

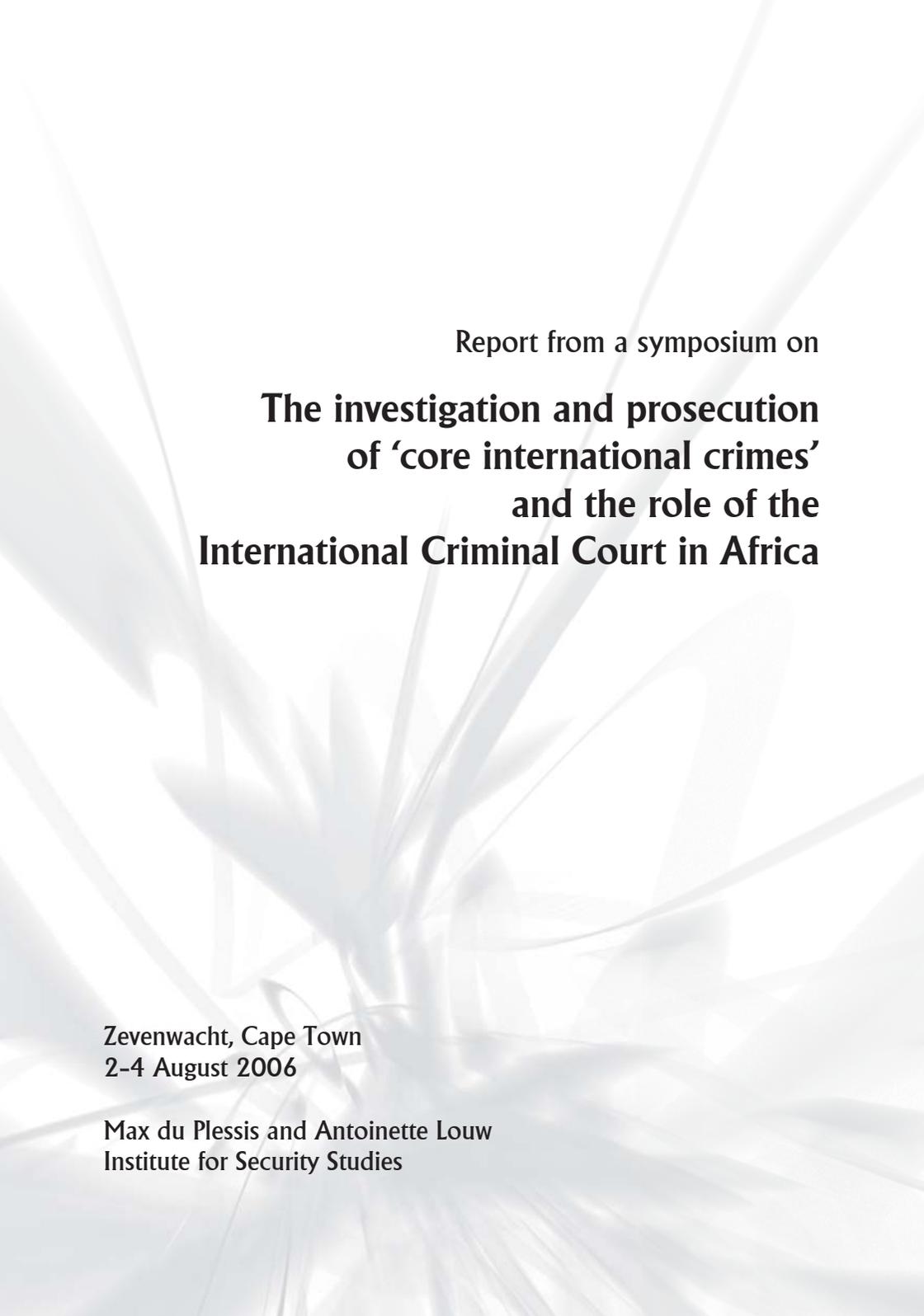


The Open Society Foundation
for South Africa

Report from a symposium on
**The investigation and prosecution
of 'core international crimes'
and the role of the
International Criminal Court in Africa**

Zevenwacht, Cape Town
2-4 August 2006

Max du Plessis and Antoinette Louw
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Introduction and objectives

Over 2 to 4 August 2006 the Institute for Security Studies (ISS), with funding from the Open Society Foundation South Africa, brought together a group of 47 local, regional and international experts¹ to a symposium on the investigation and prosecution of 'core international crimes' and the role of the International Criminal Court (ICC) in Africa. The symposium was held at Zevenwacht Wine Estate near Cape Town in the Western Cape.

Given the perceived importance of political support by the AU for the ICC, the organisers invited leading representatives from the ICC, the AU, and international stakeholders to a closed symposium on the topic: "The Investigation and Prosecution of 'Core International Crimes' and the Role of the International Criminal Court in Africa". The objectives were twofold:

- To help lay the foundation for greater cooperation between the African Union and the International Criminal Court. By cooperation is meant that the AU: i) takes up the fight against impunity; ii) provides training and support to African states as part of a concerted effort to strengthen complementarity between African states and the ICC; (iii) adopts an AU initiative/plan to strengthen capacity of domestic criminal justice systems and to ensure the effective prosecution of international crimes committed on the continent.
- To highlight the problems and politics of prosecuting international crimes with a view to enhancing domestic capacity in African states to deal with such prosecutions. The idea was to identify critical areas where national criminal justice officials are likely

¹ A list of the symposium's participants is attached as Appendix 1.

to need support/training in investigating and prosecuting international crimes.

The symposium was organised by Antoinette Louw (Senior Research Fellow at the ISS) with assistance from Professor Max du Plessis (University of KwaZulu-Natal, Durban, KwaZulu-Natal Bar), Advocate Howard Varney (Johannesburg Bar) and Cecile Aptel Williamson (Head, Legal Advisory Section, UN International Independent Investigation Commission).

The motivation behind the symposium

The rise of the International Criminal Court

The idea of a permanent international criminal court was on the international agenda for much of the last century.² It took the aggressive war conducted by Germany and the atrocities committed by its officials and soldiers during World War II to provide the requisite impetus for the creation by Allied powers of an *ad hoc* international military tribunal at Nuremberg³ (a similar tribunal was constituted in Tokyo⁴ in respect of crimes committed by Japan's leaders). The enthusiasm generated by Nuremberg and Tokyo for a permanent court in the immediate post war period was, however, abandoned during the Cold War. Even the consensus between East and West over apartheid failed to produce the court proposed to try apartheid's criminals in the late 1970s.⁵ The stars truly had to be aligned before a permanent international criminal court could be created.

That alignment was eventually achieved because of two horrific events in the 1990s. The idea of a permanent criminal court for the world had been placed back on the international agenda through a proposal by Latin American states who envisaged such a court as their last resort to prosecute international drug-traffickers.⁶ Thereafter the International

2 For an account of this history see B Ferencz, *An International Criminal Court: A Step towards World Peace – A Documentary History and Analysis*, 1980.

3 See T Taylor, *The Anatomy of the Nuremberg Trials*, 1992. The judgment of the Nuremberg Tribunal is published in 41 *AJIL*, 1947, p 172.

4 AC Brackman, *The Other Nuremberg: The Untold Story of the Tokyo War Crimes Trials*, 1989.

5 In 1979 the United Nations Human Rights Commission instructed Professor M Cherif Bassiouni to draft a statute for an international court to try offenders under the 1973 International Convention on the Suppression and Punishment of the Crime of Apartheid. A statute was drafted but no action was taken on the project: see M Cherif Bassiouni, *A Draft International Criminal Code and Draft Statute for an International Criminal Tribunal*, 1987, pp 10-11.

6 See K Kittichaisaree *International Criminal Law*, 2001, p 27.

Law Commission was directed by the UN General Assembly to consider the drafting of a statute of an international criminal court. The early 1990s saw the Commission prepare a draft statute for such a court and by 1994 a formal Draft Statute for an International Criminal Tribunal was adopted by the ILC and forwarded to the General Assembly for consideration.⁷

During the time that the Commission was preparing the Draft Statute, events compelled the creation of a court on an *ad hoc* basis to respond to the atrocities that were being committed in the former Yugoslavia. That tribunal, the International Criminal Tribunal for the Former Yugoslavia, was established by the Security Council in 1993 and mandated to prosecute persons responsible for serious violations of international humanitarian law committed in the territory of the former Yugoslavia since 1991.⁸ Then, in November 1994, and acting on a request from Rwanda, the Security Council voted to create a second *ad hoc* tribunal, charged with the prosecution of genocide and other serious violations of international humanitarian law committed in Rwanda and in neighbouring countries during 1994.⁹

These two tribunals are still in operation (although they are both aiming to wind down operations in the foreseeable future). The Rwanda and Yugoslav Tribunals fuelled the widespread belief that a permanent international criminal court was desirable and practical. When delegates convened in Rome in 1998 to draft a statute for a permanent international criminal court, the Tribunals could provide a reassuring model of how such a court might function. In addition to the example which the Tribunals provided of working criminal justice, the innovative international criminal law jurisprudence that they had produced – such as the progressive view that crimes against humanity could be

committed in peacetime,¹⁰ and the finding that war crimes could be committed during an internal armed conflict¹¹ – fed into the debates at Rome and eventually came to be reflected in the Rome Statute.¹²

The Statute of the International Criminal Court was adopted on 17 July 1998 by an overwhelming majority of the states attending the Rome Conference. The conference was specifically organised to secure agreement on a treaty for the establishment of a permanent international criminal tribunal. After five weeks of intense negotiations, 120 countries voted to adopt the treaty. Only seven countries voted against it (including China, Israel, Iraq, and the United States) and 21 abstained. By the 31 December 2000 deadline, 139 states had signed the treaty which would come into force upon 60 ratifications. Sixty-six countries – six more than the threshold needed to establish the court – ratified the treaty on 11 April 2002. To date, the Rome Statute has been signed by 139 states and 104 states have ratified it.¹³

Africa and the International Criminal Court

Africa has already demonstrated a clear commitment to the ideals and objectives of the ICC: more than half of all African states (28) have ratified the Rome Statute, and many have taken proactive steps to ensure effective implementation of its provisions.

The Court's first cases all involve atrocities committed on African soil. ICC prosecutors have issued arrest warrants for five commanders of the Lord's Resistance Army in Uganda, are investigating the conflict

7 See J Crawford, The ILC's Draft Statute for an International Criminal Tribunal, 88 *AJIL*, 1994, p 140; J Crawford, The ILC Adopts a Statute for an International Criminal Court, 89 *AJIL*, 1995, p 404.

8 SC Resolution 808 of 22 February 1993 and SC Resolution 827 of 25 May 1993. For detailed accounts of the creation of the ICTY see M Cherif Bassiouni and P Manikas, *The Law of the International Criminal Tribunal for the Former Yugoslavia*, Chapters I-III, 1996. See too V Morris and M Scharf, *An Insider's Guide to the International Criminal Tribunal for the Former Yugoslavia: A Documentary History and Analysis*, 1995.

9 SC Resolution 955 of 8 November 1994. For detail see C Scheltema and W van der Wolf (eds), *The International Tribunal for Rwanda: Facts, Cases, Documents*, 1999.

10 At Nuremberg 'crimes against humanity' were prosecuted as crimes associated with one of the other crimes within the Nuremberg Tribunal's jurisdiction, namely war crimes and crimes against peace. Since Nuremberg several variants of crimes against humanity developed, not all with a nexus with armed conflict (the most prominent example is genocide – the most egregious form of crime against humanity – which the Genocide Convention of 1948 defines as an offence which can be committed in times of peace and war). The requirement of a nexus with armed conflict was firmly done away with by the Yugoslavia Tribunal in its celebrated decision in *Prosecutor v Tadic* (Case No. IT-94-1-AR72), 2 October, 1995, 35 *ILM*, 1997, p 32. Article 7 of the Rome Statute codifies this evolution of crimes against humanity as being crimes committed either in times of peace or war.

11 See *Tadic* above n 10. Interesting developments have also come out of the Rwanda Tribunal's decisions. For instance, in the *Akayesu* matter (Judgment, ICTR Trial Chamber (2 September 1998), Case No. ICTR-96-4-T), the Rwanda Tribunal came to the enlightened conclusion that rape could constitute an act of genocide.

12 WA Schabas, *An Introduction to the International Criminal Court*, 2004, p 12.

13 For latest ratification status see <www.iccnw.org>.

in Darfur, have been asked by the Central African Republic to open an investigation into war crimes there, and are investigating mass atrocities committed in the Ituri region of the Democratic Republic of the Congo.

The Court's first accused is an African warlord called Thomas Lubanga. Lubanga, a former leader of the Union of Congolese Patriots, is currently being detained in The Hague where a pre-trial hearing is now under way to test the evidence against him of recruiting child soldiers, some as young as 10 years, and forcing them to kill and mutilate his enemies. If charges are pressed, the ICC's first prosecution will begin within weeks. Conviction could mean a maximum sentence of life imprisonment.

Africa is thus high on the Court's agenda. This is an important development for those committed to post-conflict peacebuilding. One of the key elements of long-term peace and sustainability is strengthening the rule of law and access to justice. Equally important is developing mechanisms to manage and prevent conflict, and creating accountability in government. In Africa, post-conflict peacebuilding is threatened by the widespread lack of accountability among those responsible for the continent's many violent conflicts that are characterised by torture, rape, murder, and other atrocities. The pervasive culture of impunity threatens newly established peace processes – not only because those responsible for atrocities remain free to commit further acts, but also because impunity fuels a desire for revenge which can lead to further violence. Moreover, public confidence in attempts to establish the rule of law is undermined, as are the chances of establishing meaningful forms of accountable governance.

Albeit few, there are signs that these challenges are beginning to be understood by countries such as Rwanda, Sierra Leone, and Ethiopia. Rwanda has devoted huge efforts to the national prosecution of those responsible for the 1994 genocide, and justice initiatives in Sierra Leone – although largely implemented by the international community – have included national dimensions. Ethiopia is trying to ensure that the worst crimes committed by Menghistu and his regime are duly tried in national courts.

However, for most African countries, the national judicial systems are often too weak to cope with the burden of rendering justice for these crimes. 'International crimes' including war crimes, crimes against

humanity and genocide are characterised by large numbers of victims and perpetrators, and are often committed with the complicity, if not the active participation, of state structures or political leaders. This means that the political pressure may be too great for national justice systems to cope with. Successful domestic prosecutions are further limited by resource and skills shortages, together with the strain of establishing functional criminal justice systems in countries with little tradition of democracy and the rule of law.

In circumstances such as these, when the national justice system is unable or unwilling to investigate or prosecute those responsible, the international community can and should assist. The ICC is one of the most symbolically and practically important tools in this regard. And Africa – at least for the time being – is where the Court will be kept most busy. Africa is currently the only continent in the world where the ICC is active. It is the most represented region in the ICC's Assembly of States Parties with 28 countries having ratified the Rome Statute, and generally the continent where international justice is in the making.

Ensuring the success of the ICC is important for peacebuilding efforts on the continent. However, the task of reversing the culture of impunity for international crimes cannot simply be devolved to the ICC. Apart from many African states' well-known resistance to interventions perceived as emanating from or being imposed by the 'West', the ICC faces several challenges, not least of which is the scale of the impunity problem.

In reality, the Court will be able to tackle a selection of only the most serious cases. And even if it did have the capacity to handle higher volumes of cases, this would be limited by the fact that the ICC is, by design, a 'court of last resort' – with the main responsibility for dealing with alleged offenders resting with domestic justice systems. Governed by the principle of complementarity, this means that the ICC can only act in support of domestic criminal justice systems. National courts should be the first to act, and only when they are 'unwilling or unable' to do so, can the ICC take up the matter. This implies a certain level of technical competency among domestic criminal justice officials.

The ICC's impact in Africa will thus be limited by the extent to which countries have ratified the Rome Statute and developed complementary national legislation – processes that rely equally on domestic capacity as well as political support among states for ending impunity and for the

ICC as an institution. The process is one that per force must be driven within each state's domestic legislative and executive framework. At the same time, regional support by the African Union for the ICC and its work is an essential ingredient to ensure the political impetus necessary to make the ICC a reality on the African continent.

Therefore, the philosophy that underlay the symposium is the idea that the success of the ICC's perceptibly difficult task of prosecuting the world's worst crimes will depend to a significant degree on the political will and support of Africa's states and their regional body, the African Union.

Overview of issues covered

The symposium was held over two days, and the agenda is included as Appendix 2. In what follows, a short description is provided of the topics covered by the various experts who attended.¹⁴ Speakers' papers are provided in full in the next section.

The first day of the symposium began with an overview by Judge Navi Pillay of the rise of the International Criminal Court with particular emphasis on the complementarity regime and what that means for the African states that are party to the Rome Statute. Judge Pillay was followed by the Deputy Prosecutor of the International Criminal Court, Fatou Bensouda, who provided an update on the latest developments in international criminal justice on the African continent. Ms Bensouda spoke in particular on the ICC's current prosecutions and investigations and the challenges faced by the prosecutor with special reference to Africa and the need for collaboration with and support from the African Union.

The morning session ended with a discussion by Dr Admore Kambudzi about the AU and the ICC with special reference to the possible role that the AU sees for itself with respect to the ICC and international criminal justice more generally. The session was chaired by Pansy Tlakula of the African Commission on Human and Peoples' Rights.

The afternoon session on the first day, chaired by Cecile Aptel Williamson, provided the opportunity for skilled international prosecutors to speak about their experiences in the prosecution and investigation of core international crimes. The prosecutors concerned were Maxine Marcus who focused on the Sierra Leone Special Court, Bongani Majola who considered the experience of the International Criminal

¹⁴ A short biography of the speakers and chairpersons who attended the symposium is attached as Appendix 3.

Tribunal for Rwanda, and Richard Buteera who spoke on the challenges of prosecuting international crimes in Uganda's domestic courts.

The assumption was that the experience of these prosecutors is likely to be of assistance to any domestic prosecutor who in future – under complementarity or otherwise – undertakes to prosecute an international crime. Accordingly, each of the speakers in this session provided a succinct summary of the context in which international crimes are being investigated and prosecuted in their region (whether by domestic court or by international tribunal), whether other mechanisms such as truth commissions are being employed alongside criminal prosecutions, and how such commissions impact on their prosecutorial/investigative work.

In their discussion, and drawing upon their relevant experience, speakers commented on best practices and on the main challenges facing the prosecution and investigation of core crimes. Speakers also dealt with the question of the availability of resources, witness protection, and security for prosecutors and investigators (particularly in situations of on-going atrocities and crimes). Each speaker concluded by identifying critical areas where national criminal justice officials are likely to need support in investigating and prosecuting these crimes. Howard Varney acted as rapporteur for this session and concluded with his views on 'lessons and legacies' arising from the presentations made by the afternoon's speakers.

The first session of the second day was dedicated to the 'politics and problems of international criminal justice in Africa'. Judge Richard Goldstone chaired this important session. Howard Varney provided a domestic example by covering the Malan and other prosecutions in South Africa and touched on the challenge posed by the seeming lack of current political will to prosecute apartheid crimes. Thereafter, Reed Brody spoke on Chad and the African Union's involvement in the Hissen Habre matter. He was followed by Yasmin Sooka who provided an update on the indictment by the Special Court for Sierra Leone of Charles Taylor.

The session ended with Judge Goldstone reflecting on some of the problems and politics of international criminal justice viewed from his perspective as former Chief Prosecutor for the International Criminal Tribunals for Rwanda and the Former Yugoslavia.

The first afternoon session of the second day was chaired by Yasmin Sooka. Speakers in this session focused on the topic of justice, the timing of restorative and retributive interventions, and the challenge of ensuring that justice is seen to be done. In this regard Graeme Simpson spoke about the tensions that exist between the achievement of retributive justice by way of prosecution and other restorative forms of justice exemplified by truth commission processes, particularly in regard to Africa. Mr Simpson related this tension to the African Union and considered whether the AU might play a meaningful role in assisting the ICC regarding questions such as timing of investigations and prosecutions, brokering of peace-deals, assessing local capacity and willingness to prosecute. Thereafter, Ron Slye spoke on the problem of amnesties specifically and the circumstances under which they might trump or stall international prosecution of crimes.

The final session of the day was chaired by Martin Polaine and considered the challenge of ensuring collaboration and cooperation between the ICC and other international role players, in particular the AU. Fatou Bensouda gave her view of the best way in which the AU might assist the work of the ICC in Africa, and Admore Kambudzi, on behalf of Patrick Tigere of the AU, provided a response and highlighted the steps the AU has already taken towards cooperating with the ICC and what further steps the AU intends taking.

Speakers' papers

This section of the report includes edited versions of the papers presented by the speakers who attended the symposium. The papers appear in the order in which they were presented.

The rise of the International Criminal Court, complementarity and domestic prosecution of international crimes

Judge Navi Pillay

The world we inhabit has forever been altered by the setting up of the International Criminal Court (ICC) on 1 July 2002. The ICC is the world's first permanent international criminal court established by treaty by the states that signed and ratified the treaty. After five years of negotiation and drafting, the Rome Statute of the International Criminal Court was adopted on 17 July 1998 and came into force on 1 July 2002 – an important date because that is when the Court's jurisdiction commences. There are currently 100 States Parties to this treaty, 27 African states, 12 Asian, 15 Eastern European, 20 Latin American and Caribbean states and 25 Western European and other states. We have three judges from Africa and there are constant ripples of protest that there should be more because Africa is the majority ratifying continent.

The relationship with Africa is very important to the Court. From its inception at the negotiations over the Rome Statute, African states played an extremely important role. More than any other country, they understood the impact of the commission of massive crimes on their own territories. This understanding is reflected in several ways in the Constitutive Act of the African Union. Consequently it is no surprise that today Africa is the most represented continent among the States Parties to the Court.

The close tie between the Court and Africa is also evident in our current activities. Four situations have been referred to the Court and all relate to situations in African countries. Three of these referrals came from African governments – Uganda, the Democratic Republic of the Congo and the Central African Republic – relating to situations on their own territories. In addition, the Security Council has referred the situation in Darfur, Sudan (a non-State Party).

After analysing the referrals for jurisdiction and admissibility, the Prosecutor began investigations in three situations – Uganda, Democratic Republic of the Congo, and Darfur. The Deputy Prosecutor will no doubt cover the work of her office in these investigations. I will speak more generally about the ICC, focusing on three elements: the establishment and jurisdiction of the ICC, the principle of complementarity, and domestic prosecution of international crimes.

The Court's jurisdiction

The jurisdiction of the Court is limited to the most serious crimes of concern to the international community as a whole. The ICC is not a human rights court. It has jurisdiction over genocide, crimes against humanity and war crimes. The Court's jurisdiction is not universal. It is clearly limited to the most recognised bases of jurisdiction. The Court has jurisdiction over nationals of States Parties or offences committed on the territory of a State Party. The Court's jurisdiction may be triggered in three ways:

- a State Party may refer a situation within the Court's jurisdiction to the Court;
- the Security Council may refer a situation to the Court; and
- the Prosecutor can begin a situation on his own initiative, but only after he receives the approval of a Pre-Trial Chamber of three judges.

Unlike the *ad hoc* tribunals for Rwanda and the former Yugoslavia, also known as the ICTR and ICTY, the mandate of the ICC does not expire. This will allow for the development of institutional expertise and create uniformity in its jurisprudence. In contrast to tribunals constituted in response to a particular war or humanitarian crisis, the ICC will also be

able to act more efficiently since its human and judicial resources will already be in place. The Court's permanence as a forum where potential perpetrators could be tried if their crimes go unpunished by national courts will help deter future crimes.

The Court's relationship with the United Nations

Contrary to frequent misconceptions, the ICC is not a UN court or part of any other political body but rather it is an independent institution and exercises purely judicial functions. The Court however has a relationship with the UN Security Council. During the negotiation debates, states were careful to ensure that the independence given to the Prosecutor does not override the authority of the UN Security Council which is, after all, the highest peacekeeping authority in the world.

So while the principle of the independence of the Prosecutor is respected, the ICC also has a relationship with the UN Security Council written into the Statute. When the Security Council refers a situation to the ICC, the Court will have jurisdiction independent of the nationality of the accused or the location of the crime. The Security Council also has the power to defer an investigation or prosecution for one year in the interests of maintaining international peace and security.

The UN also provides critical support to the Court. The UN and the Court cooperate on a regular basis, both in field activities and in our institutional relations. This cooperation is governed by a relationship agreement signed by the UN Secretary-General and ICC President in October 2004.

The ICC is also developing cooperation with regional organisations. The Court recently signed a relationship agreement with the European Union and is in the process of concluding an agreement with the African Union.

The ICC grew out of the experience of the *ad hoc* tribunals for the ICTY and the ICTR which demonstrated that international justice can be effective when there is political will and the necessary support of nations. Together, these institutions have made it possible to contemplate a world in which political leaders can no longer commit with impunity heinous crimes such as depriving groups of their own citizens of the right to life, of the right to be free from physical harm, sexual violence or

political or religious persecution. For example, the ICTR tried the prime minister of Rwanda, Jean Kambanda, for genocide, sentencing him to life imprisonment; and the ICTY tried Slobodan Milosovic, president of Serbia who died before the conclusion of his trial. Others prosecuted include government, military and civilian leaders.

The principle of complementarity

A background

The International Criminal Court (ICC) operates on an essential principle, especially with respect to its member states and their right to exercise jurisdiction over gross international crimes. This central principle is complementarity – that the ICC can only complement, and not substitute, national criminal procedures. In principle, only when a national procedure fails or when there is no national procedure, is it intended that the ICC will proceed.

The ICC represents a qualitative step forward in the progressive development of international criminal justice. Its predecessors provide an invaluable contribution to the work of the ICC, but they are based on different principles. The Nuremberg and Tokyo Tribunals following World War II were established by the allied powers to prosecute perpetrators of war crimes, which at the time was a new concept. Although invaluable in the development of international criminal law, these tribunals have since been criticised as being born of 'victor's justice'.

The most recent predecessors of the ICC are the *ad hoc* tribunals. Both the ICTY and the ICTR were established by UN Security Council resolutions, in response to given situations, to deal with specific crimes on specific territory during a certain time period. For the time they are operating they have primacy over national tribunals for these crimes. However, in terms of the completion strategy, by 2008 they will transfer cases to the national authorities. Other types of international judicial institutions have also been established, which can be defined as hybrid courts with mixed national and international elements, such as those in Sierra Leone, Cambodia, Kosovo and East Timor.

The ICC is intended to carry out prosecution and punishment for the most heinous crimes wherever they are committed, and yet it does not

have primacy over national courts. Instead it operates on the principle of complementarity. This key feature of the Court means it will intervene only when national jurisdictions are unwilling or unable to investigate or prosecute certain crimes.

Essential features of the system of complementarity

In essence, the complementarity regime results in sharing responsibility between national courts and the ICC, which is aimed at achieving a fundamental objective: to "put an end to impunity" for the perpetrators of the core crimes under international law and "thus to contribute" to their prevention (these are the words used in the preamble of the Rome Statute).

One of the reasons for a complementarity regime is the recognition that national courts are often the best place to deal with international crimes, due to the availability of evidence and witnesses. The purpose of the ICC is not to compete with states for jurisdiction, but to ensure that the most serious international crimes do not go unpunished. States remain obliged to exercise their criminal jurisdiction over individuals responsible for international crimes such as war crimes, genocide, and crimes against humanity. Article 17 of the Rome Statute determines that whenever a crime has been or is being investigated or prosecuted by a state which has jurisdiction over it, the ICC may not admit a case. It is only when national action is lacking or does not meet certain basic requirements of genuineness and fairness, as set out in Article 17, that the ICC is meant to exercise jurisdiction.

On the other hand, the recognition of the primacy of national courts does not mean that the ICC should play a residual or minor role in dealing with international crimes. The Statute stipulates that the existence of a "genuine willingness and ability" to investigate and prosecute on the part of a state is the essential condition for deference to national action, while the competence to determine whether this condition is met, remains with the ICC. In other words, the ICC is supposed to work as a watchdog of national jurisdictions, ready to supplement certain key deficiencies and failures, in order to achieve the objective of bringing to justice those responsible for the most heinous crimes.

'Genuinely willing and able'

Article 17 provides that the ICC may take action in cases when a state is unwilling or unable "genuinely to carry out" an investigation or prosecution. Inability in the Statute is spelled out in Article 17 as situations in which the state is unable to secure the arrest of the accused, unable to obtain the necessary evidence and testimony, or unable to otherwise carry out its proceedings.

The inclusion of inability as a factor triggering a possible case before the ICC aims to cover situations in which a state, though willing, is nevertheless not in a position to fulfill its duty to investigate and prosecute, due to lack of judicial capacity and resources. This may amount to a substantial collapse of the national judicial system, such as occurred in Rwanda in 1994.

Amnesties and pardons

There is no strict rule when it comes to amnesties and pardons. The granting of amnesty or pardon clearly forestalls an investigation on the part of a state, and may demonstrate unwillingness to prosecute. The intent of a pardon or amnesty may not be the same when it comes to Truth and Reconciliation Commissions, such as one would find in South Africa. These commissions do indeed involve inquiries into the facts, and amnesties are granted upon condition of a full disclosure of the criminal acts of the person involved as a way of achieving national reconciliation.

It is therefore clear that states have the primary obligation to conduct investigations and prosecutions of international crimes and their primacy can only be overcome by the ICC's determination that a case is admissible. This is to ensure that national jurisdictions operate as the first line of defence against impunity, and the ICC stands ready to fill the gap when national systems fail, without substituting itself for national authorities.

So, what does this mean for states and their governments?

Essentially, with or without the existence of the ICC, states are under an obligation in international law to prevent and prosecute crimes of genocide, war crimes and crimes against humanity. This obligation is based on international instruments such as the Geneva Conventions, the

Genocide Convention, and international rules relating to torture, genocide and other crimes against humanity. The principle of complementarity is designed to encourage national procedures to be taken in accordance with these obligations. The ICC can step in when a state fails to fulfill these obligations, in which case an obligation to cooperate with the ICC arises.

The obligation to cooperate

By signing the Rome Statute, states have expressed their commitment to the principles of international law and justice that are stated in the preamble, which reiterate the duty to prevent and prosecute international crimes. It 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 by taking measures at the national level and by enhancing international cooperation." So apart from the obligation held by each state to take action wherever it can, there is also an obligation to cooperate with the ICC and with other states.

Article 86 of the Rome Statute stipulates a general obligation to cooperate fully with the Court in its investigation and prosecution of crimes, and in signing the treaty and becoming a party to the Statute, States agree to comply with its content. The obligation to cooperate is therefore an obligation created by states themselves, in order to ensure the effective working of the ICC.

Internationally, just as nationally, it is not possible to run a fair and effective criminal justice system without control of suspects and access to all relevant facts. If the ICC is to fulfill its purpose to end impunity, it must have full cooperation and assistance of states including regional organisations such as the African Union. In practice, this also means that states are obliged to implement the provisions of the Rome Statute at a national level, and must ensure that there are procedures available for all forms of cooperation, as written in Article 88 of the Rome Statute.

Of course a state may withhold information or prevent a person from giving evidence if this would prejudice national security. This is one of the few grounds on which a state may refuse to comply with a request of the Court, under Article 93 paragraph (4). Another ground may be when a request for assistance is inconsistent with a national law, according to Article 93 paragraph (3). In this case, however, the state shall promptly consult with the Court to try and resolve the matter.

For states this means firstly that their own criminal justice systems should be ready and able to deal with international war crimes and crimes against humanity; and secondly that should cooperation be requested by the ICC for a case that has been brought before it, there is a readiness and ability to comply.

Why are national prosecutions of international crimes of interest for states?

- They send a clear signal of public intolerance of these serious crimes.
- They provide a direct form of accountability for perpetrators.
- They ensure justice for victims.
- Criminal trials can also contribute to greater public confidence in the state's ability and willingness to enforce the law.
- For historical public record.
- They delegitimise extremist elements, ensure their removal from the political process and contribute to restoration of peace.

What do national prosecutions mean for Africa?

No other continent has suffered greater political and economic instability, for want of legitimate institutions of law and governance that ensure accountability and an end to the culture of impunity. Many have come to realise that the economic and social development programs of NEPAD (The New Partnership for Africa's Development) can only be achieved if, in addition to good governance, perpetrators of international crimes are brought to justice.

Conflicts and internal armed struggles spill over national boundaries, threatening to destabilise the region, and create the imperative for regional control and leadership from the African Union and The African Court on Human and People's Rights. A significant number of African states have ratified the Rome Statute thereby endorsing their commitment to end impunity for international crimes. The fact that the first three investigations initiated by the Prosecutor of the ICC are in Africa raises questions among Africans as to the focus of the ICC and provides a reason for African states to take charge of national prosecutions of ICC crimes.

All communities in Africa share aspirations of peace, democracy and human rights. When South Africa emerged from a legacy of apartheid, the people sought a new order of equality, dignity and freedom from violence. The post-amble to the SA Constitution articulates a need for, "understanding, but not for vengeance, a need for reparation but not retaliation, a need for *ubuntu* but not victimisation". *Ubuntu* translates as humaneness and in a fundamental sense denotes humanity, dignity and morality.

The ICC will, in its turn, bring the prospect of justice to places in the world where previously impunity, injustice and conflict would have been the expectation. Just go through the dread roll-call of names of Twentieth Century massacres – Armenia, Jews under Nazi occupation, the massacres of Cossacks and Kurds, the killing fields of Cambodia, Rwanda, Bosnia, East Timor, Sierra Leone and currently Uganda, Democratic Republic of Congo and Sudan. The list is endless as one recounts the names that sum up the roughly 170 million civilians who have died in the last century's political violence. We can, by what we are doing now, make such a list a great deal shorter. That would be the short answer to the question as to why we need national prosecutions of international crimes.

In conclusion it must be acknowledged that the ICC alone cannot achieve the goals of peace or justice. Many actors from governments to civil society organisations have a role in a comprehensive and integrated process to foster peace, democratic governance and access to justice. Civil society can provide important forms of support to international courts. Civil society has been particularly involved in urging ratifications of the Rome Statute. Non-governmental organisations also play important roles in the field by assisting victims to apply for participation or reparations and in increasing awareness and understanding of the ICC.

For the very first time the ICC Statute, in particular articles 68 and 75 respectively, provide a right for victims not only to participate in the proceedings but to claim reparation, restitution and compensation. The ICC Registry is holding ongoing consultations with experts like Yasmin Sooka who participated in the Truth and Reconciliation Commission of South Africa and Sierra Leone to advise on principles of reparation. The Pre-Trial Chamber has already granted the status of victims to six applicants in the case arising out of the situation in the DRC.

To be fully effective, we must continue our efforts to ensure that the Court has the support necessary to dispense justice as fairly and efficiently as possible.

The International Criminal Court in Africa: Current cases

Fatou Bensouda

Distinguished delegates, it is my pleasure to address you today and provide you with an update of the work of the International Criminal Court (ICC) in Africa. I look forward to the fruitful discussions that will surely be taking place throughout this symposium, and the exchange of ideas in achieving our common goal of international justice.

We have an important task at the ICC, to hold persons who commit crimes considered gravest by the international community as a whole accountable for their actions. In doing this we also want to have an impact on the prevention of future crimes. Our goal is to bring to an end the culture of impunity by investigating and prosecuting the commission of crimes that have a devastating impact on the societies in which they are committed.

As you are aware we have three opened investigations: Uganda, DRC and Sudan. The first two were initiated by state referrals and in the case of Sudan, by a referral from the United Nations Security Council pursuant to Resolution 1593 (2005). Two of these investigations, namely Uganda and DRC, have progressed to the judicial phase. To date various pre-trial proceedings have taken place and I would like to share with you some of the recent developments in the cases.

Uganda

As previously mentioned, the Office of the Prosecutor's (OTP) analysis of the situation in Northern Uganda was triggered by that government's referral of December 2003 and the decision to open an investigation on 29 July 2004, following an independent analysis of information obtained from a wide variety of sources. Whilst the government referral made specific reference to an armed group active in that part of the country, the Lord's Resistance Army (LRA), the Prosecutor interpreted this referral to

include all crimes committed in Northern Uganda.

The selection of the first case followed an impartial analysis of the information using objective criteria. It is important to recognise that while the OTP selects its cases in an impartial manner, this does not imply an equivalence of blame. The first case selected was that of the LRA because the evidence showed that these were the gravest crimes within the ICC jurisdiction. However, the OTP investigation in the situation of Northern Uganda continues until today and may yield further prosecutions.

In May 2005, the Prosecutor requested under seal, the issuance of warrants of arrest against five leaders of the LRA. In July 2005, Pre-Trial Chamber II (PTC II) issued warrants of arrest against: Joseph Kony, Vincent Otti, Raska Lukwiya, Okot Odhiambo and Dominic Ongwen. In October 2005, the PTC made public, in redacted form, the warrants of arrest. The PTC also issued requests for arrest and surrender to the governments of Uganda, DRC and Sudan. At the same time the PTC unsealed, fully or in redacted form, other documents in the record which were previously kept under seal.

Since the unsealing of the warrants of arrest, the PTC and the OTP have been in continuous dialogue to unseal additional documents, in order to keep the record as transparent as possible. The OTP has also requested PTC II to enter into the public record the reasons for any sealing or redaction of any document of the record of the situation or of the case. The latest document to be unsealed was on 6 July 2006. The PTC unsealed the DNA results of a test conducted on the body reported to be that of LRA commander Dominic Ongwen. The DNA results revealed that the body was not that of Dominic Ongwen.

To this day the suspects are still at large. The prosecution team dealing with the Uganda case is in an interim phase while the arrest warrants are executed. The investigation is still ongoing and additional information is being gathered. Further progress in the prosecution of the case rests in the cooperation of states in the execution of the five warrants of arrest.

With regard to the peace process in the region, the Prosecutor has remained in close contact with those individuals and groups involved in efforts to mediate with the LRA. We have also been following the recent reports of meetings taking place between the government of Southern Sudan and the LRA, in an attempt to mediate a peaceful

solution to the conflict. We are not party to those discussions but we continue to work together with the government of Uganda and the other affected states in the region to find a lasting solution involving both peace and justice. The Prosecutor has also stated that he will not issue further warrants against members of the LRA for past crimes. We therefore encourage national and local efforts to persuade other members of the LRA to return and take advantage of mechanisms for reintegration and reconciliation.

The LRA commanders are today located in Northern Uganda, Southern Sudan and Eastern DRC. We have seen that they are now very much in the news what with the present peace talks going on which we continue to monitor. We must remind ourselves that they continue to be a regional threat and therefore require a coordinated regional solution with international support.

Democratic Republic of Congo (DRC)

After the referral of the Government of the DRC in March 2004, the DRC situation was assigned to Pre-Trial Chamber I (PTC I) on 5 July 2004. On 12 January 2006 the OTP submitted an application for the issuance of a warrant of arrest against Thomas Lubanga Dyilo. Following this application, on 10 February the PTC issued the arrest warrant against Lubanga. On 17 March 2006, in Kinshasa, Lubanga, a Congolese national and alleged founder and leader of the Union des Patriotes Congolais (UPC) was arrested and transferred to the ICC. Lubanga is the first person to be arrested and transferred to the ICC since the entry into force of the Statute in July 2002.

Upcoming developments in the Lubanga case include the confirmation hearing scheduled for 28 September 2006. Additionally, a Single Judge of the PTC decided that the parties in the case must disclose and file any Rule 81 applications, in regards to redactions of witness statements, by 28 August 2006. On the same date the Judge requested that the Prosecution must file the document containing the charges and the list of evidence, the former in a case matrix format.

An issue that has been pending since the end of May 2006 is an application for release which was submitted by the defence, based on the argument that Thomas Lubanga was imprisoned illegally in the

DRC prior to his surrender to the ICC, which meant that his detention in The Hague was illegal too. The OTP has asked the PTC to deny such application. It is expected that there will be a hearing on this matter in the near future. Moreover, status conferences are being held every 3–4 weeks on the status of disclosure and this will continue until the confirmation hearing in September.

During the investigation stage of the DRC situation, six victims applied for participation. As a measure to protect these victims, their identity is not known by outside parties. On its decision of 17 January 2006, PTC I granted them the status of victims, a pre-requisite to their participation, and set out a framework for their participation which allows them to have, for now, a limited role in the proceedings. They can present their views and concerns to the PTC, file documents, and request the PTC to order specific measures.

On 31 March 2006, the PTC I denied our application under article 82(1)(d) of the Statute for leave to appeal its decision of 17 January. Consequently, the Prosecutor requested the Appeals Chamber on 24 April 2006 to conduct an extraordinary review of the PTC I's decision of 31 March 2006 denying leave to appeal. On 13 July 2006 the Appeals Chamber dismissed the application of the Prosecutor for the "Extraordinary Review" of a decision of Pre-Trial Chamber I, denying leave to appeal under article 82(1)(d) of the Statute. The Appeals Chamber determined that the Statute confers no jurisdiction for review of the decisions denying leave to appeal nor does the absence of such power constitute a lacuna in the Statute.

Overall, we are at a developmental stage in the case where procedural aspects are taking shape. As this is the first case before the Court there are procedural matters being addressed and defined by the Chambers for the first time. Despite this being a lengthy process, it is of great importance not only to this case but for future cases.

Sudan

In regards to the situation in Darfur, the Prosecutor opened the investigation on 1 June 2005 following the United Nations Security Council Resolution 1593 (2005) of 31 March 2005, in which the Security Council referred the situation in Darfur to the Prosecutor of the ICC.

The Prosecutor has recently submitted his third report to the UN Security Council, highlighting the advances in the investigation and the challenges that are being faced.

Overall, we are in still in the investigation stage, gathering information by looking at factors such as the scale and nature of the crimes, as gravity of the crimes is central to the process of case selection. Credible information in our possession indicates that crimes have been committed on a large scale, including the killing of a large number of civilians, the pervasive pattern of rape and sexual violence, the displacement of civilians and the destruction of property and looting throughout Darfur.

At this investigative phase we are facing problems related to the protection of and access to victims and witnesses. Therefore, the investigation team has been working in countries around Sudan, such as Chad, where they have had easier access to victims and witnesses.

We anticipate the Darfur situation will bring the investigation and prosecution of a sequence of cases, rather than a single case dealing with the situation in Darfur as a whole. We are aiming for the first case to stem from a very focused investigation and to charge the individuals who bear the most responsibility. In regards to the identification of individual criminal responsibility in the current stage of investigation, the prosecution has identified specific cases for full investigation and possible prosecution. However, we are still gathering the necessary information.

After the decision to open an investigation was announced by the Prosecutor in June 2005, Sudan informed us that they had established a new Special Court to deal with crimes committed in Darfur. Other mechanisms were subsequently opened such as: the National Commission of Inquiry, Ad Hoc Committees and the Committees against Rape. These actions invoked the complementarity framework under the Rome Statute. However, based on OTP assessments, it does not appear that the national authorities have investigated or prosecuted, or are investigating or prosecuting, cases that are or will be the focus of OTP's attention such as to render those cases inadmissible before the ICC. Ongoing assessment of these national mechanisms will be conducted.

The Darfur investigation is entering a new phase where the OTP will seek to complete the investigation of those individuals with

greatest responsibility for the most serious crimes. The achievement of our objectives in an expeditious manner will require the full support of the Security Council and the unfettered cooperation of the international community, in particular the government of the Sudan and all parties to the conflict, as well as the African Union and the United Nations.

The prosecution division expects a substantial increase of procedures both before the Pre-Trial Chambers and Trial Chambers in the future. The particular challenge we face lies in the fact that none of the articles of the Rome Statute nor the Rules of Evidence and Procedure have ever been tested or challenged before the Court. It is expected that various legal technical issues will continue to come up for clarification and interpretation and that they will require substantial efforts from all three trial teams to commonly build solid legal bases.

There is a lot of work ahead of us, but we are committed to bringing justice to those who need it. Aside from bringing those responsible for serious crimes to court, our goal is to create an impact – a deterrent impact – so that these crimes do not happen again. I trust that this overview of the progress in our three cases has given you a good idea of the range of issues and challenges that we face.

The International Criminal Court and Africa: The AU and the ICC¹⁵

AM Kambudzi

This paper considers the newly established but fast growing cooperation and partnership between the African Union (AU) and the International Criminal Court (ICC) – both of which are institutions in their infancy. In so doing, the paper draws on the AU's approach to issues of peace, security, stability and development in Africa in relation to the ongoing efforts to work harmoniously with an international legal mechanism that could assist the continent in achieving its goals in these areas.

Accordingly, the paper is divided into two sections. The first focuses on the new AU continental peace and security architecture in order

¹⁵ The views expressed here are those of the author only, and no other party.

to contextualise the functional relations the AU may promote with other international organisations in the domain of peace, security and development. The second section of the paper deals with the evolving cooperation and partnership between the AU and the ICC. In that regard, the potential dividends to Africa from AU–ICC cooperation will be highlighted, as well as the challenges of developing that cooperation and partnership.

AU continental peace and security architecture

One could argue that an end to violent conflict and bad governance, in all their forms, and the building of a culture of peace guided by an acceptance of diversity, inclusiveness and justice, remains a foremost challenge for Africa. It is noteworthy that since the beginning of the post-independence era, the continent has not had a respite from the ugly scenarios of violent conflict and poor political and economic governance.

The 1990s were characterised by a proliferation of internal crises and violent internal conflicts in different parts of Africa, all of them closely, but not exclusively linked to the disequilibrium that the end of the Cold War brought to the continent. The African one-party regimes collapsed one after another, leaving a trail of uncertain political transitions and a syndrome of instability in each affected country, with cross-border implications. Yet the continent was ill prepared to deal with those crises and conflicts, notwithstanding the many efforts of the Organisation of African Unity (OAU), formed in 1963, to equip the continent with effective mechanisms to prevent or resolve conflicts.

In view of those crises and conflicts, and the general transformation then taking place on a global scale, African leaders adopted the 'Declaration on the Political and Socio-Economic Situation in Africa and the Fundamental Changes Taking Place in the World'. In that declaration, the Heads of State and Government noted that:

No single internal factor has contributed more to the present socio-economic problems on the Continent than the scourge of conflicts within and between our countries. They have brought about death and human suffering, engendered hate and divided nations and families. Conflicts have forced millions of our people into a drifting life as refugees and internally displaced persons, deprived of their means of livelihood, human dignity and hope. Conflicts have gobbled up scarce

resources and undermined the ability of our countries to address the many compelling needs of our people.¹⁶

It was this sentiment that laid the foundation for the conception, over time, of the AU peace and security agenda as currently pursued by the new continental peace and security architecture.

Threats that the AU peace and security architecture must deal with

Over the past decades, the security situation on the continent has been marked by the following conditions which the AU has tackled using its peace and security architecture:

- collapse of state institutions, exemplified in countries like Liberia, Sierra Leone, and the Democratic Republic of Congo (DRC);
- disintegration of the state in the case of Somalia;
- an increase in communal conflicts emerging mainly from inter-group rivalry and the collapse of old patterns of relationships as well as the social fabric upon which any community thrives;
- conflicts over ownership, management and control of natural resources despite the African continent being sufficiently endowed with these resources to meet the needs of all its people;
- a slow response, or a lack of response, from the United Nations (as was the case with the Rwanda genocide), and even a withdrawal of peacekeeping operations in some cases (as in Somalia);
- rampant war-generated crimes and pervasive indifference and helplessness vis-à-vis civilian suffering;
- the proliferation and stockpiling of small arms and light weapons;
- a rise in the activities of terrorists, mercenaries, warlords, irregular militia and other transnational organised criminal groups;
- a rise of new forms of security threats, including money laundering, human trafficking, drugs and cyber-crimes;
- unconstitutional changes of government;
- the violation of international humanitarian law.

The above conditions constitute the threats and problems that the peace and security architecture must deal with in order to bring about a peaceful

¹⁶ Summit of the Heads of State and Government, Addis Ababa, July 1990.

dispensation on the continent. It is now a commonly shared view in Africa that, without peaceful social and political systems and productive economic systems, the processes of post-conflict reconstruction and development will continue to falter.

Essence of the continental peace and security architecture

The term 'architecture' might appear to be a misnomer when addressing issues of peace and security, human rights, justice and democracy. Yet it makes sense in terms of what the AU has started doing in this domain: building interwoven functionality and operationally coherent mechanisms at the continental, regional, sub-regional and national levels aimed at preventing, managing and resolving crises and conflicts, as well as taking care of the tasks of post-conflict reconstruction, peacebuilding, revitalisation of state institutions, rebuilding the societal fabric and development.

The essence and spirit of the architecture is best set out in the Protocol Establishing the Peace and Security Council (PSC) of the AU. In the Protocol, a vision of a more robust apparatus for anticipating and preventing crises and conflicts is self-evident. The idea is to place the entire continent under a kind of radar of permanent observation and interpretation of any signals that may be symptomatic of a simmering crisis about to explode into a disruptive conflict. Such signals will then trigger immediate remedial action – the so-called early response.

Thus the emphasis in the peace and security architecture is on the early detection and prevention of crises and conflicts and on timely and effective intervention to deal with those conflicts that erupt into violence. Not least, emphasis is also placed on the need to promote democratic political and economic governance as a way of meeting the needs of all sectors of society in a peaceful way. In this regard, the cooperation of the governing authorities, civil society and the private sector is crucial. This is not to exclude the media which also has a vital role to play in the promotion of good governance.

As provided for in the PSC Protocol, the components of the peace and security architecture that must always act in consonance are, in addition to the decision making Peace and Security Council itself:

- Chairperson of the Commission;
- Panel of the Wise;
- Continental Early Warning System;
- Peace Fund (provision of resources to carry out interventions);
- African Standby Force and the Military Staff Committee;
- Regional Mechanisms of the Regional Economic Communities.

In addition, the peace and security architecture includes:

- the African Union Non-Aggression and Common Defence Pact, adopted by the 4th Ordinary Session of the Assembly of the Union, held in Abuja, Nigeria, in January 2005;
- the Common African Defence and Security policy (CADSP), adopted by the 2nd Extraordinary Session of the Union held in Sirte, Libya, in February 2005;
- other security instruments of the AU, including the Treaty Establishing the African Nuclear Weapons-Free Zone (the Pelindaba Treaty), and the Convention for the Prevention and Combating of Terrorism.

Notably, while previous efforts concentrated on conflict resolution, the new peace and security architecture provides for a holistic approach to the promotion of peace and security in Africa, taking account of the political, social, economic, cultural, military and other relevant conditions, as well as the possibilities of cooperation and partnership with outside organisations.

Early assessment of the peace and security architecture

It would be premature to judge the performance of the peace and security architecture given that implementation is still in the learning stage. The architecture is not borrowing from other models which means there are as yet no benchmarks. However it is possible to indicate some positive elements which hold the promise of further gains at a later stage, provided the current momentum is maintained by, among others:

- commitment to and support of the AU member states to the peace and security architecture;
- active participation by the members of the PSC who are the core of the architecture;
- a readiness by some member states to provide lead action;
- an open culture of dealing with conflicts, premised on positive interference on humanitarian grounds (non-interference is no longer an obstacle to save lives);
- growing coordination between the AU and the Regional Economic Communities and the Regional Mechanisms;
- support from the African civil society given the expanding AU-civil society cooperation;
- support from external partners; and
- taking account of basic needs in terms of:
 - equipping the AU and RECs with appropriate management capability for peace and security operations;
 - establishing a reliable early warning capacity;
 - establishing appropriate organisational (less bureaucratic) mechanisms to manage the processes of dealing with crises and conflicts;
 - effective mobilisation of financial and logistical resources, with emphasis on internal resource mobilisation;
 - enhancing the role of civil society in peace education and the promotion of a culture of peace;
 - harmonising the regional economic communities (streamlining of membership) to enable the logical arrangement of regional brigades;
 - creating enabling conditions for the private sector (a major player in socio-economic development).

It should be stressed that the success of the AU in developing this peace and security architecture to its full potential is key for the AU to develop cooperation and partnerships with external actors in improving the continent's situation.

Towards AU–ICC cooperation and partnership

Some observers have noted that Africa had the “highest number of internal conflicts in the world and in most of them violations of human rights and international humanitarian law have occurred on a massive scale”.¹⁷ This is self evident, even without stating the obvious fact that post independence Africa was susceptible to crises and violent conflict owing to both internal and external factors. It is also self evident that for much of the era of independence, the continent lacked an effective machinery to avert crises and prevent conflict, let alone the capacity to manage and resolve them.

The AU and the ICC are not short of entry points to build a robust cooperation and partnership. Viewed from an AU perspective, the political will and legal framework to enable that process exists. The Constitutive Act of the AU and the Protocol Relating to the Establishment of the PSC embody provisions regulating the AU's conduct vis-à-vis the violation of human rights and war crimes and the PSC's external relations with a view to enhancing the effective discharge of its mandate in the area of peace and security. Article 4(o) of the Constitutive Act provides, with respect to the principles according to which the Union shall function, for “respect for the sanctity of human life, condemnation and rejection of impunity and political assassination, acts of terrorism and subversive activities”.¹⁸ Whereas the PSC Protocol, in articles 17(4) and 20 respectively, provides for the PSC to:

cooperate and work closely with other relevant (note, apart from the United Nations) international organisations on issues of peace, security and stability in Africa. Such organisations may be invited to address the Peace and Security Council on issues of common interest, if the latter considers that the efficient discharge of its responsibilities does so require.¹⁹

Also, article 13(c) of the Protocol gives grounds for AU intervention in a member state in view of grave circumstances, or if the AU is invited by a member state for reasons of peace and security.

¹⁷ See Davies Iber, *The ICC and Africa*, 2005.

¹⁸ Constitutive Act of the African Union.

¹⁹ Protocol Establishing the Peace and Security Council of the African Union, (adopted), Durban, July 2002.

Some parameters have thus been set for processes that enhance peace, security and stability in Africa through a holistic approach that includes all relevant actors and means. It was not, therefore, by impromptu arrangements that the ICC was able to brief the PSC at the AU headquarters on 17 June 2006. The ICC president stated that "without Africa the ICC would not exist as it does today; and because of the relationship between the Court and African States, cooperation with the African Union is particularly important to the Court."²⁰ On that occasion, the PSC issued a press statement which noted:

The Peace and Security Council (PSC) today, 19 June 2006, received a briefing from the President and the Prosecutor of the International Criminal Court (ICC). The ICC representatives seized the opportunity to update members of the Council on the activities of the Court in Africa and the ways in which the ICC can contribute to the work of the PSC. The Council welcomed the briefing and underlined the importance of effective and continued working relationships between the AU Commission and the ICC. The Council reiterated the AU's commitment to fight impunity and, in this respect, stressed the importance of the relevant provisions of the AU Constitutive Act.²¹

Furthermore, a new political culture is emerging in Africa, albeit at different rates in different parts of the continent. There is a movement towards non-tolerance of human rights violations; there is an increasing awareness of the need to deliver justice to those leaders and persons who have committed crimes during their tenure; precedents are being set to prosecute former leaders; studies are being commissioned to prepare judicial formulae for dealing with human rights violations and war crimes; there is a declining anathema to NGOs; and state authorities are increasingly listening to NGOs on policy issues; an increasing number of leaders are willing to subject themselves to peer review (as evidenced by the African Peer Review Mechanism); and above all, Africa is bidding farewell to indifference and impunity. Certainly the issue of the responsibility to protect, in terms of bringing more forceful provisions – beyond the intentions in article 4(o) of the Constitutive Act and article 13 of the Protocol, has still to gain space in African political thinking and practice.

²⁰ Statement by the Peace and Security Council of the African Union, 19 June 2006.

²¹ Ibid.

Indeed, the promotion of an arrangement designed to streamline all aspects of responsibility to protect individuals, groups, institutions and civilians on the continent is one way for the AU to add more value, in terms of extracting benefits, to its cooperation and partnership with external actors in the area of peace, security and development, as well as the promotion of human rights, justice, good governance and democracy.

Memorandum of Understanding (MOU) between the AU and the ICC

Within the broad context of the AU Constitutive Act and the Rome Statute, an MOU is being negotiated between the AU and the ICC. The MOU is to provide for a more cohesive functional cooperation and partnership between the AU and the ICC. Preliminary contacts and discussions have already taken place between the two organisations, including a courtesy call/meeting by an ICC delegation with the AU Legal Counsel at the AU headquarters on 17 June 2006.

AU–ICC cooperation and partnership: potential dividends for Africa

The evolving cooperation and partnership between the AU and the ICC could generate significant dividends for Africa and its people in, among others, the following ways:

Defining internal armed conflict as a war crime

To start with, the very inclusion of armed conflict in the definition of war crimes, as stated by Davies Iber, makes it possible to prosecute, try and punish those found guilty of crimes during an internal conflict, with the attendant protection and compensation to victims. The inclusion of crimes such as rape, sexual slavery, sexual violence and forced pregnancy, which are so common in armed internal conflict, is significant in itself.

Cumulative moral momentum against impunity

Though still in its infancy, Africa is increasingly expressing its revulsion for impunity. More and more, the thinking is towards identifying, exposing, shaming and punishing those leaders and persons who, while

entrusted with state duties and responsibilities, perpetrate or assist in the perpetration of crimes against humanity.

Interestingly, this thinking makes it possible to consider crimes and cases that occurred many years ago. The case of Hissen Habre provides an example. Against the background of Senegal's request for the AU to provide guidance on the Habre case, who at the time was sought by a Belgian court to stand trial for crimes he allegedly committed when he was head of state in Chad (1983–1991), the AU took steps to provide a guiding decision on the matter. One of those steps was to set up a Committee of Eminent African Jurists (CEAJ) on the Hissen Habre Case.²² Among other aspects recommended by the Eminent Jurists to the AU Assembly was the need to give "priority for an African mechanism".²³

In its decision in Banjul, The Gambia, in July 2006, the AU Assembly observed that "according to the terms of Articles 3(h), 4(h), and 4(o) of the Constitutive Act of the African Union, the crimes of which Hissen Habre is accused fall within the competence of the African Union".²⁴ The Assembly further decided, *inter alia*, to consider the Habre case as falling within the competence of the AU and mandated the Republic of Senegal to prosecute and ensure that Habre is tried, on behalf of Africa, by a competent Senegalese court with guarantees of a fair trial.

Thus the political and legal framework has been set in an actual case, demonstrating that the growing African and international rejection of impunity can apply in retrospect. This is a significant gain for those victims who have long been afflicted by the absence of mechanisms of recourse, and consequently, continue to suffer physically, psychologically and spiritually.

Useful tool for locking rebels/political opponents into peace negotiations

The ICC power of arrest provides a useful tool for backstopping peace negotiations in cases when suspicion and security by the parties involved hamper progress. Talking about the elusive peace talks to end the conflict

in Northern Uganda, the Sudanese authorities called on the ICC to "stay the warrant against the Ugandan LRA rebels in order to give a chance for the peace process to succeed". The Northern Uganda conflict has raged since 1986, engendering one of Africa's worst human tragedies.

Thus it is a fact that the ICC can play a role in helping to end some of Africa's long running conflicts. Another example is the case of the prolonged conflict in Somalia, which has seen numerous war crimes, sexual violence, rape, disappearances and assassinations. War criminals will not appear before a court and justice will not be realised without the deployment of the necessary complimentary arms of domestic and international justice.

Enhanced healing of wounds

We have heard of truth and reconciliation commissions, with South Africa's work having provided a precedent on the continent. Whereas truth revelation and reconciliation initiatives have proved to be one way of soothing the souls of afflicted victims and their relatives, and healing their wounds, the current willingness and capacity to identify and try war criminals and human rights violators goes much further to enhance that soothing and healing.

AU–ICC cooperation: common challenges in Africa

Some challenges quickly come to mind when one looks at the issue of AU–ICC cooperation in the African context.

Fear among former and incumbent leaders

The biggest enemy to the ratification of the Rome Statute among African countries is the pervasive fear among former and incumbent leaders that they may face investigation and prosecution before the ICC. So rampant have been internal armed conflicts that an increasing number of former and incumbent leaders would face investigation. That very fear is reinforced by two factors:

- the residual ability of former leaders to control the affairs of the ruling party (those who they leave behind in power) and the state;
- the residual dependency of the new leader and government, as well as the stability of the polity, on the former leader.

²² Committee of Eminent African Jurists, as established by the AU Khartoum Summit, January 2006.

²³ *Ibid.*

²⁴ Report of the Committee of Eminent Jurists to the AU Assembly, Banjul, July 2006.

Limited public awareness

The Rome Statute and its entire machinery has yet to become common knowledge in Africa. Those who commit international crimes might still get away with their deeds because the national populace is unaware of the international mechanisms of legal recourse and justice.

Claim of political ownership and control versus effective prosecution/trial and compensation to victims

The Hissen Habre case shows areas of possible collision between, first, the AU and the ICC, and second, between the victims and African leaders. The spirit in the AU is to own and control and as a result calls for war criminals and human rights violators to be tried in Africa, and by an African mechanism, will increase. But then there is the issue of standard approaches and practices, which the ICC should always stand for, but which the AU might feel undermines its ownership and control of practices. The issue of Charles Taylor, the former Liberian leader, being tried outside Africa and presumably serving a jail term out of the continent, has raised concerns within African leadership. The disquiet is such that if the Taylor issue had been preceded by that of Hissen Habre, the determination of Taylor's trial conditions could have been quite different.

Equally, a risk of collision exists between African governments and victims, depending on the impact of ownership and control claims that the former will make on such cases as the trial of former leaders/war criminals or violators of human rights.

Economic redress or violations of human rights?

Another challenge to AU–ICC cooperation and partnership is a situation whereby political expediency is used by incumbent leaders to realise economic redress, i.e. re-adjustment of property relations through land redistribution and re-allocation of water rights, industrial rights, mining rights, and other such economic rights. It may happen that, in taking recourse to achieve economic justice by alleviating or rectifying past injustices, actions of incumbent leaders may be viewed as crimes or violations of human rights.

Given Africa's colonial experience and legacy, conflicts of approach and interest are likely to occur in the AU–ICC setting, or even between

the AU and any other international entity. Issues such as these may cause the AU not to pronounce itself in clear terms due to political sensitivities even though the ICC may see cases to prosecute the same situations.

Tensions due to political protection for persons accused of crimes related to looting/plundering of natural resources

The recent conflict in the DRC has, according to UN investigations, been accompanied by massive looting of natural resources. Because such actions are akin to the aggravation of armed conflict and the suffering of civilians, there are grounds for laying charges of war-related crimes against those involved in the plunder. Yet those persons would enjoy the protection of government. Certainly, this situation could cause tensions if an ICC-led process is set in motion to bring the plunderers to justice.

Of course, the MOU between the AU and the ICC is expected to delve into some of these issues and provide a playing field on which issues could be approached in future from complimentary perspectives, bearing in mind that the ICC has no universal jurisdiction. Some homework must be done to reconcile political desire and the efficient delivery of justice.

Conclusion

The new peace and security architecture of the AU came with a promise to make Africa a more liveable place, where each individual can work freely to realise his or her potential. This being the case, the central pillar of the African philosophy of promoting and preserving peace and security has to be premised on the need to enhance individual freedom, democratic space, human rights and protection, and access to the opportunities for self-development. This would be the real guarantee for fostering a culture of peace and security and a propulsive development drive for Africa. Africa has to cultivate productive partnerships to move forward along this path. Indeed, the AU should approach its cooperation and partnership with the ICC as one of the showcases.

Whatever the obstacles and challenges facing cooperation and partnership between the AU and the ICC, the ball has started rolling in the right direction. A strong platform is taking shape for building and strengthening of AU–ICC cooperation and partnership. This could be entrenched by, among other efforts, a renewed drive for the remaining

African countries to sign and ratify the Rome Statute. Equally, there should be a strong drive to spread awareness among the African populace of the international justice delivery mechanism as embodied by the ICC, and of the potential benefits of an AU-ICC partnership. After all, we must keep in mind that cleaning the African political and economic house is key to success in this endeavour.

Main challenges investigating and prosecuting international crimes in Sierra Leone

Max Marcus

It is a true honour to be here among you today, and I thank the ISS sincerely for organising this phenomenal symposium. I have been in the field of international humanitarian law for more than ten years, and before that in the human rights field. I have conducted inquiries into International Humanitarian Law violations in Cote D'Ivoire, Bosnia, Kosovo, Chechnya, Guinea, Sierra Leone, Darfur, and Gambella, Ethiopia. Each context has been different, of course, in the methods of accessing information regarding violations; in the customary context in which the crimes took place; and in the security obstacles faced. However, I have found two things to be common to each and every context. First there is a universal yearning for accountability, tempered only by security concerns; and second, the need for prosecutors in all contexts to understand the particularities of that community, and its belief system, in order to ensure ownership by the community of the justice process, empowerment through information, and, ultimately, participation through informed consent.

It is my pleasure to share with you today some of my experiences investigating and prosecuting international crimes in Sierra Leone.

Summary of the context of the SCSL

The Special Court for Sierra Leone (SCSL) was established pursuant to a bilateral treaty between the government of Sierra Leone and the United Nations. Its territorial jurisdiction covers only the territory of Sierra Leone, and its temporal jurisdiction is from 30 November 1996. It is a hybrid tribunal, and thus there are Sierra Leonean and international judges,

prosecutors, investigators, and defence counsel. Its mandate is short term, and is restricted to those who bear the greatest responsibility for crimes committed in Sierra Leone during the relevant time period.

There are currently three ongoing trials, with three accused per trial. One trial is of three leaders of the Revolutionary United Front (RUF) rebel group, the second is the trial of three leaders of the Armed Forces Revolutionary Council (AFRC) rebel group, and the third is the trial of three leaders of the Civil Defence Forces. A fourth trial of Charles Taylor, former president of Liberia, will commence in the coming year.

Best practices and main challenges

I came to the SCSL early in the investigations process. President Kabbah's letter to the UN seeking support in prosecuting international crimes mentioned only the RUF rebels, and of course made no mention of prosecuting the Civil Defence Forces militia. The CDF were the pro-government militia who fought against the RUF rebels on behalf of the government. They were the 'defenders of the nation'.

The NGO reports of wartime atrocities in Sierra Leone rarely described CDF abuses, implying that the CDF had committed crimes on a dramatically smaller scale than had the RUF. In fact there had been so little coverage of CDF atrocities – as compared with abundant international coverage of RUF atrocities – that the Special Court prosecutors and investigators began with the impression that perhaps if there had been crimes committed by the CDF, the scale may not put the perpetrators among the ranks of those bearing the greatest responsibility. But as we investigated, we uncovered just the opposite – a pattern of gruesome atrocities on a widespread and systematic scale committed by the CDF under the leadership of Hinga Norman. Norman had been Minister of Defence during the war and was Minister of the Interior at the time we commenced our investigations.

The victims of the CDF truly had untold stories. Their suffering had gone entirely unnoticed, shrouded by the myth of their perpetrators – the defenders of the nation. The CDF fighters – the largest group of which were called Kamajors – were the grassroots village hunters who emerged and unified to defend their people against the machetes of Foday Sankoh's RUF. They were mostly from the Mende tribe, and all

initiated into the Kamajor secret society. President Kabbah had supported the CDF, and after the war, many of their ranks had obtained local positions of authority. They were untouchable and they made sure their victims knew the price they would pay for reporting CDF atrocities. We conducted this investigation with the utmost discretion, and its covert nature made for a longer and more elaborate evidence-gathering process than that for the RUF and AFRC cases.

I'd like to call to your attention three specific aspects of this investigation that posed challenges we did not predict. The first is a challenge that we managed to overcome. The second is one we did not – or haven't yet. The third was somewhere in the middle.

Local custom in the context of international prosecution – a clash?

The largest grouping of CDF fighters were the Kamajors – traditional hunters from villages mostly in the Mende chiefdoms of Sierra Leone. As part of their requisite training to become Kamajors eligible to fight on behalf of the CDF, they were made to take part in an initiation ceremony. Following up to a week in the bush for their initiation under the leadership of an experienced herbalist, often called the High Priest, the Kamajors were deemed to be members of the Kamajor secret society and were ready for their formal military training. Without this initiation process, no man could fight as a Kamajor. (There were no female Kamajors, however there was one female High Priestess who performed the initiations). The initiation process rendered the Kamajors bullet proof as long as they followed the stringent rules of the society.

Secret societies are quite common in Sierra Leone and many other countries. Often at puberty there is a rite of passage similar to an initiation ceremony that is usually performed by a traditional leader. A majority of Sierra Leoneans are members of secret societies. They are 'secret' in that no one from outside the society ever knows what is involved in the initiation process, and the penalty for revealing the secrets of the society can be excommunication from the community, or even death.

Of course we all understand that deep respect for a community's customary traditions is a basis for building the trust we need as prosecutors to build confidence and participation in the legal process.

Prosecutors and investigators in these contexts learn the traditional greetings for the Masaleit in Darfur; we know that in certain communities one must pay respect to the elders as a prerequisite to speaking to their constituents; we know that one must not use the actual term 'rape' with a Chechen woman; and we know that refusing a cup of coffee from a Bosnian family could mean they may refuse to share their stories with us. In this field, access to information is based on confidence and that confidence is built on respect, and on taking the time to learn about a community's practices.

But this secret society matter of the Kamajors gave us pause. Our initial inclination was not to touch it too closely and to tread very carefully with questions relating to the secret society to ensure that we do not lose key evidence of atrocities by alienating witnesses. The line was a very fine one; word could easily spread from chiefdom to chiefdom that the Special Court was investigating secret societies, which would have seriously endangered the security of potential witnesses and informants – not to mention SCSL staff. But through the interviews we came to understand that the secret society was the core psychological component of the military strategy – and thus it was a key factor in the planning and execution of criminal acts in violation of international law.

This inquiry took time and care, it required a sensitivity to the witnesses' wishes to speak more or less, and an abundance of confidence-building. And what did we find? We found that the Kamajor society was in fact not an authentic secret society in the way of the Bundu and Poro societies. In fact, it was a fabrication modelled on custom, a tool of manipulation by the CDF leadership to build fear and secrecy into the structure of the Kamajor forces. The CDF had *themselves* violated traditional customary practices by creating this pseudo-secret society to achieve their wartime goals. Had we been too afraid to delve into this for fear of violating tradition and custom, we would not have exposed this critical component of the criminal agenda.

Following the issuance of indictments, the Sierra Leone police force executed an arrest warrant for their boss, Chief Sam Hinga Norman, the Minister of the Interior, arresting him in his office in downtown Freetown. He is currently on trial in the CDF case, as the administrative head of the CDF, along with Moinina Fofana, the CDF's Director of War, and Alieu Kondewa, their High Priest and Spiritual Leader. Their

prosecution is an example which shows that even if your ends are noble, if the means you use to achieve those ends violate international law, you shall be held accountable.

Of course this was not where this challenge ended. Witnesses for the prosecution swore under oath that they saw bullets bounce off their chests, or the uniforms of other Kamajors, who had been rendered bullet proof. The matter of customary spiritual beliefs emerges frequently in Court, challenging the Chamber to be adaptable to the local traditional context.

Overall, I believe we overcame that obstacle. Now I'll move on to an example that I fear we may not have overcome.

Gathering evidence of crimes of sexual violence and prosecuting forced marriage

CDF crimes of sexual violence

The world knows Sierra Leone for its gruesome amputations committed by the RUF and AFRC against civilians, including young children. But in Sierra Leone, even more widespread than the amputations were crimes of sexual violence. The RUF, AFRC and CDF committed these crimes against women and girls, and we intended early on in the prosecutorial process to ensure prosecution of these crimes.

Again in the context of the CDF, we faced an immense challenge in gathering evidence of crimes of sexual violence. The women in the community were reporting not against the rampaging rebels but rather against their own men, who had been instructed that they could use the civilian women in their communities as rations for the war effort. The Kamajor taboo against touching women while dressed in the Kamajor war attire – violation of which would render the bullet proofing ineffective – posed another obstacle in the path of obtaining access to this evidence.

It took so long to access evidence of CDF crimes of sexual violence that we did not have the evidence in time for the issuance of the indictment. When the breakthrough came and the evidence began to pour in, we filed an amendment to the indictment, prior to the commencement of trial. But the trial chamber did not grant that amendment, and consequently the CDF leadership is not being prosecuted for the commission of crimes of

sexual violence. The court has gone so far as to insist on excluding any evidence of crimes of sexual violence, accusing the prosecution of trying to admit this evidence through the back door when it tries to enter this evidence in support of other charges, such as inhumane acts as a crime against humanity, or cruel treatment as a violation of Common Article 3 of the Geneva Conventions.

This I would say was one of the challenges we were unable to overcome in investigating and prosecuting international crimes.

Forced marriage

We had easier access to evidence of crimes of sexual violence committed by the RUF and AFRC than those committed by the CDF. Even so, it took extensive investigations over time to discover that in addition to rapes and gang rapes, sexual mutilation of unimaginable forms, and sexual slavery, the women of Sierra Leone had been victims of the crime of forced marriage. The nature of the harm these women had suffered was different than that suffered by the women who had been sexually enslaved. The women who had been forcibly married were enslaved by their perpetrators, but the obstacles to their liberation went beyond their perpetrator and extended to society around them. The perpetrator had used the traditional notion of marriage as a tool to imprison these women, and they were thus doubly enslaved by their perpetrator and his community.

Now we faced a prosecutorial conundrum. We felt an obligation to prosecute this crime to bring justice to the victims, and to expose the nature of their particular harm. Yet we knew that this crime had never been prosecuted before, and that the Court may decide that in fact these acts do not constitute a unique crime. We were taking a risk of setting a precedent which could be a setback for gender jurisprudence. Such a precedent could negatively affect the prosecution of this crime in other contexts.

We decided to consult the community themselves – those who had put their trust in us to be their vehicles of justice. We gathered together women community leaders and survivors from all over Sierra Leone to discuss the issue. Essentially we explained that there was no guarantee, and that it was highly likely that prosecution of this crime could even lead to an acquittal and perhaps a setback for the law. They unanimously asked us to take the risk.

The court accepted amendment of the RUF and AFRC indictments to include charges of the crime of forced marriage as an "other inhumane act," a crime against humanity. Unfortunately, it did not accept amendment of the CDF indictment, as discussed before. However the RUF and the AFRC are being prosecuted for the first time ever, for the crime of forced marriage.

This could also, I fear, be a challenge that ultimately we may not overcome, although this remains to be seen as the trial proceeds.

Outreach – the key

The last but perhaps the main challenge in investigating and prosecuting these crimes in Sierra Leone has to do with outreach. How can we narrow the gap between the field and the courtroom?

For the vast majority of Sierra Leoneans, a functioning law enforcement system and judiciary were entirely unfamiliar. The country is one of the richest in natural resources and yet one of the least developed, aggravated by a ten-year brutal civil war. Outside Freetown, there is little or no electricity or running water; illiteracy is estimated at approximately 85% and average life expectancy is 36.

Prior to the SCSL's establishment, most Sierra Leoneans were familiar with justice only as administered by chiefdom authorities. Beyond that, the concept of a national court system, let alone an international tribunal, was inconceivable. The only way to ensure that the population of Sierra Leone would feel a sense of ownership of the international criminal justice process that was meant to bring justice to them, was to bring them into the process with as much information as possible from as early on as possible. In a place where the vast majority of our evidence would be testimonial, with almost no documentary or physical evidence available, the entire process rested on the participation of the population.

There was a great risk that we would be obtaining witnesses' agreement to participate without giving them access to full information. In such a case their participation would not be based on 'informed consent'. The risk of even subtly or inadvertently misleading individuals into participating in the process without fully understanding what it was they were agreeing to, was a risk too great to take.

Outreach was without a doubt the key to ensuring that the population participated in the international criminal justice process with full and

complete information and based on an informed choice to participate. Without outreach, there would have been absolutely no way to build the kind of buy-in we needed for the evidence gathering process. We simply would not have had any witnesses; those that would have testified would have been somewhat deceived, and may well even have backed out at a late stage in anger over that deception. In a prosecution relying almost entirely on witness testimony, this would have been devastating to the process.

Most importantly, without the population feeling a sense of ownership over the justice process, one has to ask what we are doing this for.

Why do I say that this is a challenge which has only partially been overcome? Because although outreach was done extensively, it should have been done even more comprehensively. The trials were never broadcast via radio which would have been the only way for most of the population to follow the proceedings. Rather a weekly summary was broadcast, which cannot possibly replace the impact of broadcasting witness testimony.

Donors and the diplomatic community appear to have little understanding and provide scant support for outreach efforts. The Special Court's Management Committee in New York tried to abolish funding for what outreach efforts there were, and any funding that remained was due exclusively to the determination of the Registrar.

Yet I can say without hesitation that the success of the Special Court process in terms of bringing justice to the Sierra Leonean population was directly proportionate to successful and creative outreach conducted on a shoestring budget. Outreach was the vehicle that brought the population into the justice process.

Areas where national criminal justice officials are likely to need support

The SCSL's hybrid nature means that Sierra Leonean judges, prosecutors, defence attorneys, and investigators are functioning alongside international staff. The process would have been difficult – if not impossible – were it not for their involvement; as international prosecutors we were immensely dependent upon their central role. The Sierra Leone police force demonstrated through its collaboration with the Special Court

that given the means to do so, they can and will perform their law enforcement duties with determination and objectivity.

The hope for the building of local capacity to investigate and prosecute these crimes will lie in their hands, as they are the ones who have been given the skills and training to ensure that the domestic legal process is gradually strengthened to meet international standards.

As for the obstacles in their path – these are unfortunately quite overwhelming. The situation in Sierra Leone has not changed much and the root causes of the conflict remain, though perhaps temporarily subdued by the international presence. Profound corruption, poor governance, and lack of accountability are pervasive, and thus resources that do come in do not seem to do anything other than enrich those in positions of power. I know I paint a bleak picture but I must be honest in my assessment. Those who do have the means to effect true change in the country often leave.

Unfortunately, Sierra Leone is still a country where arbitrary arrest and detention are extremely commonplace, and where access to justice is limited to those with financial means. An Anti-Corruption Commission set up to combat the pervasive power structures and ensure accountability has all but failed in its mandate. And there are more than 20 young men in pre-trial detention in the maximum security prison in Freetown since 2000, on charges relating to alleged wartime criminal acts. No attorney will defend them, and thus their cases get adjourned time and again.

Any development of the capacity of national criminal justice institutions would have to take place in the context of profound change in governance.

Conclusion

Could we have anticipated and overcome these challenges earlier, or more successfully?

With regard to the Kamajor secret society matter, I do not think there would have been any way to conduct this investigation faster or earlier. The time it took was time well invested in confidence-building, and it was only due to patience and persistence that we gained access to this information in abundance. The same applies for the investigation into crimes of sexual violence, both in the CDF and in the RUF/AFRC contexts.

These types of investigations simply take time, time which cannot be cut short without asking witnesses to pay the price; and a grave one it might be for them, as they may be re-traumatised in the process.

Then how might we balance the limitations of a short term mandate, with the need to take our time in such areas of evidence gathering? One idea might be to commence the on-the-ground inquiry prior to the official start of the mandate. Similar to a UN Commission of Experts which preceded both the ICTY process, and the Darfur referral to the ICC, an investigation which begins earlier can contribute to balancing these two realities.

Of course, one cannot conclude a discussion about the challenges and successes of the Special Court without making reference to the successful arrest of Charles Taylor, and his upcoming trial to commence next year. This was perhaps the Court's biggest achievement.

Investigating and prosecuting international crimes at the International Criminal Tribunal for Rwanda

Bongani Majola

The International Criminal Tribunal for Rwanda (the ICTR) has prosecuted accused persons for genocide, crimes against humanity and war crimes. Whereas there have been many convictions for genocide and crimes against humanity, there have been fewer for war crimes. A number of accused persons currently undergoing trials also face charges of war crimes. As of now, the ICTR has completed cases against 28 accused persons, of whom 25 were convicted and three acquitted. Trials of 27 accused persons are going on and are at various stages of development. We have investigated hundreds of accused persons since the beginning of the work of the Office of the Prosecutor. A lot of experience has been gained and many lessons have been learnt in the process.

I was requested to talk about challenges faced and best practices developed in prosecuting international crimes and to briefly give the context in which the ICTR was conceived.

The aim of the symposium is to help the International Criminal Court learn lessons and forge a better working relationship with the relevant structures of the African Union. For this reason, I would

like to concentrate on the challenges more than on best practices as I believe that highlighting challenges will be more helpful to the ICC. Nevertheless, I believe that it is worth commenting briefly on the work of the Tribunal to provide a balanced impression of the ICTR. In my view, the project has been more than worthwhile, in spite of the challenges that are discussed below.

Context

Let me briefly touch on the context before I talk more about the ICTR and the challenges that it has faced. The prosecution of those suspected of planning the Rwandan genocide of 1994 takes place in the international context. Of course there is a parallel process in Rwanda where genocide suspects are prosecuted at the national level. Although there were peace negotiations already concluded in Arusha, in my view, the Rwandan genocide of 1994 occurred during the time of an internal armed conflict between the former Hutu regime and a resistance movement of and led by the Tutsis. After the downing of the President's plane on 6 April 1994, Hutu extremists, both inside and outside the army, unleashed a wave of massacres of Tutsi civilians and moderate Hutus.

By the middle of 1994 the genocide had killed tens of thousands, decimated the judiciary and crippled the court structures in Rwanda. By July, the Hutu government had been defeated by the Tutsi guerillas who then took over the government of the country. In an effort to avoid the so-called 'victors' justice', the international community decided to establish an *ad hoc* tribunal – the International Criminal Tribunal for Rwanda – to try all who had committed serious violations of international humanitarian law within the territory of Rwanda, and Rwandan citizens who had committed such violations on the territories of neighbouring countries between 1 January and 31 December 1994.

Although the ICTR is now seen as a success story, it has faced many daunting challenges. By the beginning of 2003, the international community had grown tired of the ICTR. It was openly expressing concern that the Tribunal had not lived up to expectations. Its record was that, in a period of about five to six years, the Tribunal had managed to complete trials of only 13 accused persons. Part of the concern was that the large amounts of money that had up to then been invested

in the ICTR had not been justified by outputs. Some members of the Fifth Committee of the General Assembly had visited the Tribunal in February 2003 to see for themselves what was happening. In the process they expressed their concerns, particularly at the slow pace at which the Tribunal was doing its work.

The slow pace had not been as a result of lack of hard work on the part of the Tribunal but because of the many challenges that it faced especially soon after it started its work. One challenge was the slow pace resulting from the need to translate proceedings from Kinyarwanda to French and from French to English, and *vice versa*.

However, instead of being overwhelmed and consumed by its challenges, the ICTR learnt lessons from them, devised new strategies and set out to improve its performance. First, it developed its capacity to render simultaneous translation of court proceedings. Previously, the Tribunal used consecutive translation which slowed down the proceedings considerably. Trials move much faster now, since the adoption of simultaneous translation. The Rules of Evidence and Procedure were reviewed and amended so as to speed up trials. This is a continuing process. Recently, we have won a major victory in the Appeals Chamber which decided that Trial Chambers can take judicial notice of notorious facts. This will cut out a lot of otherwise unnecessary evidence and shorten trial times significantly compared to what happened before the Appeals Chamber decision was handed down.

The ICTR is now seen as a major international success because of the strides it has taken. It is the first tribunal to convict a person of genocide and to define rape as a means of committing genocide. Apart from this, the ICTR and its sister tribunal, the ICTY, has developed a large body of international criminal jurisprudence which will be of benefit to the International Criminal Court. We have improved our techniques for investigating international crimes of genocide, crimes against humanity and war crimes. Our investigators are now highly sought after because of the experiences they have. We have seconded some to assist in the investigation in Darfur. Others are now assisting in Beirut in the investigation that followed the assassination of Lebanon's former Prime Minister Rafik Hariri.

But we have had lots of challenges to contend with. I will touch on a few to illustrate.

Challenges

The collection and preservation of evidence

The collection and preservation of evidence necessary to prove the guilt of those accused of playing a leadership role in the genocide was a challenge. The way in which the evidence is collected during and after the genocide and who collects it, has an impact on the successful use thereof. It was the journalists, non-governmental organisations and historians who were first on the scene in Rwanda soon after the genocide. In an effort to assist, many collected the evidence with the aim of availing it during the trials. In the process, some of the evidence was either distorted, lost or rendered unusable by the prosecution.

Other problems include issues surrounding the chain of custody of the evidence. Journalists, especially, were the first to interview witnesses and victims. By the time the ICTR investigators came, the witnesses were either no longer willing to repeat their stories or gave accounts that were contradicted by earlier accounts given to journalists.

The arrest of those indicted by the Tribunal

The fact that the Tribunal does not have its own police force and relies on assistance from member states has sometimes denied it the opportunity to arrest and prosecute some of the most notorious perpetrators of the Rwandan genocide of 1994. While some member states have readily cooperated and assisted the Tribunal, others have assisted accused persons to evade justice.

In December 2005, the Prosecutor found himself with no other option than to report the government of Kenya to the Security Council for non-cooperation in the arrest of Felicien Kabuga, one of the most notorious leaders of the genocide. For a long time, the Kenyan government has given refuge and protection to Kabuga. In June 2005, after we had located him in Kenya we requested the Kenyan police to assist with his arrest. Before the end of the day, Kabuga had been tipped off and had hurriedly left the location, thereby evading arrest. We came close to arresting Ngirabatware in one of the West African countries. He was also tipped off and fled just before the arrest was effected.

On their part, fugitives resort to all kinds of tricks to evade arrest. For example, the former Minister of Defence, Augustin Bizimana, has on two

occasions submitted death certificates to convince us that he is dead. We constantly receive delegates from the fugitives giving us misinformation about their health, locations and intentions. Coupled with member states' lack of cooperation, this has made it very difficult for us to arrest some of the most notorious leaders of the Rwandan genocide of 1994.

Witness's ability to recall details after many years

It is 12 years since the Rwandan genocide occurred. Witnesses are finding it progressively harder to remember the exact details of what happened. They sometimes cannot fully remember finer details of an incident. While we, the prosecution, have no doubt that they are telling the truth, it can be argued that the risk is increased for convicting an innocent person on the basis of the testimony of some of them. Similarly the risk of an acquittal of a guilty person is increased because of the doubt that can be created in the minds of the judges. It is therefore important that judicial processes, if any, be undertaken at the earliest possible moment, preferably while the events are still fresh in the minds of witnesses.

Access to and security of witnesses

The intimidation and bribery of witnesses remains one of the major challenges we have to deal with. Some prosecution witnesses have died under mysterious circumstances. Many witnesses have reported being threatened or intimidated once it is known that they had been to Arusha to testify for the prosecution or that they intend to do so. The mood in some localities in Rwanda is against testifying against the leaders of the genocide and witnesses often experience difficulties when they return from Arusha. Although the Rwandan government is keen on protecting them, it lacks the necessary resources. As a result, we have had to dispense with crucial witnesses in some cases, the most recent being the Rwamakuba trial.

What is even more discouraging is that the accused and their collaborators have managed to bribe a few of our own staff who, in exchange for compensation, have intimidated and misled witnesses into refusing to testify for the prosecution or changing their testimonies. The Prosecutor is currently investigating such conduct and a few indictments are due to be issued for interference with witnesses and defeating the ends of justice.

Some witnesses are reluctant to dredge up the past. They do not want to open old and painful wounds. They therefore refuse to testify even

when threatened with judicial sanctions. Often crucial evidence is lost when that happens and a guilty person may go free as a result. This is not conducive to a successful fight against impunity. I do not have solutions to these problems. But I would suggest that it is important to have a strong witness management program that also invests in the protection and security of witnesses.

Prosecuting offences of sexual violence

Our experience is that it has been hardest to put together and prosecute cases on sexual violence arising out of the Rwandan genocide of 1994. While there were widespread, systematic and shocking incidents of sexual violence during the genocide, the Tribunal has tried very few persons for these crimes. We have often been forced to consider withdrawing charges of rape rather than proceeding with them only to see the accused acquitted.

The main challenge has been to establish the link between the leaders of the genocide and the rapes and other incidents of sexual violence. The other challenge has been that Rwandan women are largely unwilling to come forward and testify. Quite late in the day, we realised that victims of sexual violence are uncomfortable talking about matters of a sexual nature especially with male investigators. We then established a Sexual Offences investigating team and provided investigators with training. One witness who had been badly abused had initially given a statement and was willing to testify. She later met someone and got married. Now she is refusing to testify because if it comes out that she was raped during the genocide, it may result in the dissolution of her marriage.

The difficulty we experience with rape cases may not be experienced elsewhere. Our difficulties may stem largely from the nature of the Rwandan genocide. However, it would be prudent to use well trained investigators to investigate allegations of sexual assaults and to provide counseling to victims right at the beginning of the investigation.

Limited scope for utilising documentary evidence to prove facts alleged in the indictment

In prosecuting crimes of this nature, our experience shows a heavy reliance on oral evidence. We have crucial witnesses who cannot testify because they are too sick to endure the demands of a witness box. In the Serugendo

case, he has given the prosecution a very detailed and powerful statement that heavily implicates some of the leaders of the genocide whom we are currently trying. But he is lying in hospital in a neighbouring country struggling with a terminal illness. Doctors say that he is too infirm to testify. There is little scope for using his statement against our accused persons.

The evolving jurisprudence

While the trial chambers have welcomed the development of international criminal jurisprudence, the evolution of that jurisprudence poses serious challenges to the prosecution in some areas of the law. This is particularly the case in respect of indictments. Many of our completed trials and some ongoing ones were or are based on old indictments. These were formulated and confirmed by the judges in the early years of the Tribunal. Among others, the Butare trial, which has been running for five years now, the Military I trial which has been running for almost four years, and the Government II trial, which has been running for three years, are being prosecuted on the basis of so-called old indictments.

In 2003 the Ntakirutimana Appeals Chamber judgment modified and tightened the law on the form of indictments. It required more particularisation of information in the indictment so that the accused is fully informed and receives sufficient and timely notice of the allegations, and the case against him or her. The Ntakirutimana standard renders many of the old indictments potentially deficient and therefore defective. These indictments cannot be amended at the stage where all the mentioned trials are way into the defence cases.

Coordination of information of trials

On several occasions we have either lost counts in a trial or come perilously close to losing counts because of our failure to coordinate information among various trials. Although we have several trials going on in different trial chambers, we are essentially trying one genocide case. The evidence that a witness gives in one trial is often relevant in one or more other trials or cases. Situations have arisen when a witness who has testified in one trial, does so in another trial. The defence often uses the witness's earlier testimony to try and show inconsistencies. Coordinating information on witnesses, exhibits, documents, the accused persons and trial chamber rulings and orders is of utmost importance.

Prosecuting sitting governments

If the future international criminal justice mechanisms are to have a significant degree of success, it will be necessary, especially at the political level, to reconcile and balance the interests of governments in conflict situations with the interests of maintaining international criminal justice. One challenge we face is that in Rwanda international crimes were committed by both the Hutu regime and by the Rwandan Patriotic Front which is currently ruling Rwanda. It has not been easy for the Tribunal to investigate and bring charges against members of the ruling RPF. Yet we have prosecuted over 56 Hutus for genocide and crimes against humanity. We are to start trials against another 14 Hutus in detention and 18 who are still at large.

The Tribunal is facing constant criticism from not only the Hutus who are facing prosecution, but also from the international community. They all accuse us of dispensing victors' justice. You may have heard from other speakers at this symposium, talking about the cases of Uganda and Darfur which, in my view, are aimed at thwarting the judicial intervention of the International Criminal Court. To some, what motivates the Ugandan government to work harder on the peace initiatives with the Lord's Resistance Army is the fear that the investigations by the ICC will unearth violations of international humanitarian law by officials of the ruling Ugandan government.

Best practices

- The Prosecutors' Colloquium: In 2004 the Office of the Prosecutor proposed a colloquium of prosecutors of international criminal tribunals. This forum has been very instrumental in facilitating the sharing of ideas among tribunals such as the ICTR, ICTY, ICC and the Special Court of Sierra Leone. The colloquium has become an annual event ensuring a continuous sharing of ideas and a joint search for solutions to challenges.
- Indictment review and trial readiness review: One of the lessons learnt is that a fat and fluffy indictment contributes to the slowing down of proceedings. For this reason, our best practice is to draw lean and mean indictments containing only essential counts in respect of which there is strong evidence. In addition every

indictment undergoes an indictment review process to ensure that it conforms to the latest jurisprudence on indictments. The other best practice we have adopted is the trial readiness review. This checks on whether all the procedural requirements have been complied with before the start of the trial.

- When investigating sexual assault crimes, it is better to use well trained investigators who are able to deal sensitively with the trauma that the victims have undergone.

Conclusion

As stated earlier, the aim was to highlight challenges that we have encountered at the ICTR in the hope that these challenges can be anticipated by the ICC and solutions sought well in advance.

Best practices and challenges encountered when prosecuting and investigating international crimes in Uganda

Richard Buteera

The investigation and prosecution of crime is never an easy task and yet the two roles have always been critical in the administration of criminal justice. The proper investigation of crime is the basis for a successful prosecution. The prosecutor will depend upon the availability of evidence in order to prove his case. The prosecutors' duty in court is to prove the case against the accused beyond reasonable doubt. That is no easy task.

The investigation and prosecution of crime requires resources, facilities, experience, expertise and a proper legal and procedural legal framework. The more complicated a case is the more of each of those requirements it will need. Complex international crime is usually more expensive to handle and it requires more expertise. Adequate facilitation of investigators and prosecutors is a challenge particularly for the poor countries.

The criminals know the weaknesses of criminal justice systems in the less developed countries and will concentrate their activities in these areas where they may escape apprehension. As a result, international criminal justice systems must work together to prevent criminals using

these countries as hideouts that they operate from to commit crimes all over the world.

With international crime there is also the challenge of working with others from outside your borders. You do not know each other in the first place. The systems and laws are different which makes it difficult for investigators and prosecutors to work together in systems, procedures and laws with which they are unfamiliar.

Workshops like this one and other forms of international interaction are very useful in this regard. Establishing contacts amongst law enforcement agencies is useful. When investigators and prosecutors determine to cooperate, they overcome the differences and justice is done. I will give one example of international cooperation that clearly illustrates that differences in systems and laws will not be a hindrance to the enforcement of international law if the relevant authorities and countries are determined to see that justice is done.

The Itongwa case: Successful international cooperation with Denmark

One Major Herbert Itongwa was a soldier in the Ugandan Army. He and his associates were suspected by police of committing a number of offences. They formed a rebel force, essentially to evade apprehension by the police, which they called the Uganda National Democratic Alliance. He headed the force assisted by his deputy, Lt Gonzaga Bukenya. They started terrorising places near Kampala and in the Central region, committing robberies and murders.

Major Herbert Itongwa escaped and ended up in Denmark. To secure refugee status in Denmark, Itongwa explained the offences he committed in Uganda in graphic detail to the Danish immigration authorities. One of the offences he described was how he had murdered a Regional Police Commander, Karakire, and kidnapped and tortured a Minister, Dr Makumbi, and a female doctor he was travelling with. Major Herbert Itongwa could not be extradited for trial in Uganda because Denmark does not extradite offenders to countries where there is a possibility of them being sentenced to death.

We discussed this case with colleagues that head the prosecution authority of Denmark when at the International Association of

Prosecutors Annual conference in London in September 2002. We agreed that the most important thing is to ensure that such serious offenders face justice regardless of where they are tried. Acting in a coordinated manner, investigators and prosecutors from Denmark worked together with their counterparts from Uganda. Evidence was collected from Uganda and adduced on video tape in the High Court of Uganda in the presence of Herbert Itongwa's Danish defence lawyers. The same evidence was later adduced in the High Court in Denmark at Itongwa's trial. He was convicted in Denmark where he is still in detention.

This case is a good example of how international cooperation by investigating and prosecuting authorities can overcome difficulties and ensure that justice is done in spite of the potential obstacles caused by differences in legal systems and laws. In the fight against international crime and impunity, Ugandan investigators and prosecutors have on-going international cooperation with the International Criminal Court. This experience has provided lessons for every prosecutor and investigator on a number of challenges that arise in the process of handling such a case. These lessons are discussed below.

The LRA leaders' crimes and cooperation with the ICC

The Lord's Resistance Army (LRA) is a criminal organisation that commits heinous criminal acts in strange ways. Jonathan Holmes had the following to say about the Lord's Resistance Army:

From Uganda, a country which has had more than its fair share of madmen and bloodshed comes a new gang of butchers – the Lord's Resistance Army. The North of Uganda has been devastated by this rebel army of fanatics whose blend of Christianity and black magic is used to deadly effect. Their standard recruiting technique involves kidnapping children, after torturing and executing their parents, and then training them to become killers. Thousands of children have been turned into soldiers or sex slaves. The LRA hopes to gain control over all of Uganda and then implement a government ruled by the Ten Commandments. For the moment their commandments are rather more hellish – one of their most recent and bizarre edicts has been against the riding of bicycles – anyone caught doing so has both of their feet cut off on the spot.

Kony, who is the leader of the LRA, operates in Northern Uganda which is largely a rural community, many of whose inhabitants are Roman Catholics. The claim to rule by the biblical Ten Commandments is for the purpose of identifying this terrorist organisation with the Roman Catholic religion and thereby hopefully fooling the Catholic population into supporting the LRA. Kony is known not to believe nor behave as a believer in the Roman Catholic religion. This is what one of the abductees that escaped from Kony observed:

It was a strange religion Kony adhered to. He prayed to the God of the Christians on Sundays reciting the Rosary and quoting the Bible; but he also prayed on Fridays, like the Moslems. He celebrated Christmas, but he also fasted for 30 days during Ramathan and prohibited the consumption of pork.²⁵

Kony and his organisation claim to be Christians and Moslems at different times for the purpose of benefiting from both beliefs.

The government of Sudan has now stated that it has withdrawn its support from The Lord's Resistance Army. Originally the Sudan government and Islamic extremists in Sudan supported Kony and the LRA in order to use them to disrupt Northern Uganda which they thought was a base used by the Sudanese People Liberation Army (SPLA) which was fighting a war of liberation in Sudan.

The LRA has committed many heinous crimes and is extremely unpopular as a result. For its survival its main recruitment process is the abduction of young men and women including very young children who are forced to be child soldiers. The female children are raped and distributed to commanders and soldiers as sex slaves. The LRA soldiers attack villages in Northern Uganda, Southern Sudan and now in the DRC and commit murders, robberies, gang rape, defilement and thefts from shops, farms and homes. The local population in Northern Uganda where the LRA operates has had to move into internally displaced people's camps under government protection. This has caused untold suffering and the conditions in camps are difficult.

The LRA case has been referred to the International Criminal Court (ICC) by the government of Uganda. The ICC has been working with the law enforcement authorities in Uganda and has investigated the case.

²⁵ Els De Temmerman, *Aboke Girls*, p 73.

Evidence that is sufficient for the prosecution of LRA leaders has been gathered and the ICC has issued international warrants for the arrest of five leaders of the Lord's Resistance Army including Joseph Kony.

The challenges of the LRA case

The Lord's Resistance Army and its commanders operate in Northern Uganda, Southern Sudan and Eastern parts of the Democratic Republic of Congo. These criminals are well armed with weapons obtained from the government of Sudan and from the instability of the region as a result of wars in the DRC, Somalia, Ethiopia and Southern Sudan. The supply of illegal arms is therefore difficult to handle.

The challenge to law enforcement in this situation is how to maintain law and order. The criminals keep shifting from one country to another making their arrest difficult. Right now they are stationed in the Garamba National Park in the DRC. The DRC government does not seem to have sufficient control over the area to arrest the armed thugs who are wanted by the ICC. The administration of justice is a big challenge to law enforcement officials in a politically unstable environment.

Local and international concerns that impact on the case and its management

For investigators and prosecutors, it is logical and clear that criminals who have committed serious international crime should be apprehended, tried and if convicted, punished for the offences they have committed. This is not so clear to all parties in the Lord's Resistance Army case.

As stated above, the Lord's Resistance Army recruited most of its fighters by abducting young children whom it trained and armed. The children would be used to terrorise their original home villages, harass their own friends and relatives, forcing them into internally displaced people's camps where they live in horrible conditions. Although one might expect the victims to welcome the news that the perpetrators of these crimes have been indicted by the ICC, this has not been the uniform response from the affected population and the public. Some people are of the view that the offenders should be tried and punished for the heinous crimes they have committed. Others, however, do not agree with the trial of these serious offenders. Some have argued that

the child soldiers who committed atrocities after abduction and forceful recruitment are themselves victims of crime and should be rehabilitated. This argument would not be valid for the top leaders but even for these, some have argued for peace talks for the purpose of achieving reconciliation and peace rather than criminal trials and justice.

Archbishop John Baptism Andama, the Chairman of the Acholi Religious leaders' peace Initiative (ARLPI), has urged the ICC to "keep as far away as possible from the Juba talks. Our people have suffered enough. They are tired of staying in camps".²⁶ He said the role of the ARLPI was to build confidence between the two warring parties so that they can sit around a table to end the war in Northern Uganda. The Executive Director of the Non-government Organisations (NGO's) forum recently had the following to say:

It would be better to pursue dialogue first and see whether we can realise everlasting peace in Northern Uganda and have justice thereafter. Justice can come later when peace is achieved.

Professor Mahmood Mamdani, a Ugandan at Columbia University in the USA, said the following about the LRA/government of Uganda talks:

For those wanting to understand the folly of an ICC option and the potential of a negotiated strategy, the appropriate analogy is not the end of Nazi Germany but that of apartheid South Africa. If an international court had insisted on trying the perpetrators of apartheid in the name of justice in 1990, it would have only delayed the end of apartheid and the suffering of the South African people, who knows for how long. Let us remember that apartheid did not end with the involvement of an international court of justice, but with a negotiated political settlement at Kempton Park.

Just as the end of apartheid followed a change in the international balance of forces at the end of the Cold War and made possible a new political era based on reconciliation (and not justice), so the changed regional balance of forces offers us the possibility of a historic national reconciliation. But so long as Kampala's vision is confined to Kony and the LRA, and its agenda limited to revenge in the name of justice, a durable reconciliation is likely to evade us.

²⁶ *New Vision Newspaper*, 11 July 2006.

The government of South Sudan has explained that it is interested in the talks and has offered to act as mediator because their people have suffered from the brutality of the LRA. The government of Uganda has stated that the LRA are now operating from the Garamba National Park in the DRC after fleeing from Ugandan army operations in South Sudan, which had been authorised by the government of Sudan. The government of the DRC has refused to allow the Ugandan army to attack the LRA in the Congo. As a result, the Ugandan government has accepted negotiations instead of simply watching the LRA regroup and reorganise for further attacks into Northern Uganda from the DRC.

The legal challenges

The Rome Statute makes it an obligation for party states to cooperate with the ICC. The full cooperation of states is needed for the ICC to meet its expectations and be fully operational, because among other reasons, the ICC does not have its own police and prisons. The ICC is thus only a part of the international criminal justice system. States should investigate the crimes and prosecute them domestically and when that is not possible, the ICC should assist. In the case of Uganda, Kony was not available in the country to be arrested and prosecuted and so his case was referred to the ICC by the government of Uganda.

Presently peace talks are going on in Juba, South Sudan, between the LRA and the government of Uganda. At the same time, the ICC international arrest warrants are still pending. The legal challenge that arises is the implementation of the international arrest warrants and the peace process that is being pursued. There are pressures for a negotiated settlement and there are pressures to reject impunity for serious crimes by prosecuting. There are also concerns that Acholi traditional norms of criminal justice should be applied. The offenders would be subjected to traditional punishments and then be cleansed in Acholi cultural ways. It is argued that resorting to traditional norms does not mean allowing impunity for the offenders.

Prosecutors would find it easy to argue that those accused of international crime should be charged, tried and punished upon conviction. This would send the message that there will be no impunity for serious crime. The reality on the ground, however, should not be ignored. Kony and his criminal group are in a forest in the DRC and the

pressure for peace negotiations is great. The local population has suffered and continues to suffer and they, along with many others, are calling for peace talks. It is probably reasonable to give peace talks a chance, given that the debate on peace and justice could continue whatever the results of the peace talks.

The Amnesty Act

Some offenders who have been committing offences in the LRA have been arrested and prosecuted. These arrests and prosecutions have raised legal challenges – in one case because of the Amnesty Act.

The LRA war has caused untold suffering to the people of Northern Uganda but for purposes of reconciliation and peace, Parliament passed an Amnesty Act in 2000. The Act declared amnesty in respect of any Ugandan who has engaged in war or armed rebellion against the Republic of Uganda since 26 February 1986. The applicant shall not be prosecuted or subjected to any form of punishment for participation in the war or rebellion or for any crime committed in the name of the war or armed rebellion. Those who have participated in the LRA atrocities then escape answering for their offences through simply applying for amnesty. Under the amnesty law, the state has no discretion on the granting of the amnesty as amnesty is automatically granted on application. The challenge is that the person who has committed heinous crimes will not be prosecuted or be prosecutable after applying for amnesty.

Witnesses and witness protection

A big challenge to investigators and prosecutors in serious offences of the gravity of the LRA, relates to witnesses and witness protection. Many LRA atrocities are committed in broad daylight and in villages where the perpetrators are well known. The abducted people know or come to know those who abducted them or raped/defiled them, so there is clear evidence to identify the perpetrators. The LRA, however, attacks for purposes of destruction. They attack and kill whoever is in sight. They burn all the houses and those that survive flee, which means that killers cannot be clearly identified. Witnesses are also scared and traumatised.

The survivors of these attacks and the victims of defilement and rape who know the offenders well find themselves in a difficult situation that prevents them from freely testifying against their attackers. They

fear the consequences of retaliation for themselves and their relatives, especially because they know the LRA rebels are merciless and that if you testify against one of them, the others will punish either the witness or the witnesses' relatives.

The potential witnesses therefore need assurance that the evidence they may provide will be recorded in confidence and that their lives will not be in danger after the testimony. There is a need to develop a relationship of trust between the investigators, prosecutors and the witnesses in order to convince them to testify. This requires a well planned witness protection programme.

Witness protection is a complicated and expensive activity. For poor countries like Uganda, it is not easy to implement witness protection programmes. This is an area where the ICC could play a useful role in providing technical assistance and sharing expertise. The experiences that have been gathered from the trials in the Rwanda tribunal, the Yugoslav trials and now Sierra Leone and other international experiences should be gathered and shared to help in situations that Uganda and other countries are now experiencing.

Some witnesses need support and some even need to change their identity and residence if they have to testify. In this regard, international cooperation is extremely important. We are in the process of proposing witness protection legislation to parliament, and it would be useful to learn from others who may have useful lessons that could be relied upon as best practices.

Protecting victims' rights

Our criminal justice system is based on common law. We have developed a lot of procedures that clearly protect the rights of accused persons, which is certainly worthwhile. The protection of victims' rights is just as important, but the common law does not seem to have developed good procedures that pay equal attention to victims of crime. I am interested in learning from those of us here who have well developed procedures that protect the rights of crime victims. As a prosecutor, victims are stakeholders in my daily work and I do not feel that our criminal justice system, experts, politicians and law enforcement agencies pay sufficient attention to them.

Peace and tranquillity for the whole community are important considerations in an area like Northern Uganda that has suffered greatly

from the atrocities of the LRA. It is correct therefore that these community interests should be considered and catered for. We probably need to be aware, however, that reconciliation and peace may address the interests of the community without resolving victims' individual concerns. We need to think of ways of striking a balance between individuals' need for redress and the community's need for a peaceful future. These interests are not necessarily the same. I do not think they are in conflict either.

The Ugandan government has been considering the issue of how victims of LRA atrocities could be handled. The President of Uganda has recently made the following proposal:

We could use the traditional system in which the one who made the mistake or the killer must compensate their victims. After serious consideration, we asked ourselves where Kony will get things like money and others to compensate his victims. We have decided that the NRM Government plus our friends here and outside Uganda mobilise money to compensation the victims on behalf of the LRA criminals but Kony must apologise, there is no escape from that. He must apologise.²⁷

Compensation to victims of crime could certainly be a way of doing justice to victims of crime.

Access to justice in conflict affected areas

With the war in Northern Uganda the justice, law and order institutions were destroyed or at least disrupted. The courts are no longer functioning except in a few urban areas and the administration of justice is therefore a challenge. Now that peace has started returning to the region, the proper functioning of justice institutions is what the public will be expecting. Rebuilding, retooling and staffing the criminal justice institutions so that the infrastructure is ready to handle public expectations is a challenge. We may need to consult with development partners on ways of handling this challenge.

The complaints about the atrocities are likely to be raised after peace has been restored. Victims and their relatives will then start coming into contact with their tormentors and we need to start thinking about how these complaints will be handled. The Amnesty Act and whether it may

need amendment after the peace talks is another issue that must now be discussed. Other's views are welcome on these issues, particularly our partners from the ICC.

Conclusion

We shall have to work together to ensure that both peace and justice prevail. There is no way that either peace or justice can prevail in the absence of the other – these are not separable goals. International crime affects all humanity. It may at times appear to be affecting only one country or a region but eventually it affects all of us. There is a need therefore for increased international cooperation, which requires dialogue and understanding, to combat international crime.

Best practices and challenges encountered when prosecuting and investigating international crimes: Lessons and legacies

Howard Varney

In this short paper I will highlight a few aspects that arose from the experiences of East Timor and Sierra Leone.

East Timor

East Timor involved a hybrid approach in which international crimes were prosecuted within the domestic system through a Serious Crimes Unit (SCU) involving international and local prosecutors and investigators and a Serious Crimes Panel staffed by local and international judges. It was decided that Indonesia would prosecute Indonesian military and political figures accused of carrying out atrocities – while the serious crimes process in East Timor was originally tasked with focusing on the role of local militias.

Main lessons from the serious crimes process

- The ability of the local justice system to independently and fearlessly pursue the most politically sensitive cases should be carefully assessed. The international community recognised the weaknesses of the justice system in Timor, but the assessment of

²⁷ The New Vision Newspaper of 31st July 2006.

the justice system in Indonesia proved to be wholly incorrect. The Ad Hoc Human Rights Courts in Indonesia proved to be a travesty of justice.

- When the UN and the international community sponsor domestic initiatives they must provide such bodies with effective and coherent oversight.
- The mandate of an international justice initiative must be clear and provide direction to the prosecution of serious crimes. In East Timor, the prosecution's mandate was not clear. It was open to prosecutors to concentrate on the high command or anyone within the jurisdiction regardless of the roles they played.
- There must be overall strategic planning. The paucity of overall strategic planning of the serious crimes process in East Timor dealt severe blows to those attempting to keep the process together. Highly unrealistic timelines were developed which resulted in attempts to secure quick justice on the cheap. This resulted in a volatile work force with several adjustments occurring in the leadership and management of the unit. The resulting uncertainty was at times reflected in the quality of the work produced. The high staff turnover contributed to the loss of institutional memory. The lack of commitment in planning and support was to ultimately contribute to the spread of a culture of impunity in the wider region.
- International justice initiatives should be well resourced. Many of the difficulties faced by the SCU can be attributed at least in part to resource shortages and organisational problems. For example, resource shortages led to inadequate recording and inputting of information into the database. In the early years of the SCU, investigators were not issued with vehicles, nor did the unit have a forensic pathologist. Translators had to be funded independently.
- International justice initiatives should be sensitive to local conditions. Issues will arise employing the hybrid approach when practitioners from the local justice system and international practitioners are thrown together. Practitioners from affluent countries still expect to be remunerated at the same scales they are accustomed to. The following stark situations have arisen. Security guards at the Special Court for Sierra Leone earned

more than the Chief Justice of Sierra Leone. Drivers at the Serious Crimes Unit in Timor earned more than prosecutors in Timor's Department of Justice. The SCU thus experienced some difficulty in attracting prosecutors to nominally paid training programmes since most preferred to take more lucrative positions with the UN or international NGOs.

- There should be continuity in leadership and certainty as to the lifespan of operations. In East Timor, long term planning and continuity were severely impeded by the short terms served by those occupying leadership positions. Repeated changes in leadership led to the constant redirection of the SCU's efforts. These difficulties were exacerbated by ongoing uncertainty about the lifespan of the SCU. SCU staff reported that the uncertainty caused a short term focus in planning and decision making and that the prioritisation of investigations would have been better managed had it been known that the unit would continue operating until May 2005. The stop-start approach to the unit's oversight undermined staff morale and inevitably impacted on the ability to pursue investigations.
- The serious lack of adequate quality in the representation of the accused in many cases in East Timor brought the legitimacy of whole process into question. The perception that a conviction was more or less a *fait accompli* in many cases as a result of the lack of adequate representation constituted a serious setback for the serious crimes process.
- Initially no plans were put in place by the UN to provide for the legacy of the unit or for the transferal of skills to local professionals. At the behest of Deputy Prosecutor General Serious Crimes, Siri Frigaard, a training programme was initiated in 2002 and funding was secured from the Norwegian Government to pay for the trainees' salaries. A comprehensive strategic training and mentoring plan together with financial support initiated from the outset would have assisted to make significant advances in the building of the local justice system.
- In the final analysis, the UN and international community abandoned ownership of the pursuit for justice in East Timor. This is seen nowhere better than the refusal of the UN to associate

itself with the indictment of General Wiranto of the Indonesian armed forces. In so doing, the UN effectively subverted the cause of justice for East Timor and the struggle for international justice in the region. While regional power and economic imbalances adequately explain the conduct of the Timor Leste Government in distancing itself from the indictment, the same cannot be said for the UN and the international community. Indeed it is because of such power imbalances that the UN ought to have intervened on the side of the powerless.

- If there is one lesson to be learnt from the East Timor experience, it is that such hybrid initiatives should never be launched without the full and committed support of both the national government and the international community.

Relationship with CAVR (East Timor Truth & Reconciliation Commission)

- The CAVR's Community Reconciliation Procedures (CRP) envisaged a process whereby people accused of *minor* crimes could take part in a local hearing conducted under customary law known as '*adat*'. Serious crimes could not form the subject of a CRP. Following a CRP hearing a Community Reconciliation Agreement (CRA) could be concluded requiring the perpetrator to undertake an act of reconciliation. A person who complied with his obligations under a CRA would acquire 'immunity' from prosecution (as well as from civil suit) in respect of the acts to which it related.²⁸
- One difficulty in the relationship between the CRPs and prosecutions for serious crimes was the fact that virtually all acts that constituted 'serious crimes' that were referred from the CRP to the SCU were never prosecuted. The legislative scheme governing the relationship between the serious crimes process and the CAVR failed to grapple with the situation of the lowest level perpetrators of serious crimes. These persons were declared to be ineligible to participate in a CRP under the regulations, but they

were ultimately left outside the serious crimes regime as a result of time and resource constraints.

- The SCU's failure to indict most of the suspects referred to it by the CAVR meant that it was unable to provide the validation required by the CRPs. The reconciliation process was contingent upon the effective threat of prosecution against the more serious criminals. These expectations remain unfulfilled in most cases.
- The two bodies operated apart from each other with different timetables and with little central coordination and planning. The CAVR was meant to recommend prosecutions. By the time the CAVR issued its report, the SCU had already closed shop.

Sierra Leone

The TRC and the Special Court for Sierra Leone (SLSC) will undoubtedly make significant contributions towards the establishment of peace and justice in Sierra Leone. However, that contribution could have been immeasurably stronger had the two institutions shared a common vision of the basic goals of post-conflict transitional justice.

The two bodies were not created out of some concerted and coherent plan. The operation of these transitional bodies working in parallel did not work optimally. The two institutions had little contact and when they intersected at the operational level, the relationship was a troubled one. Trouble emerged over the issue of the TRC's access to awaiting trial detainees held in the custody of the Court. The TRC assumed that it had access to the detainees and that the detainees had guaranteed rights to participate in the TRC process. The Court ultimately did not recognise these rights.

Harmonisation of objectives

- The practical problems that afflicted the 'dual accountability' model in Sierra Leone stemmed from the creation of the two institutions separately from each another. These problems were compounded by the subsequent and mutual failure of the institutions to harmonise their objectives.
- Much of the difficulty lies in the fact that the two mechanisms represent different approaches to addressing impunity. Operational

²⁸ UNTAET Regulation 2001/10, s 32.

difficulties are likely given that they also share many objectives: both seek truth about a conflict, although in different forms; both attempt to assign responsibilities for atrocities; both work with similar bodies of law; both are aimed at establishing peace and preventing future conflict.

- Ultimately when there is no harmonisation of objectives, conflict between such objectives is likely. Confusion in the minds of the public is inevitable.
- Harmonisation of objectives means that the two bodies cannot operate in a manner that is oblivious of the other. It is highly incongruous for one body to engage in intensive truth seeking and reconciliation exercises involving former participants in the conflict, while another body is independently pursuing punitive actions against the same individuals. Harmonisation requires the developing of an operational model that permits the different objectives to be reached in a symbiotic manner.

Future post-conflict arrangements

It is likely that in the future there will be more truth commissions that work alongside international judicial bodies. Future experiences of joint operations need not be troubled ones. The Sierra Leone TRC's recommendations for this eventuality are as follows:

- There ought to be recognition from the outset that there is a primary objective shared by both organisations, namely that the processes of both institutions must ultimately lead to the goal of building lasting peace and stability. In the pursuit of this objective, both bodies are equal partners.
- A model should be developed that is sensitive to local conditions and which harmonises the objectives of the two bodies in a symbiotic fashion.
- A consensus, on matters of important principle should be reached between the organisations. This consensus should be reflected in a written agreement.
- It may be necessary that matters of fundamental principle should not only be part of an agreement, but enshrined in law to provide enforceable protection.

- Matters of fundamental principle should establish the basic rights of individuals in relation to each body in different circumstances. In particular, the right of detainees and prisoners, in the custody of a justice body, to participate in the truth and reconciliation process should be enshrined in law.
- Provision should be made for a binding dispute resolution mechanism. The arbiter should not be one or the other complementary body.

Staffing of future post-conflict bodies

In the appointment of foreign personnel to staff post-conflict organisations, great care must be taken to ensure that staff members undergo sensitisation not only to local conditions but also to the delicate balances that must be maintained in post-conflict endeavours. Such training should engender a good understanding of the history and nature of transitional justice, the history of the country and region in question, and the respect required for local people, customs and traditions.

Building the national justice system

- The SLSC will strike a blow against impunity in Sierra Leone and the region of West Africa. It will also leave behind a brand new court building. Sadly, however, it will leave the Sierra Leone justice system in the same parlous and corrupt state that it always has been.
- The international justice initiative ought to have left something behind. A specialised investigative and prosecutorial capacity should have been developed to assist Sierra Leone to tackle future priority crimes.
- In South Africa the skills and experiences of the Goldstone Commission of Inquiry were subsequently used very successfully in the Investigation Unit attached to the office of the Transvaal Attorney General. This unit, together with that of the Investigation Task Unit in KwaZulu, in turn helped to build the capacity that was ultimately used to set up the highly successful Directorate of Special Operations, (the 'Scorpions'), South Africa's elite crime fighting unit. International crime combating initiatives ought to feed into the development of local capacity and skills.

- International criminal justice initiatives should leave a legacy behind in the form of localised capacity to tackle the most serious cases of the future.

The politics and problems of international criminal justice in Africa: The South African experience

Howard Varney

The South African experience, while unique and even celebrated, was not without its problems. On the one hand it involved a truth and reconciliation process in which truth was exchanged for amnesty. Those perpetrators who were refused amnesty or who did not apply for amnesty were meant to face prosecution. On the other hand, it also involved *ad hoc* criminal investigations and prosecutions. *Ad hoc*, because the prosecutions were not intended to complement the TRC process. If the amnesty offered by the TRC was regarded as the 'carrot', these investigations were not intended to provide the 'stick'. Rather, they were intended to address specific situations.

When the South African truth commission started there was no dedicated body in the criminal justice system tasked with investigating and prosecuting political crimes of the past. Certainly nobody expected the police to fill this role. This enormous task fell to two relatively small inquiries, one based in Pretoria and the other in Durban. The aim of these investigations was to use the criminal justice system to neutralise those behind organised political violence and in particular those behind organised hit squads. At the time of the investigations these individuals wielded considerable power. It was feared that if they were not challenged and exposed, they may play future destabilising roles.

The Pretoria investigation was set up in early 1994 under the Transvaal Attorney General. It was tasked with cleansing the South African Police of death squads, most notably the unit based at the farm known as Vlakplaas. This investigation was the direct product of the commission of inquiry led by Judge Richard Goldstone. The Durban initiative, the Investigation Task Unit, established in late 1994, was tasked with intervening in the bloody Natal conflict through the bringing to book of those behind organised hit squads. Both investigations faced

enormous odds. The Pretoria inquiry achieved a measure of success with the conviction of Colonel Eugene De Kock, commander of a police death unit. It was the conviction of De Kock that led directly to the amnesty application of several senior police officers.

The Durban investigation focused on the roles played by the state, and in particular the military, in supporting Inkatha and KwaZulu Police hit squads. The massacre of 13 people at the home of United Democratic Front (UDF) activist Victor Ntuli at KwaMakhutha, south of Durban on 20 January 1987, was the event which became the subject of the Malan trial. The massacre took place in the context of increasing rivalry and conflict in the KwaZulu-Natal region between Inkatha and the ANC. Following investigations, some 20 persons were charged with murder and conspiracy to murder, including the former Minister of Defence, Magnus Malan, the entire senior hierarchy of the former South African Defence Force (including a Vice-Admiral and several Generals), a security branch Colonel, the Secretary-General of Inkatha, and members of the hit squad that carried out the massacre.

The military was accused of secretly supplying hit squads for Inkatha by way of secret training; the provision of arms and ammunition; and conspiring with Inkatha to plan, execute and cover up crimes. Several hundred people were trained and placed in a para-military unit comprising four components styled as offensive, defensive, VIP protection, and contra mobilisation. The offensive unit was the pro-active or attacking part of the force – a hit squad that was provided to Inkatha.

All the accused were acquitted. It is worth quoting two sentences from one of the documents put up by the state. The document was a top secret report which recorded a meeting held in 1989 between senior military officers, former Chief Minister Buthelezi and the secretary-general of Inkatha, known in the documents by his code name, Reeva:

The Chief Minister was concerned that he was losing the armed struggle and in that regard emphasised that "offensive steps" were still a necessity; meaning the deployment of "hit squads". (in Afrikaans).

REEVA however indicated that he is still looking at his idea of an armed force, or at the very least "cells" which could take out undesirable members.

While there was some interesting debate around how it was that the phrase 'hit squads' crept into an official military document, the authenticity of

the document was accepted by the court. The case ultimately turned on the meaning of 'offensive actions'. The state argued that offensive steps meant the carrying out of violent actions, such as hit squad activity. The defence argued that offensive actions meant protective actions or lawful reactions to attacks. One would have thought that documentary evidence that equated offensive steps with hit squads would have settled the matter.

It did not help that the Attorney-General chose not to charge the author of the document or call him as a witness. Ultimately the Judge and his assessors felt they could completely ignore this document because the date of the document fell just outside of the conspiracy period set by the Attorney General. That the offensive steps referred to in this document were the same offensive actions that had been supported by the military throughout the 1980s seemed to escape the court. This episode speaks volumes of how this matter was prosecuted and adjudicated.

Lessons

- There was no strategic plan to investigate and prosecute crimes of the past in South Africa notwithstanding the truth for amnesty formula which demanded that there be a coordinated criminal justice response.
- It is not good enough to sanitise a criminal investigation from a corrupt police force that is unable to investigate itself and its former masters. The same must happen with the prosecution services.
- The composition of the judiciary will always be a big factor in sensitive prosecutions. The handling of the Malan case by the court raised questions as to whether such politically sensitive cases should be treated as normal criminal cases to be allocated to judges who may be ill suited to adjudicating such matters; and whether they should not have been heard by specially appointed panels.

What has happened since the winding up of the TRC?

In a few words: not much. The amnesty committee wound up its work in early 2003. Towards the end of 2004 the Priority Crimes Litigation Unit

was about to move against those behind the attempted murder through poisoning of a leading opponent of apartheid, the Rev Frank Chikane. At the eleventh hour they were 'instructed' not to proceed with the arrests. The National Prosecuting Authority (NPA) announced that this case and indeed all the TRC cases were to be held back pending the amendment of the prosecution policy. The amendments we were told would deal specifically with the TRC cases. Between November 2004 and December 2005, none of the TRC cases were taken forward.

NGOs voiced their concerns at indications that the proposed policy would amount to a rerun of the truth for amnesty procedure of the former TRC under the guise of prosecutorial discretion. They expressed their disquiet over the fact that all prosecutions of the past had been placed under an effective moratorium pending the amendment of the prosecutions policy and that every day that passed by saw crimes prescribed in terms of section 18 of the Criminal Procedure Act. They pointed out that the prejudice suffered by affected victims and communities was irreversible.

NGOs such as the Foundation for Human Rights urged government to circulate the proposed amendments to the prosecution policy so that they and other interest groups could provide comment and input. Notwithstanding their early written representations, the amended policy was issued on 1 December 2005 without such consultation; at least not with the NGOs. And it did precisely what the NGOs feared. The amended policy permits perpetrators of the past to approach the NPA behind closed doors and to apply for an effective immunity against prosecution. In order to win this immunity, perpetrators have to meet the same amnesty criteria set out by the old TRC law, namely full disclosure.

The policy, which sets out a shopping list of criteria that prosecutors can take into account, includes the "degree of indoctrination to which a perpetrator was subjected". This is alarming. The degree to which an offender subscribed to an ideology should never be a factor in the consideration as to whether to prosecute or not. Including such a criterion sets a dangerous precedent. Ideology and indoctrination can never justify the committal of human rights atrocities. Such a criterion is in clear violation of South Africa's obligations in terms of international law.

The objections of the NGOs to the amendments to the prosecutions policy are summarised below:

- The amended policy impermissibly empowers the National Director of Public Prosecutions to decline to prosecute, or to offer indemnities against prosecution, on essentially the same grounds employed by the TRC's erstwhile Amnesty Committee.
- Full disclosure may no longer be used as it was in the TRC amnesty process in exchange for an effective indemnity against prosecution.
- Unlike the old TRC Act, which was specifically authorised under the Interim Constitution, no constitutional authority exists under the 1996 Constitution for any measure that would serve to undermine the rights of victims to justice.
- The amendments to the prosecution policy promote impunity and set a dangerous new precedent in Africa.
- The amendments to the prosecution policy place South Africa in violation of its international law obligations.
- The amended policy is perpetrator friendly and affords little sensitivity to the needs and wishes of victims. It bestows upon perpetrators yet another generous dispensation to allow them to escape justice, this time around for an open and unlimited period.

Contrary to pronouncements made by the National Prosecuting Authority (NPA) before the Justice Portfolio Committee of Parliament, the amendments do not provide for arrangements "that are standard in the normal execution of justice" nor do they "accord with current legislation such as the Criminal Procedure Act". If the amended policy was intended to do no more than to make use of plea bargain and state witness arrangements, then there would have been no need to amend the original policy. In fact the amended policy purports to empower the NDPP to decline to prosecute on the basis of full disclosure without requiring the perpetrator to become a state witness or having to enter a plea bargain arrangement.

The fact that victims can still bring civil cases and that they have the right to bring private prosecutions is of little or no succor to victims. Most civil claims have long prescribed and the bringing of private prosecutions in South Africa is not a realistic option. In 2006 there is no place for the TRC's amnesty criteria in South Africa's prosecution policy.

The prosecution of international crimes in South Africa

As far as I am aware there has never been a prosecution of a crime against humanity or any other core international crime in South Africa. However the Constitutional Court in the matter of *S v Basson*²⁹ has held that the NPA represents the community and is under an international obligation to prosecute crimes of apartheid:

... the State's obligation to prosecute offences is not limited to offences which were committed after the Constitution came into force but also applies to all offences committed before it came into force. It is relevant to this enquiry that international law obliges the State to punish crimes against humanity and war crimes. It is also clear that the practice of apartheid constituted crimes against humanity and some of the practices of the apartheid government constituted war crimes.³⁰

There is currently at least one matter before the NPA which may result in the prosecution of the international crime of torture. That is the case of the 1983 abduction, torture and disappearance of Nokhuthula Simelane. In this case the perpetrators received amnesty for the abduction but not for the torture of Simelane. The PCLU has agreed to take this case forward but they have advised us that there is currently nothing they can do on this matter and indeed virtually all of their TRC cases because the police refuse to supply the unit with experienced investigators. It seems that we are back to square one. In these circumstances one has to question the commitment of the state to keeping the national compact struck with victims – to prosecute those denied amnesty.

Amnesties, international crimes and the ICC

Ron Slye

How should the ICC respond to a domestic amnesty? While this is a question posed directly by current events in Uganda, it is an issue that the Court will surely confront in the future. Despite a growing trend to declare illegal and reverse amnesties granted for violations of

²⁹ 2005 (1) SA 171 (CC)

³⁰ Paragraph 37, *Basson*.

international criminal law, amnesties continue to be widely used by states undergoing a transition to human rights friendly democracies.

Rome Statute

At Rome, a conscious decision was made to omit any mention of amnesties despite lobbying by members of the South African delegation and others, who had the South African amnesty in mind. As I have argued elsewhere, the South African amnesty is a model of an amnesty that provides some justice and accountability.

While the Rome Statute does not mention amnesties explicitly, it does have a number of provisions that are relevant in determining what discretion the court has in responding to a domestic amnesty. I want to focus briefly on three provisions of the Rome Statute: Articles 16, 17, and 20. Pursuant to Article 16, the Security Council can use its Chapter VII powers to order that the Court defer prosecution for one year. The Security Council could determine that a peace process that concludes an amnesty provision warrants such a deferral. The Court in turn could certainly evaluate that deferral with respect to whether it genuinely meets the requirements of Chapter VII – in other words is such a deferral necessary to maintain international peace and security. The ICTY in its first decision on jurisdiction in the Tadic case provides a useful precedent of an international court evaluating the legality of a Security Council action. In the case of the ICTY, the court was *created by* the Security Council, which could argue for a greater degree of deference than in the case of the ICC, which owes its existence, legitimacy and power to a treaty and not the authority of the Security Council.

Pursuant to Article 17 concerning admissibility, the Court is to refuse to hear a case if a national state court is addressing the matter adequately. The question then is whether an amnesty would qualify as a mechanism that is adequately addressing the alleged crime of the suspect. This in turn is a question for the prosecutor in exercising his discretion; for states in determining what mechanisms would satisfy the Court under the admissibility provisions; and the trial and appellate chamber in hearings on the matter. A matter is being addressed adequately if it is being investigated or prosecuted by a state, unless there is evidence that

the state is unwilling or unable to genuinely carry out such investigation or prosecution. Failure to prosecute and a completed prosecution may be adequate unless either of these courses is chosen by the state for the purpose of shielding the individual from accountability for crimes.

The admissibility provisions focus on three concepts: investigation, prosecution, and justice. Investigations and prosecutions are to be judged based upon whether they further such justice and accountability. The fundamental issue therefore is one of justice and accountability. The relevant question then is whether an amnesty or other mechanism provides some form of justice or accountability. If it does, then there is an argument that the Court should declare such a matter inadmissible.

For our purposes here, Article 20 plays a similar function as Article 17. Pursuant to Article 20, a person may not be tried before the Court if he has already been tried for the same matter before another court. However if that other court proceeding was designed to protect the individual from accountability, then the Court may proceed to hear the matter. Again, the question is whether the other proceeding is compatible with justice and accountability.

Amnesties under international law

Blanket amnesties that provide no form of accountability have been found to be illegal under international law. National courts, UN treaty bodies, the *ad hoc* international criminal tribunals, and the Inter-American Commission and Court have all opined on the legality of amnesties. These decisions have focused on the right to justice; right to truth; and access to courts or access to justice. Upholding these rights have led all of these bodies to declare the amnesties presented to them illegal under international law. There is also dicta in a number of other cases asserting that amnesty for certain offences is not allowed. Thus the ICTY in the Furundzija case opined that torture could not be subject to an amnesty. The Lome accord asserted that amnesty could not be a bar for prosecution of crimes committed in the Sierra Leone conflict.

In the refugee context, the UNHCR adopts a more nuanced approach to amnesties in the context of Article 1(F) of the Refugee Convention. Article 1(F) provides that individuals suspected of committing acts that violate international criminal law are not entitled to refugee status. With

respect to amnesties and other similar mechanisms granted for such acts, the UNHCR states:

Where expiation of the crime is considered to have taken place, application of the exclusion clauses may no longer be justified. This may be the case where the individual has served a penal sentence for the crime in question, or perhaps where a significant period of time has elapsed since commission of the offence. Relevant factors would include the seriousness of the offence, the passage of time, and any expression of regret shown by the individual concerned. In considering the effect of any pardon or amnesty, consideration should be given to whether it reflects the democratic will of the relevant country and whether the individual has been held accountable in any other way. Some crimes are, however, so grave and heinous that the application of Article 1F is still considered justified despite the existence of a pardon or amnesty.³¹

As noted above, states continue to prefer amnesties for addressing periods of transition, though this preference is eroding. The last decade has seen an increased willingness on states to reverse or ignore amnesty-like provisions. Both Chile and Argentina have overcome and even reversed some of their amnesty provisions to allow for criminal prosecutions.

Evaluating amnesties

Out of this international and state practice, one can create a set of criteria to evaluate the justice of particular amnesties. I have identified below a typology of amnesties – four different types of amnesties that one can use as a guide to determine whether to defer to or recognise a particular amnesty.

Amnesic amnesties

Amnesic amnesties tend to be blanket self-amnesties, although they may also be the result of an agreement among all sides to a political and military conflict. Their defining characteristics are concealment and anonymity. Beneficiaries are identified, if at all, through group characteristics rather than individually. Amnesic amnesties provide little or no information concerning past abuses, and examples include Chile (1978), Sierra Leone, Cambodia and Uganda.

³¹ Guidelines on International Protection: Application of the Exclusion Clause: Article 1(F) of the 1951 Convention relating to the Status of Refugees, HCR/GIP/03/05 4 September 2003.

Corrective amnesties

There are two types of corrective amnesties:

- Protection from prosecution for crimes like treason, including taking up arms against the state. These are acts that do not qualify as a human rights violation or as a violation of international criminal law, but are acts that a state may legitimately criminalise. With a transition to a new regime, what may have been viewed as treasonous is now viewed as patriotic, and thus may no longer warrant such prosecution. These are the amnesties that are encouraged at the end of an armed conflict by Article 6(5) of Protocol II to the Geneva Conventions. This was the type of amnesty that motivated the creation of Amnesty International.
- Amnesty for violations of laws that themselves violate international law. Thus amnesty from prosecution for violations of the pass laws during apartheid South Africa; for illegally leaving the country; for membership in a political organisation, such as the PAC or ANC. The UN rapporteur Joinet has in my view correctly criticised the use of amnesties in cases like this. He argues that amnesty implies that there is an underlying offence for which protection from accountability is being provided. These cases do not involve an underlying offence. Rather they involve protection from illegal laws.

Accountable amnesties

These provide some form of accountability. There are seven characteristics that define accountable amnesties. They:

- are democratically created;
- do not apply to those most responsible for violations of international criminal law;
- provide some form of public accountability of recipients, such as acknowledgement by individual perpetrators;
- provide participatory rights to victims – to hear testimony, and to question or challenge;
- provide reparations to victims;
- are designed and justified by transition to a more friendly regime;
- contribute to truth.

Compromise amnesties

This is a catch-all category for amnesties that partially reveal and partially conceal, and may thus provide some partial form of accountability. It may, for example, consist of a blanket amnesty combined with a truth commission. There is institutional, but not individual, acknowledgment and identification. Thus beneficiaries are identified by their membership in a group, without any requirement that they otherwise identify themselves. Possible examples include Argentina, Chile in the 1990s, Guatemala and Honduras.

Applying the amnesties typology

The typology suggested above can be applied to three case studies: the South African amnesty process, the Ugandan amnesty proposal, and the new South African prosecution policy for apartheid-era crimes.

South Africa's amnesty process

The South African amnesty process of the Truth and Reconciliation Commission is the one type that comes closest to meeting the criteria for an accountable amnesty. The South African amnesty:

- was democratically created;
- might exclude those most responsible – under an interpretation of the requirement of proportionality – but in practice proportionality was not strictly interpreted, and thus amnesty was available to those most responsible;
- followed a process of self identification and allowed for the identification of individual perpetrators;
- was a public process for gross violations of human rights;
- allowed the participation by victims who could attend hearings, question applicants, and submit their views on whether an individual should be granted amnesty or not;
- provided for reparations, although here the process was less satisfactory than many had hoped;
- contributed to truth by providing some additional knowledge even though there is clearly much that was not revealed.

Should such an amnesty be upheld by, for example, the ICC? This issue was played out in a very minor way in connection with litigation in the

US against a number of major multinational corporations for complicity in the crime of apartheid. The SA government submitted a statement urging the court to decline to hear the case, arguing that the TRC process had adequately dealt with the issues raised by the plaintiffs in that case. The US Court did dismiss, although on other grounds.

I would argue that the ICC and foreign courts should generally defer to the SA amnesty process. This does not mean that I think the process did not have its problems and limitations.

Uganda's amnesty proposal

The Ugandan amnesty might qualify as a compromise amnesty. It is part of a genuine transition and peace negotiations but there is no accountability and no participation by victims. The Ugandan amnesty is granted to anyone who agrees to give up fighting. This is a common use of amnesties – a mechanism for weakening an armed opposition. While such amnesties may contribute to a lessening of violence, there is growing experience and evidence that such amnesties do not contribute to long term peace and stability, as they do not provide justice.

There is however strong evidence that many in Uganda support such an amnesty. Superficially it resembles the Uruguay situation where the amnesty was upheld by a popular referendum, although I think there are some legitimate concerns raised about whether the Uruguayan referendum accurately reflected popular sentiment. In Uganda my understanding is that there is broad support.

I would then generally support the Ugandan amnesty, except for its application to those most responsible for atrocities – the five leaders that have in fact been indicted by the ICC.

South African prosecution policy for apartheid-era crimes

The National Prosecuting Authority has recently issued a policy memorandum to guide the decision of whether to pursue prosecution for acts committed during some of the apartheid years (1960 – 1994). The policy creates another amnesty-like process. Under the new policy, an individual files an affidavit making full disclosure of the acts for which he is responsible. In return the individual may be provided protection from any criminal prosecution. There are significant differences between this process and the TRC amnesty process:

- The new policy is not crucial to a transition to a human rights friendly democracy. It is being proposed more than ten years after that transition.
- There is no victim participation in this process. The policy requires that best efforts be made to locate victims, but nothing more.
- The process is not public, and thus there will be no public truth or public participation.
- Criteria have been altered from the original amnesty to include things like reconciliation, remorse, and infirmity.
- The process is thus open to more individuals as beneficiaries, while at the same time closed to victims and the public.

It is clear that SA could decide not to prosecute some individuals using criteria like this under its powers of prosecutorial discretion, and such decisions would be entitled to a good deal of deference by the ICC. Providing affirmative protection from accountability, which is what the new policy appears to do, seems to be much more problematic. It is not clear if this new policy is constitutional under SA law. I suspect it is not, given particularly the original Constitutional Court decision that upholds the amnesty provisions.

It is clear to me that such an amnesty at best might qualify as a compromise amnesty, although there is hardly much of an argument that it is needed for or furthers a transition to democracy that has clearly occurred and is not in danger of failing.

A new amnesty-like proposal

As noted above, states – such as Argentina, Chile, Bangladesh and Guatemala to name just a few – have begun to annul their own amnesties. These developments have occurred years after the original amnesty was granted. This suggests something like a reverse statute of limitations. A somewhat fanciful proposal for a new form of amnesty might be the following:

- no prosecutions for a period of time, say five to 10 years;
- individuals must apply and make 'full disclosure';
- disclosure could occur at the beginning or end of this period:
 - at the beginning, events are fresh in people's minds, although this might create resentment for lack of prosecution;

- disclosure at the end may postpone uncovering the truth and may also give rise to the dangers that memories fade and witnesses lose interest or become tired of repeating their stories.

At the end of that period, individuals then apply for permanent extension of amnesty. A permanent amnesty could be granted if the following requirements were met:

- full disclosure – did any information come out that was not disclosed initially;
- contributions to reconciliation/peace.

Unlike what has been tried to date, this would create an incentive on amnesty recipients to perform good works during the probationary period. A possible problem is whether the carrot of this amnesty is sweet enough to encourage disclosure/participation. With the increased possibility of prosecutions – from the ICC and other mechanisms – I would argue that such an amnesty becomes more attractive to its intended recipients.

Conclusion

The ICC clearly has flexibility in addressing amnesties. I would urge the Court not to treat all amnesties the same. I have offered a typology by which the Court could distinguish among amnesties, and then used some real life examples to illustrate that typology. I have also suggested another type of amnesty that may be developing based upon state practice.

Finally, I assume that we all agree that the 'peace vs justice' paradigm by which these issues are so often discussed is a false, or at least unhelpful, one and that one cannot have one without the other. Thus the real question is what form of justice contributes in the best way to peace. The specific answer to that question will depend on the specific context in which the question is raised. My point here is that an amnesty is not necessarily incompatible with justice, and may in fact provide justice in a way that furthers peace.

The symposium's key outcomes

Outcomes from the symposium included this report, along with the Key Outcomes document prepared with the inputs and comments of participants. This document also provides a useful guide for further work in this area.

Key outcomes document

At the close of the two-day symposium participants concluded an outcomes document in which they identified and recorded clear initiatives that can be taken to enhance the prosecution of international crimes and end impunity for serious crimes in Africa.³² Specifically, the participants at the symposium agreed on the following:

1. The fulfillment of the aims and objectives of the ICC on the African continent are dependent on the support of African states, relevant regional organisations, the AU and civil society. This requires a collaborative relationship between the AU, regional organisations, civil society and the ICC.
2. The AU needs to play a vital role in building understanding and support among its member states about the importance of ending impunity for serious violations of international crimes. This will enhance the role and work of the ICC in Africa and encourage states to comply with their complementarity principles under the Rome Statute.
3. The collaborative relationship between the AU and ICC must be strengthened. Specifically:

³² The full outcomes document is attached as Appendix 4.

- 3.1. The AU should fully extend to the ICC its assistance and support in accordance with the terms of the imminent MoU between the two organisations.
- 3.2. A targeted African campaign should be launched to achieve increased levels of ratification and implementation of the Rome Statute to enhance the work of the ICC in Africa.
- 3.3. The capacity of national criminal justice systems in African states must be developed to ensure that international crimes can be and are effectively investigated and prosecuted.
4. Awareness among the public and stakeholders (including civil society, political leadership and practitioners) of the ICC, its role in Africa, international criminal justice and reconciliation, and the duties of States Parties and States' officials, must be improved. This could include the establishment of an informal African network of justice stakeholders and the coordination of regular symposia to take stock of African progress in relation to the ICC and the prosecution of international crimes.
5. Recognised international criminal justice principles must be embedded and adapted to promote the development of a tailored approach for Africa's people. This would guard against parallel mechanisms being used, which could undermine the objectives and activities of the ICC in Africa. It is also important to remember that questions of responsibility for the prosecution of core international crimes in Africa are broader than the ICC alone. The extent to which other structures such as the Commission on Human and Peoples' Rights, the African Court on Human and Peoples' Rights, and other pan-African institutions can play a role in this regard should be explored to maximise this potential.
6. Prioritisation must be given to the improved investigation and prosecution of sexual violations as international crimes. Such cases should be investigated in a timely manner to ensure that evidence is obtained, and training is needed for investigators and prosecutors in how to deal with victims. The development of appropriate prosecutorial strategies at the outset of proceedings could also assist.
7. Witness protection and services to victims must be entrenched as an essential component of the prosecution of international crimes.

This would require strengthened regional and international cooperation, including the sharing of best practices and the establishment of country focal points, and necessary capacity and resources.

Foundation for future work on international crimes in Africa

The symposium has also provided impetus and guidance for continued work in the area. The ISS hopes to assist in developing domestic capacity for responding to international crimes in Africa within the context of human rights and international law.

If the pervasive culture of impunity is to be tackled, an important response will be to develop domestic capacity to respond to war crimes, crimes against humanity and genocide in support of the International Criminal Court's efforts. Because Africa is the only continent where the ICC is active, the Court's impact will be limited by the extent to which countries have ratified the Rome Statute and developed complementary national legislation.

These processes rely on domestic capacity as well as political support among states. The symposium clearly identified the need for African-based initiatives that can assist in developing 'African mechanisms' for responding to international crimes and the problem of impunity. In this regard, it will be important that efforts build understanding of, and support for, the role of international law and the ICC in ending impunity, promote the ratification and effective implementation of the Rome Statute, assist in building domestic capacity to deal with international crimes, and provide an African forum for dialogue and learning among policy makers, practitioners and experts.

Conclusion

The International Criminal Court stands as a working model of international criminal justice in terms of which an international criminal forum applies rules of international law, is staffed by independent prosecutors and judges, and holds persons individually responsible for crimes against humanity and war crimes, after allowing them a fair trial. It is the appropriate pinnacle of international criminal justice. Today, international criminal law has truly come of age.

The moral imperative of international criminal law – of holding individuals accountable under the world's highest law for the world's worst crimes – means that international law can no longer be seen as a law that applies only between states. It is today a law that binds soldiers, civilians, and leaders. And it is a law that protects individuals from genocide, crimes against humanity and war crimes, if only through the promise that perpetrators of such crimes will not go unpunished. Its importance for Africa can no longer be denied.

The practical application and effect of international criminal law depends, however, on the cooperation of states and organisations. In Africa, where the Court's work is currently under way, there is thus a need for enhanced understanding and political acceptance of the ICC's work. There is also a role for close reflection on the problems that face domestic African prosecutors confronted with giving effect to their state's complementarity obligation of investigating and prosecuting international crimes.

The ICC's impact in Africa will be limited by the extent to which countries have ratified the Rome Statute and developed complementary national legislation – processes that rely equally on domestic capacity as well as political support among states for ending impunity and for the ICC as an institution. Political support is particularly important. The participants at the symposium, including leading figures within the AU

and the ICC, highlighted the fact that the success of the ICC will depend on support of African states, relevant regional organisations, the AU and civil society.

It was agreed by all that the AU needs to play a vital role in building this support among its member states, and that the collaborative relationship between the AU and the ICC must be strengthened. The AU is well poised in this regard. The aims of the AU (under Articles 4(m), 3(h) and 4(o) of the Constitutive Act) reiterate that the AU is committed to ensuring respect for the rule of law and human rights, and condemning and rejecting impunity.

And the role for civil society in this regard was clearly articulated by the African Commission on Human and People's Rights in 2005. The Commission's *Resolution on ending impunity in Africa and on the domestication and implementation of the Rome Statute of the ICC* calls on civil society organisations in Africa to work collaboratively to develop partnerships to further respect for the rule of law internationally and strengthen the Rome Statute.

These partnerships and the AU's support for international criminal justice are particularly important when considering the fact that serious hurdles must be overcome if the ICC is to be effective in Africa. For instance, it is evident that while there is general support for the principle of ending impunity, in practice, the uncomfortable choices facing political leaders and policy makers means that little gets done. Some no doubt fear that the Court may target them or members of their support base. Others are faced with having to choose between the long term goal of ending impunity through criminal prosecutions or the short term pressures to negotiate and reach peace agreements with political rivals (which would probably require amnesties for perpetrators of international crimes).

The debate (exemplified by current events in Uganda) about whether prosecutions may delay conflict resolution and peacebuilding, or whether the threat of prosecutions itself forces leaders to the negotiation table, is just one of the examples of how contested the terrain is and how imperative it is for the ICC's work to be understood and championed by African leaders and institutions in the face of such challenges.

As speakers at the symposium pointed out, a further question is that of the timing of ICC interventions, which is crucial, particularly on a continent where many violent conflicts are unresolved and fears abound

that attempts to prosecute protagonists may prolong the violence and suffering on the ground. This is especially relevant when considering that the capacity, resource and technical considerations facing both states and the ICC, mean that cases could take years to finalise.

In evaluating if and when to pursue prosecutions for international crimes, participants at the symposium noted the challenge faced by political leaders who are forced to weigh up the cost-benefit of international justice against that of social and economic justice. Particularly in impoverished countries, the dominant sentiment may well be that resources ought to be devoted to social and economic upliftment rather than to convicting one or two perpetrators of large-scale atrocities.

Lastly, the ICC must also contend with states' reluctance to support justice initiatives perceived to be 'foreign' or 'un-African'. Despite the fact that the complementarity principles of the ICC are aimed at precisely these concerns, symposium participants stressed how much work needs to be done to raise awareness among leaders in Africa that this is the case, and that the ICC is designed to allow states to take ownership of the international criminal justice process by performing the investigations and prosecutions themselves.³³

Despite these challenges, the formation of the ICC and its focus on Africa has provided the impetus to pursue efforts to end impunity on the continent in earnest. Not only does the Rome Statute provide a framework for responding to international crimes within the context of human rights and international law, but the process of developing complementary legislation presents an opportunity to strengthen states' criminal justice systems by reforming and refining domestic criminal and procedure codes, and training criminal justice officials in specialised skills.

The speakers at the symposium underlined the need to develop domestic capacity to respond to international crimes in support of the ICC, and to build political support for such efforts. Without such efforts,

³³ See the challenges of outreach for the ICC discussed in *the First Outreach Report*, ICC Monitoring and Outreach Programme, An International Bar Association Human Rights Institute Report, IBA, London, June 2006.

the potential for strengthening the rule of law and peacebuilding will not be realised.

International criminal law, which for so long has stuttered and stumbled, is now firmly gaining stride. Its pace is lengthening on African soil. The hope is that the ISS symposium on the investigation and prosecution of 'core international crimes' and the role of the International Criminal Court in Africa was a means of contributing to the debate about international criminal justice within Africa and that it will form one of the foundations for further efforts towards ensuring that the work of the International Criminal Court is supported and enhanced on the continent.

APPENDIX 1

List of symposium participants

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APPENDIX 2

Symposium agenda

Thursday 3 August

08h30 – 09h00 Registration

Morning session: Introduction, overview, orientation

Chair: Pansy Tlakula (Commissioner, African Commission on Human and Peoples' Rights)

09h00 – 09h15 Welcome and objectives (Jakkie Cilliers, Executive Director, ISS)

09h15 – 09h45 TheriseoftheInternationalCriminalCourt,complementarity and domestic prosecution of international crimes (Judge Navi Pillay, Judge of the International Criminal Court)

09h45 – 10h15 The International Criminal Court *in* Africa: current cases (Fatou Bensouda, Deputy Prosecutor, International Criminal Court)

10h15 – 10h45 Tea break

10h45 – 11h15 The International Criminal Court *and* Africa: the AU and the ICC (Admore Kambudzi, Secretary to the Peace and Security Council, Commission of the African Union)

11h15 – 12h30 Discussion

12h30 – 13h30 Lunch

Afternoon session: Best practices and main challenges encountered when prosecuting and investigating core international crimes

Chair: Cecile Aptel Williamson (Head, Legal Advisory Section, UN International Independent Investigation Commission)

13h30 – 14h05 Sierra Leone (Maxine Marcus, prosecuting attorney at ICTY, and former attorney/investigator at SCSL)

- 14h05 – 14h40 Rwanda (Bongani Majola, Deputy Prosecutor, International Criminal Tribunal for Rwanda)
- 14h40 – 15h15 Uganda (Richard Buteera, Director of Public Prosecutions, Uganda)
- 15h15 – 15h40 Tea break
- 15h40 – 16h10 Lessons and legacies (Howard Varney, Advocate, Johannesburg Bar)
- 16h10 – 17h00 Discussion
- 18h00 – 19h00 Welcome address by Adv Vusi Pikoli (National Director of Public Prosecutions, SA) followed by wine and cheese tasting at Zevenwacht Winetasting centre

Friday 4 August

Morning session: The politics and problems of international criminal justice in Africa

Chair: Judge Richard Goldstone (Former Chief Prosecutor ICTY/ICTR)

- 09h00 – 09h35 A domestic example: the South African experience (Howard Varney)
- 09h35 – 10h10 A regional example (1): Chad, Habre and the African Union (Reed Brody, Human Rights Watch)
- 10h10 – 10h30 Tea break
- 10h30 – 11h05 A regional example (2): The Sierra Leone Special Court, Liberia, Nigeria, and Charles Taylor (Yasmin Sooka, Executive Director, Foundation for Human Rights)
- 11h05 – 11h40 Some reflections (Judge Richard Goldstone)
- 11h40 – 12h30 Discussion
- 12h30 – 13h30 Lunch

Afternoon session 1: Justice as tension

Chair: Yasmin Sooka

- 13h30 – 14h00 Retribution and reconciliation in Africa: clash or complement? (Graeme Simpson, International Center for Transitional Justice)
- 14h00 – 14h30 Amnesties and international crimes (Ron Slye, Seattle University School of Law, currently visiting professor, Wits Law School)

- 14h30 – 15h00 Discussion
- 15h00 – 15h15 Tea break

Afternoon session 2: International cooperation

Chair: Martin Polaine (Consultant, Commonwealth Secretariat)

- 15h15 – 15h45 A view from the ICC – how the African Union can assist (Fatou Bensouda)
- 15h45 – 16h15 Response from the African Union (Patrick Tigere, Acting Director for Political Affairs, Commission of the AU)
- 16h15 – 16h50 Discussion and conclusions
- 16h50 – 17h00 Closing (Jakkie Cilliers)

APPENDIX 3

Biographies of speakers and chairpersons

Fatou BENSOU DA is the Deputy Prosecutor of the International Criminal Court, in charge of the Prosecution Division in the Office of the Prosecutor. Before being elected to this position by the Assembly of States Parties on 8 September 2004, Mrs Bensouda worked as a Legal Adviser and Trial Attorney at the International Criminal Tribunal for Rwanda (ICTR) in Arusha, Tanzania, rising to the position of Senior Legal Advisor and Head of The Legal Advisory Unit.

Before joining the ICTR, she was the General Manager of a leading commercial bank in The Gambia. Between 1987 and 2000, she worked at the Attorney General's Chambers and Ministry of Justice of The Gambia successively as State Counsel, Senior State Counsel, Principal State Counsel, Deputy Director of Public Prosecutions, Solicitor General and Legal Secretary of the Republic, finally rising to the position of Attorney General and Minister of Justice, in which capacity she served as Chief Legal Advisor to the President and Cabinet of The Republic of The Gambia.

During her service with the Government of The Gambia, Mrs Bensouda represented the Gambia at several international fora including the negotiations on the treaty of the Economic Community of West African States (ECOWAS), the West African Parliament and the ECOWAS Tribunal.

She has also been a delegate at United Nations' Conferences on Crime Prevention and the Treatment of Offenders, the Oxford Conferences on Mutual Legal Assistance, the Organization of African Unity's Ministerial Meetings on Human Rights, and the delegate of the Gambia to the meetings of the Preparatory Commission for the International Criminal Court. Mrs. Bensouda holds a masters degree in International Maritime Law and Law of The Sea and as such is the first international maritime law expert of The Gambia.

Reed BRODY is Special Counsel at Human Rights Watch. Brody coordinated HRW's intervention in the case of Augusto Pinochet in Britain's House of Lords, and is lead counsel for the victims in the case of the exiled former dictator of Chad, Hissène Habré, who was indicted for crimes against humanity in Belgium and now faces trial in Senegal.

He is the author of the recent HRW report, "Getting Away with Torture?" which examines the impunity of top U.S. officials for the widespread mistreatment of Muslim prisoners; "The Road to Abu Ghraib," which investigates the roots of the Iraqi prisoner abuse scandal; and "The United States' 'Disappeared,'" which looks at the long-term incommunicado detention of al-Qaeda leaders in 'secret locations.'

Previously, he led United Nations teams investigating massacres in the Democratic Republic of Congo and observing human rights in El Salvador. In 1995-1996, he coordinated an international legal team to prosecute human rights crimes in Haiti. He is co-author (with Michael Ratner) of *The Pinochet Papers: The Case of Augusto Pinochet in the British and Spanish Courts*, and author of *Tibet: Human Rights and the Rule of Law*; and *Contra Terror in Nicaragua*.

Richard BUTEERA has been the Director of Public Prosecutions in Uganda since 1995. Between 1980 and 1981, he was an Assistant Lecturer/Research Fellow at the Faculty of Law, Makerere University. In 1982 he was appointed Advocate of the High Court of Uganda and Courts subordinate thereto. Between 1981 and 1993 he served as Magistrate Grade One, Chief Magistrate, and Inspector of Courts. Between 1993 and 1995 he was Chief registrar/Permanent Secretary at the Courts of Judicature. Mr Buteera has been a Member of the Executive Committee of The International Association of Prosecutors since 2000, and the Alternate Chairperson to the Justice Law and Order Sector Steering Committee since 1999.

Dr Jakkie CILLIERS co-founded the Institute for Defence Policy during 1990 which subsequently became the Institute for Security Studies (ISS). Since 1993 Dr Cilliers has served as Executive Director of the ISS. Awards and decorations include the Bronze Medal from the South African Society for the Advancement of Science and the H Bradlow Research Bursary. Dr Cilliers has presented numerous papers at conferences and seminars and is a regular commentator on local and international radio and television.

He regularly lectures on security issues and has published, edited and contributed to a large number of journals, books and other publications, serving on a number of boards and committees. Dr Cilliers has B Mil (BA), Hons BA, MA (*cum laude*) and D Litt et Phil degrees from the Universities of Stellenbosch and South Africa.

Richard J. GOLDSTONE is a former Justice of the Constitutional Court of South Africa (1995 - 2003) and former Chief Prosecutor of the United Nations International Criminal Tribunals for the former Yugoslavia and Rwanda (1994 - 1996). He is presently a Hauser Global Visiting Professor of Law at New York University School of Law. He is the co-chair of the Human Rights Institute of the International Bar Association and the Chancellor of the University of the Witwatersrand, Johannesburg.

Dr Admore Mupoki KAMBUDZI is Secretary to the Peace and Security Council of the AU Commission. Between 2001 and 2005, his activities in the Commission of the AU have, briefly, included being the focal point/analyst for Angola and Zimbabwe, Ethiopia-Eritrea, Somalia, and Uganda (Northern Uganda conflict). He is also responsible for overall coverage of east Africa, and is the back-up analyst for the work of the PSC. Between 1993 and 2001, Dr Kambudzi lectured in political science at the University of Zimbabwe at undergraduate and post-graduate levels. He authored a book, *Africa's Peace Fiasco*, as well as numerous articles in journals, book chapters and monographs.

Maxine MARCUS is an international criminal attorney and investigator with nine years international humanitarian law experience in Darfur, Sudan, Sierra Leone, Bosnia and Hercegovina, Kosovo, Croatia, Chechnya, Ivory Coast, Gambella, Ethiopia, and Guinea. Max has written and lectured on international humanitarian law and human rights law, and has provided formal and informal technical support, training, and guidance to prosecutors, police, military, international and local IGOs and NGOs, and community-based organizations in the fields of international humanitarian and human rights law, investigation and prosecution of sexual and gender based violence, international criminal tribunals, and international criminal investigations.

From 2003 to 2005 Max served as lead investigating attorney for the Civil Defense Forces prosecution team in the Special Court for Sierra Leone. In

August 2004, Max was part of a US Department of State and American Bar Association-sponsored investigation into allegations of violations of international criminal law in Darfur, Sudan, and from September through November 2005, she conducted an inquiry into an alleged pattern of violations of international humanitarian and human rights law in the Gambella region of Ethiopia. Max is currently a prosecuting attorney in the Office of the Prosecutor at the ICTY.

Judge Navanethem PILLAY was born in South Africa in 1941, and has been both a symbol and a standard-bearer for human rights in her country, in the region, and throughout the world. She received her Bachelor of Arts and her Bachelor of Law degree from Natal University in South Africa and later a Master of Law and Doctor of Juridical Science at Harvard University, U.S.A.

She opened her law practice in 1967 – the first woman to do so in Natal Province. As senior partner in the firm, she represented many opponents of apartheid, and became such a threat to the apartheid regime that she was denied a passport for many years. She handled precedent-setting cases to establish the effects of solitary confinement, the right of political prisoners to due process, and the family violence syndrome as a defense.

In 1995 came another first – she was the first black woman attorney appointed acting judge of the High Court of South Africa by the Mandela Government. On the heels of that appointment, Judge Pillay was elected by the UN General Assembly to be a judge on the International Criminal Tribunal for Rwanda, where she served for eight years, including four years as president. During her tenure, the ICTR rendered a judgment against Jean-Paul Akayesu, mayor of Taba commune in Rwanda, in which she participated, finding him guilty of genocide for the use of rape in the “destruction of the spirit, of the will to live and of life itself.” She was presiding judge in the “Media” trial which set precedential standards for Press Freedom and Press responsibility.

In February 2003, Judge Pillay was elected by the Assembly of State Parties to the Rome Statute, as one of the 18 Judges of the International Criminal Court (ICC), based in The Hague.

Martin POLAINE is a consultant at the Commonwealth Secretariat. A barrister, he has previously practised at the criminal bar in London, as a

Senior Crown Prosecutor with the Crown Prosecution Service of England & Wales, and as a lawyer at the Independent Police Complaints Commission. As a Crown Prosecutor, in addition to having conduct of a number of high profile ‘transnational’ cases, his responsibilities included liaison with other jurisdictions on mutual legal assistance requests.

From 2000 to 2005, Martin was a member of the OECD Working Group on Bribery and has been a ‘lead examiner’ for its peer review process. In the fields of anti-corruption, economic crime, organised crime and international co-operation, he has also undertaken country evaluations and training on behalf of the EC/EU, UN and other international and regional bodies, and has advised on law, procedure and drafting in Central and Eastern Europe, Asia and the Pacific.

He has written and spoken widely, and has had papers on international co-operation and on related topics published by, inter alia, the OECD and APEC. He is also the author, with three others, of ‘Corruption & Misuse of Public Office’ (Oxford University Press, 2006).

Graeme SIMPSON is the Country Programs Unit Director at the International Centre for Transitional Justice. Graeme Simpson has an LLB and an MA in history from the University of the Witwatersrand, South Africa. He has worked extensively on issues related to transitional justice, including work with the South African Truth and Reconciliation Commission, and on the transformation of criminal justice institutions in South Africa. Mr. Simpson was a founder and, from 1995-2005, executive director of the Centre for the Study of Violence and Reconciliation, in Johannesburg. He was one of the drafters of the National Crime Prevention Strategy, adopted by the South African cabinet in May 1996, as well as being a member of the drafting team for the South African White Paper on Safety and Security. Mr Simpson has worked as a consultant to both governmental and non-governmental organizations in various countries, including Cambodia, Sierra Leone, Bosnia and Indonesia.

Ronald C. SLYE is currently the Bram Fischer Visiting Professor in Human Rights at the Wits Law School. He is Director of International and Comparative Law Programs and an Associate Professor with tenure at Seattle University School of Law, where he teaches public international law, international human rights law, poverty law, and property law. He

is the author or co-author of numerous articles and books in the areas of international human rights law, poverty law, and environmental law, and is currently writing a book on the legitimacy of amnesties for gross violations of human rights.

From 1997 to 2000 he was a consultant to the South African Truth and Reconciliation Commission, advising them on issues of human rights and international law. From 1993 to 1996 he was the Associate Director of the Orville H. Schell, Jr. Center for International Human Rights at Yale Law School, and co-taught Yale's international human rights law clinic. Professor Slye received a J.D. from Yale Law School in 1989, a M.Phil in International Relations from the University of Cambridge in 1985, and a B.A. in History from Columbia University in 1984.

Yasmin SOOKA joined the Foundation for Human Rights (FHR) in South Africa in January 2001. She is currently employed as the Executive Director. The FHR is the primary indigenous grantmaker for the human rights sector in South Africa. The Foundation was established by the European Union and the Government of South Africa under the European Programme for Reconstruction and Development. Prior to joining the Foundation, Yasmin was a Member of the Truth and Reconciliation Commission in South Africa serving in the first three years as the Deputy Chair to the Human Rights Violations Committee and in the latter period as the Chair of the Committee. She also chaired the legal sub committee of the Commission and was responsible for the final report.

Yasmin was also appointed by the Office of the High Commissioner for Human Rights as one of three international Commissioners to the Truth and Reconciliation Commission for Sierra Leone. There she was responsible for policy and operational development as well as the planning and writing of the final report. Ms Sooka is widely regarded as an expert on transitional justice and has been a consultant to a number of governments, commissions and civil society organisations on this field.

Patrick TIGERE is currently the Acting Director for Political Affairs at the AU Commission. Since 2005, he has been the Head of Division for Humanitarian Affairs, Refugees and Displaced Persons in the AU's Department of Political Affairs. Between 1993 and 2004 he was with the UN High Commissioner for Refugees as:

- Assistant Protection/Legal Officer, Liberia, 1993-95.
- Associate Protection/Legal Officer, Liberia, 1995-96.
- Protection/Legal Officer, Tanzania, 1996-99.
- Legal Adviser, Standards and Legal Advice Section in the Department of International Protection, UNHCR Headquarters, Geneva, Switzerland, 1999-01.
- Member of the UNHCR High Commissioner's Advisory Committee in Geneva, 2002-04.
- Chairperson of the UNHCR Rebuttal Board in Geneva, 2002-04.
- Legal Adviser, Protection Operation Support Section of the Department of International Protection, UNHCR Headquarters, Geneva, Switzerland, 2001-03.
- Senior Protection/Legal Officer, UNHCR Branch Office Sierra Leone, 2003-04.

Patrick Tigere has extensive experience dealing with international humanitarian law, refugee law and international human rights law at a field operational level and at a policy and legal advisory level in both UNHCR and the African Union Commission over the last thirteen years. He is familiar with the challenges of enforcement of international humanitarian law during conflict, post conflict and in communities in so-called transition situations. He has been involved directly and indirectly in dealing with some questions arising out of the Rwanda genocide, war crimes in Liberia and the current situation in Darfur. Mr Tigere has an LL.M. in International Law from the University of Lund, Sweden.

Pansy TLAKULA is currently the Chief Electoral Officer of Electoral Commission of South Africa. Before she joined the Electoral Commission in February 2002, she was a member of the South African Human Rights Commission for six years. During her period in office she served as a convener of the first National Conference on Racism and also represented the HRC in the World Conference against racism, racial discrimination, xenophobia and related intolerance. She is also the former National Director of the Black Lawyers Association.

She was appointed as a member of the African Commission for Human and People's Rights at the meeting of the AU Heads of States which was held in Libya in July 2005. Her portfolio in the Commission is special

rapporteur for Freedom of Expression and she is also responsible for Swaziland, Namibia, Democratic Republic of the Congo and Zambia.

Howard VARNEY is an advocate at the Johannesburg Bar. In the early 1990s he was an attorney with the Legal Resources Centre in Durban where he represented communities and victims of political violence in public interest litigation, judicial inquests and commissions of inquiry. In the mid 1990s he led an independent criminal investigation in South Africa into state sponsored hit squad activity. Varney has acted as a consultant to the South African Truth & Reconciliation Commission. He was the Chief Investigator for the Sierra Leone Truth & Reconciliation Commission. More recently he assisted the Commission for Reception, Truth and Reconciliation in East Timor (CAVR) compile its final report. While in East Timor he co-authored a report assessing the performance of the Serious Crimes Unit and Panels. As a consultant for the International Centre for Transitional Justice (ICTJ) he has advised and assisted with the development of transitional justice initiatives in several countries in Africa and Asia.

Cécile APTEL WILLIAMSON is Head of the Legal Advisory Section at the UN International Independent Investigation Commission. She has recently worked as a senior researcher at the ISS, visiting fellow at Wits University, and lectures international criminal law at the Human Rights Centre of the University of Pretoria, and at the University of Caen (France). She contributed to the setting-up of the United Nations International Criminal Tribunal for the Former Yugoslavia (ICTY) and the International Criminal Tribunal for Rwanda (ICTR) in 1995, and worked continuously at the ICTR from 1996 to 2001, in the Registry, the President's Office, and the Chambers. In 2002, she joined the Office of the Prosecutor, which was then common to the ICTY and ICTR, to serve as Policy Co-ordinator. In 2003, she became Legal Advisor in the ICTY Prosecutor's Office, where she remained until April 2005. In this function, she supported the establishment of the Special Court for Sierra Leone, and the Special Chamber for War Crimes in the Court of Bosnia-Herzegovina. Cécile regularly publishes on international criminal justice issues, and is a member of the editorial committee of the *Journal of International Criminal Justice* (Oxford University Press).

APPENDIX 4

Key Outcomes document

The Institute for Security Studies (ISS), with funding from the Open Society Foundation South Africa, brought together a group of 47 local, regional and international experts to a symposium on the investigation and prosecution of 'core international crimes' and the role of the International Criminal Court (ICC) in Africa.

The first objective was to lay the foundation for greater cooperation between the African Union (AU) and the ICC. The second, and related, objective was to highlight the problems and politics (both domestically within African states and regionally within Africa) of prosecuting international crimes. The idea was to identify critical areas where national criminal justice officials are likely to need support/training in investigating and prosecuting international crimes.

Africa has already demonstrated a clear commitment to the ideals and objectives of the ICC: more than half of all African states (28) have ratified the Rome Statute, and many have taken proactive steps to ensure effective implementation of its provisions. In addition, participants of the symposium identified clear initiatives that can be taken to enhance the prosecution of international crimes and end impunity for serious crimes in Africa. Specifically, the participants at the symposium agreed on the following:

1. The fulfilment of the aims and objectives of the ICC on the African continent are dependent on the support of African states, relevant regional organisations, the AU and civil society. This requires a collaborative relationship between the AU, regional organisations, civil society and the ICC.
2. The AU needs to play a vital role in building understanding and support among its member states about the importance of ending impunity for serious violations of international crimes. This will enhance the role and work of the ICC in Africa and encourage

- states to comply with their complementarity principles under the Rome Statute.
3. The collaborative relationship between the AU and ICC must be strengthened. Specifically:
 - 3.1 The AU should fully extend to the ICC its assistance and support in accordance with the terms of the imminent MoU between the two organisations.
 - 3.2 A targeted African campaign should be launched to achieve increased levels of ratification and implementation of the Rome Statute to enhance the work of the ICC in Africa.
 - 3.3 The capacity of national criminal justice systems in African states must be developed to ensure that international crimes can be and are effectively investigated and prosecuted.
 4. Awareness among the public and stakeholders (including civil society, political leadership and practitioners) of the ICC, its role in Africa, international criminal justice and reconciliation, and the duties of States Parties and States' officials, must be improved. This could include the establishment of an informal African network of justice stakeholders and the coordination of regular symposia to take stock of African progress in relation to the ICC and the prosecution of international crimes.
 5. Recognised international criminal justice principles must be embedded and adapted to promote the development of a tailored approach for Africa's people. This would guard against parallel mechanisms being used, which could undermine the objectives and activities of the ICC in Africa. It is also important to remember that questions of responsibility for the prosecution of core international crimes in Africa are broader than the ICC alone. The extent to which other structures such as the Commission on Human and Peoples' Rights, the African Court on Human and Peoples' Rights, and other pan-African institutions can play a role in this regard should be explored to maximise this potential.
 6. Prioritisation must be given to the improved investigation and prosecution of sexual violations as international crimes. Such cases should be investigated in a timely manner to ensure that evidence is obtained, and training is needed for investigators and prosecutors in how to deal with victims. The development of appropriate prosecutorial strategies at the outset of proceedings could also assist.
 7. Witness protection and services to victims must be entrenched as an essential component of the prosecution of international crimes. This would require strengthened regional and international cooperation, including the sharing of best practices and the establishment of country focal points, and necessary capacity and resources.

APPENDIX 5

The symposium organiser: The ISS

The Institute for Security Studies is a regional strategic studies think-tank located in South Africa that engages on peace and security issues in Africa. The Institute's research and interactions are practical and policy orientated. The Institute has a staff complement of close to 70 persons and an annual budget of R50 million. In terms of staff composition the Institute reflects a regional composition and has staff from almost a dozen African countries. The ISS has its head office in Pretoria South Africa and offices in Cape Town, Nairobi and Addis Ababa.

The ability and capacity to engage the international debate on security issues from the region is an important component of the work of the Institute as it seeks to inform the debate from an African perspective. Much work is in support of regional and intergovernmental organisations and although the Institute researches and writes extensively on various 'sensitive' matters in the public domain, the much larger support provided to regional organisations is less well known.

As a leading African human security research institution, the ISS works towards a stable and peaceful Africa characterised by sustainable development, human rights, the rule of law, democracy and collaborative security.

The mission of the ISS is to conceptualise, inform and enhance the debate on human security in Africa in order to support policy formulation and decision-making at every level towards the enhancement of human security for all. The ISS realises this mission by:

- undertaking applied research, training and capacity building;
- working collaboratively with others;
- facilitating and supporting policy formulation;
- monitoring trends and policy implementation; and
- collecting, interpreting and disseminating information.

The Institute adopts a broad approach to security reflective of the term human security which largely brings additional areas of focus to traditional state security considerations. If human development is freedom from want (a process widening the range of people's choices), human security can be understood as the ability to pursue those choices in a safe and equitable environment.

The ISS is registered as a non-profit trust (Registration no 1922/T) and governed by a Trust Act in accordance with the requirements of the Trust Property Control Act (No. 57 of 1997). The Institute is also registered as a non-profit organisation in terms of the Non-Profit Organisations Act (No. 71 of 1997).

The ISS has two external and one internal trustees namely Advocate Selby Baqwa (until recently the Public Protector of South Africa), Judge Lucy Mailula (High Court) and Dr Jakkie Cilliers. The Trustees normally meet on a quarterly basis.

The Institute also has a Council that meets annually or more often as required. The purpose of the Council is to advise the ISS on strategic policy and management issues, to serve as a vehicle to enhance the accountability and transparency of the Institute and to advance and represent the interests of the ISS. The President of the ISS Council is Dr Salim Ahmed Salim, former Secretary-General of the OAU. At present the Institute runs the following Programmes:

- Tracking and analysis of conflict (African Security Analysis Programme)
- Defence Sector Programme (dealing with civil-military relations)
- Crime and Justice Programme
- Peace Missions Programme
- Arms Management Programme (small arms, conventional arms and landmines)
- Corruption, and Governance
- Organised Crime and Money Laundering
- Advancing human security in Southern Africa
- Support to various intergovernmental offices in Nairobi (RESCA and EAPCCO)
- Counter Terrorism in the Horn
- African Human Security Initiative

The ISS manages four web sites and an Intranet:

- www.issafrica.org (the ISS site with an average in excess of more than 1,6 million hits per month)
- www.africanreview.org (African Human Security Initiative site)
- www.trainingforpeace.org (TfP programme site for NUPI, ACCORD and ISS)
- www.smallarmsnet.org (Web portal for small arms management in Africa)
- www.ipocafrika.org (Southern African Information Portal on Corruption)
- www.whofundswho.org.za (Who Funds Who? Money in South African politics)

