98**Cooperation with respect to waiver of immunity and consent to surrender**

1. The Court may not proceed with a request for surrender or assistance which would require the requested State to act inconsistently with its obligations under international law with respect to the State or diplomatic immunity of a person or property of a third State, unless the Court can first obtain the cooperation of that third State for the waiver of the immunity.
2. The Court may not proceed with a request for surrender which would require the requested State to act inconsistently with its obligations under international agreements pursuant to which the consent of a sending State is required to

surrender a person of that State to the Court, unless the Court can first obtain the cooperation of the sending State for the giving of consent for the surrender.

Article 121
Amendments

1. After the expiry of seven years from the entry into force of this Statute, any State Party may propose amendments thereto. The text of any proposed amendment shall be submitted to the Secretary-General of the United Nations, who shall promptly circulate it to all States Parties.

2. No sooner than three months from the date of notification, the Assembly of States Parties, at its next meeting, shall, by a majority of those present and voting, decide whether to take up the proposal. The Assembly may deal with the proposal directly or convene a Review Conference if the issue involved so warrants.

3. The adoption of an amendment at a meeting of the Assembly of States Parties or at a Review Conference on which consensus cannot be reached shall require a two-thirds majority of States Parties.

4. Except as provided in paragraph 5, an amendment shall enter into force for all States Parties one year after instruments of ratification or acceptance have been deposited with the Secretary-General of the United Nations by seven-eighths of them.

5. Any amendment to articles 5, 6, 7 and 8 of this Statute shall enter into force for those States Parties which have accepted the amendment one year after the deposit of their instruments of ratification or acceptance. In respect of a State Party which has not accepted the amendment, the Court shall not exercise its jurisdiction regarding a crime covered by the amendment when committed by that State Party's nationals or on its territory.

6. If an amendment has been accepted by seven-eighths of States Parties in accordance with paragraph 4, any State Party which has not accepted the amendment may withdraw from this Statute with immediate effect, notwithstanding article 127, paragraph 1, but subject to article 127, paragraph 2, by giving notice no later than one year after the entry into force of such amendment.

7. The Secretary-General of the United Nations shall circulate to all States Parties any amendment adopted at a meeting of the Assembly of States Parties or at a Review Conference.

Article 123
Review of the Statute

1. Seven years after the entry into force of this Statute the Secretary-General of the United Nations shall convene a Review Conference to consider any amendments to this Statute. Such review may include, but is not limited to, the list of crimes contained in article 5. The Conference shall be open to those participating in the Assembly of States Parties and on the same conditions.

2. At any time thereafter, at the request of a State Party and for the purposes set out in paragraph 1, the Secretary-General of the United Nations shall, upon approval by a majority of States Parties, convene a Review Conference.

3. The provisions of article 121, paragraphs 3 to 7, shall apply to the adoption and entry into force of any amendment to the Statute considered at a Review Conference.

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2005, Paperback, 284 pp.
ISBN-10: 90-76441-03-0
ISBN-13: 978-90-76441-03-0
Price: € 40.00