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International Criminal Justice From Paper to Practice - A Contribution From The International Criminal Tribunal For Rwanda to the Establishment of the International Criminal Court

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Abstract

The international society's pursuit of international criminal justice entails the creation of a stateless jurisdiction with international scope that holds individuals, rather than States, responsible. As the institutions mandated to exercise international criminal jurisdiction begin to develop their operations, it becomes clear that the execution of justice entails a wide range of policy decisions normally undertaken by the State, in terms of legal aid, policing, education, and information, to mention but a few areas. The International Criminal Court may draw upon the wealth of operational experience of the Tribunals in these areas, but will nonetheless continue to develop its own practice just as the definition, purpose, and execution of justice will continue to evolve over time.

INTERNATIONAL CRIMINAL JUSTICE:
FROM PAPER TO PRACTICE—
A CONTRIBUTION FROM THE
INTERNATIONAL CRIMINAL TRIBUNAL FOR
RWANDA TO THE ESTABLISHMENT OF THE
INTERNATIONAL CRIMINAL COURT

*Adama Dieng**

INTRODUCTION

“[I]t has always been the case and still is, that the international society tends to reflect national society at an earlier stage”¹

Since the earliest civilization, law enforcement mechanisms have evolved with the societies they served. The definitions of law and justice, their societal function, as well as their execution, have been subject to much debate in most societies. On the international plane, globalized for some and increasingly divided for others, debate about what is just, the utility of justice, and how it should be executed, follows a similar pattern. As our international society comes of age, it is useful to draw parallels between national justice systems and international justice systems. It is noteworthy that the outcome of such debate has often been determined by those who have a greater means of influence.

Thus it is with humble pride that this contribution to the debate on international criminal justice is made, from the perspective of the International Criminal Tribunal for Rwanda (“ICTR”).²

While the Rwanda Tribunal provides the first example of

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1. G.G. Fitzmaurice, *The Foundations of the Authority of International Law and the Problem of Enforcement*, 19 MOD. L. REV. 1, 3 (1956).

2. Statute of International Criminal Tribunal for the Prosecution of Persons Responsible for Genocide and Other Serious Violations of International Humanitarian Law Committed in the Territory of Rwanda and Rwandan citizens responsible for genocide and other such violations committed in the territory of neighboring states, between January 1, 1994 and December 31, 1994, U.N. Doc. S/RES/955 (1994), *amended* by U.N. Doc. S/ RES/1165 (1998); U.N. Doc. S/RES/1329 (2000) [hereinafter ICTR Statute].

the exercise of international criminal justice on the African continent,³ it must be noted that Africa has an undeniable stake in the development of international criminal justice. The first State to ratify the Rome Statute⁴ was Senegal. Of the forty-eight ratifications to date, ten have been by African States,⁵ thirty-seven others have signed, and numerous others are in the advanced stages of the ratification process. The Rwanda Tribunal has gained a wealth of operational experience since its creation by the Security Council in 1994 and is well placed on the African continent to observe developing trends in international law from a field perspective.

I. THE CONCEPT OF JUSTICE: FROM WAR AS ENFORCEMENT, TO THE ENFORCEMENT OF INTERNATIONAL CRIMINAL JUSTICE

Until the relatively recent adoption of the United Nations Charter “war, and the use of force generally, did constitute in some sense a recognized method of enforcing international law; or, more accurately a means where by in the last resort a dispute

3. The government of Sierra Leone and the United Nations signed the agreement establishing the Special Court for Sierra Leone on January 16, 2002 in Freetown. See *Sierra Leone: UN, Government Sign Historic Accord to Set Up Special War Crimes Court*, Jan. 16, 2002, at <http://www0.un.org/apps/news/story.asp?NewsID=2639&Cr=Sierra&Cr1=court>. According to the agreement the Special Court will prosecute persons who bear “the greatest responsibility” for serious violations of international humanitarian and national law during the country’s decade-long war. Agreement Between the United Nations and the Government of Sierra Leone on the Establishment of a Special Court for Sierra Leone, pmbl. Led by the Assistant Secretary General for Legal Affairs, a 15-member team including staff from the ICTR took part in the planning mission, which began on January 14, 2002.

4. Rome Statute of the International Criminal Court, U.N. Doc. A/CONF. 183/9* (1998), available at <http://www.un.org/law/icc/statute/rome.htm> [hereinafter Rome Statute].

5. Benin, Botswana, Gabon, Ghana, Lesotho, Mali, Nigeria, Senegal, Sierra Leone, and South Africa have ratified the Rome Statute for the establishment of the International Criminal Court. Angola is likely to ratify in the near future as its parliament has adopted ratification laws, merely awaiting head of State approval. Madagascar and Uganda have draft ratification bills under parliamentary review. The Attorney General of Tanzania is currently reviewing a draft ratification paper. The relevant Ministry in the Republic of Zimbabwe is in the advanced stages of preparation of a draft bill for parliamentary review. *The Road Map to the International Criminal Court*, ICTR BULLETIN, December 2001, No. 2, at 5, available at <http://www.ictor.org>. For updated information on ratification status, see *Country by Country Ratification Status Report*, at <http://www.iccnw.org>.

between States as to their rights could be settled.”⁶ It was accepted then that “the use of force was a means, however crude, by which an injured State could assert or defend its legal rights.”⁷

The repeated cry of “never again” which has echoed through the twentieth century spurred the international community into action. It established laws and enforcement mechanisms aimed at deterring war and punishing those responsible for the most heinous crimes associated with war.

From the use of war as a recognized means of law enforcement, the U.N. Charter attempted to “save succeeding generations from the scourge of war”⁸ and provided a general prohibition on the use of force by States. Founded on the principle of sovereign equality,⁹ and embraced by nations both large and small, the United Nations welcomed membership of newly independent States in the hope of uniting strength to maintain international peace.¹⁰

The Hague Conventions of 1899 and 1907 on the laws and customs of war¹¹ and the new “general” prohibition of the use of force in article 2(4) of the U.N. Charter, addressed the responsibility of *States* in bringing “untold suffering to mankind.” However, the 1948 Genocide Convention and 1949 Geneva Conventions provided the foundations of *individual* criminal responsibility, and envisaged that such responsibility be evidenced by an international criminal court.¹² These were put into practice almost immediately at the International Military Tribunals of Nuremberg and Tokyo, where international criminal law was first exercised.

The entrenchment of the Cold War stagnated the development of individual criminal responsibility: the creation of an in-

6. Kelsen, *PRINCIPLES OF INTERNATIONAL LAW* 18-39 (1952).

7. *Id.*

8. U.N. CHARTER pmbl.

9. The belief that all men were created equal developed into the concept of sovereign equality, one of the fundamental principles of the U.N. Charter, strongly embraced by all its members. Vattel, *LE DROIT DES GENS, OU PRINCIPES DE LA LOI NATURELLE, APPLIQUES À A CONDUITE ET AUX AFFAIRES DES NATIONS ET DES SOUVEREINS* (1758) (cited in G. Zhou, *INTERNATIONAL LAW* 207-16 (1976)).

10. U.N. CHARTER pmbl.

11. First Peace Conference at The Hague, July 29, 1899, available at <http://www.lib.byu.~rdh/wwi/hague.html>; Second Peace Conference at The Hague, Oct. 18, 1907, available at <http://www.lib.byu.~rdh/wwi/hague.html>.

12. Convention on the Prevention and Punishment of the Crime of Genocide, opened for signature Dec. 9, 1948, art. 6; The Geneva Conventions of Aug. 12, 1949.

ternational court to enforce the crimes outlined in the conventions was inconceivable in a climate of mistrust and world division. The International Law Commission's early plans for such a project were shelved.

The International Court of Justice, however, was established by the U.N. Charter as the principal judicial organ of the United Nations.¹³ Mandated to decide disputes between States, the International Court of Justice has no jurisdiction over individuals. It decides upon cases, or provides advisory opinions as submitted to it by States. It was not envisaged as a body to *proprio motu* take the lead in determining breaches of international law.

From its early days, the Security Council was perceived as the peace and law enforcer. It was believed by some that:

the Security Council is not a body that merely enforces agreed law. It is a law unto itself. If it considers any situation as a threat to peace, it may decide what measures shall be taken. No principles of law are laid down to guide it; it can decide in accordance with what it thinks is expedient. It could be a tool enabling certain powers to advance their selfish interests at the expense of another power.¹⁴

Much expectation was placed upon the Security Council, considering that above all, its very existence maintained a delicate balance of power.

The ideals of peace through collective security and disarmament, as provided for in the Charter were somewhat naive given the situation that prevailed throughout the Cold War.¹⁵ Without a standing United Nations force,¹⁶ and with the 1950 Korean Crisis marking the lowest ebb of the Cold War era, the Security

13. U.N. CHARTER art. 92.

14. See MOHAMMED BEDJAOU, *NOUVEL ORDRE MONDIAL ET CONTROLE DE LA LEGALITÉ DES ACTES DU CONSEIL DE SÉCURITÉ* 11 (1994) (quoting the *mot célèbre* of JOHN FOSTER DULLES, *WAR OR PEACE* (1950)). See Gaetano Arangio-Ruiz, *On the Security Council's Law Making*, *RIVISTA DI DIRITTO INTERNAZIONALE*, 3/2000, at 610 (2000).

15. Article 24(1) of the United Nations Charter endows the Security Council with primary responsibility for the maintenance of international peace and security; Article 42 of the United Nations Charter allows for the use of force as a measure to restore peace and security; Article 51 of the United Nations Charter provides that States have a right to use collective or individual self defence, with appropriate notice to the Security Council. See U.N. CHARTER.

16. U.N. CHARTER art. 43. Article 43 states:

All members of the United Nations, in order to contribute to the maintenance of international peace and security, undertake to make available to the Security Council, on its call and in accordance with a special agreement or agree-

Council found itself paralyzed. The rift between the major powers and the overriding importance of their respective national interests resulted in a reality of proxy wars: a far cry from the post war attempts to address the responsibility of States or individuals for the cause of untold suffering.

While the General Assembly developed some limited practice of its own, like the Uniting for Peace Resolution¹⁷ to deal with pressing matters of conflict, member States turned to regional security pacts to safeguard their interests.

During this period of relative State inaction, the outcry from civil society began to surpass national debates, entering into the international arena. Aided by the growing international media, humanitarian non-governmental organizations (“NGOs”) brought images of conflict stricken and impoverished populations to television viewers around the globe. Coverage reported constant violations of international law and wide scale commission of crimes against humanity. The lacuna between international law and reality became increasingly evident, impunity being tolerated by too many.

The change of climate following the end of the Cold War allowed for the voice of civil society to be heard. More frequent consensus amongst permanent members of the Security Council put the Council under far more scrutiny for its actions than its inaction. Spurred by the creation of the two *ad hoc* Tribunals, the International Law Commission was tasked with revisiting the project for the establishment of an International Criminal Court. National courts ventured to exercise universal jurisdiction. The momentum recognizing individual criminal responsibility grew stronger and stronger. Political will and confidence to “end impunity” was highlighted in July 1998, when 120 nations from around the world, as a society of equal and sovereign States, adopted the Rome Statute of an International Criminal Court.

The international community of nation States, which once

ments, armed forces, assistance, and facilities, including rights of passage, necessary for the purpose of maintaining international peace and security.

Id.

17. The “Achson plan” formally known as the Uniting for Peace Resolution provided for the General Assembly to meet within twenty-four hours if the Security Council failed to “exercise its primary responsibility for the maintenance of peace and security.” Uniting for Peace, 5th Sess., at 10, para. 1, U.N. Doc. A/RES/377 (V) (1950).

accepted war as enforcement, is slowly giving way to an international civil society demanding individual criminal accountability under the rule of law. Transcending the shield of government institutions, the International Criminal Court does not recognize any form of immunity.¹⁸

The International Criminal Court has jurisdiction over crimes committed on the territory of a State that has ratified the Rome Treaty, or over the nationals of States party to the Treaty. Thus crimes committed by a national of a non-State party on the territory of a State party are subject to the Court's jurisdiction. However, if the Security Council refers a situation to the Court acting under Chapter VII, it has jurisdiction over non-State party nationals as well as on non-State party territories.¹⁹ The Court's Prosecutor has *proprio motu* powers to initiate investigations with regard to alleged crimes committed within the jurisdiction of the Court.²⁰ The Prosecutor may conclude that it has reasonable grounds to proceed with an investigation on the basis of information received from any source, including NGOs or individual victims.

18. Rome Statute, *supra* note 4, art. 27. Article 27 states:

Irrelevance of official capacity:

- (1) This Statute shall apply equally to all persons without any distinction based on official capacity. In particular, official capacity as a Head of State or Government, a member of a Government or parliament, an elected representative or a government official shall in no case exempt a person from criminal responsibility under this Statute, nor shall it, in and of itself, constitute a ground for reduction of sentence.
- (2) Immunities or special procedural rules which may attach to the official capacity of a person, whether under national or international law, shall not bar the Court from exercising its jurisdiction over such a person.

Id.

19. *Id.* art. 12(2). Article 12(2) states:

In the case of article 13, paragraph (a) or (c), the Court may exercise its jurisdiction if one or more of the following States are Parties to this Statute or have accepted the jurisdiction of the Court in accordance with paragraph 3:

- (a) The State on the territory of which the conduct in question occurred or, if the crime was committed on board a vessel or aircraft, the State of registration of that vessel or aircraft;
- (b) The State of which the person accused of the crime is a national.

Id.; Article 13(b) states: "A situation in which one or more of such crimes appears to have been committed is referred to the Prosecutor by the Security Council acting under Chapter VII of the Charter of the United Nations." *Id.* art. 13(b).

20. *Id.* art. 15(1). Article 15(1) states: "The Prosecutor may initiate investigations *proprio motu* on the basis of information on crimes within the jurisdiction of the Court." *Id.*

In addition to the Prosecutor's powers to initiate investigations, it is the Court itself and no other body, which determines the admissibility of a case. Even if the Court has jurisdiction over a case or situation, it must still be determined whether that case is admissible. The Court undertakes a complementary function to ensure prosecution where prosecution at national level is not feasible. A Pre-Trial Chamber will be faced with very sensitive issues, which break significant new ground in comparison to the authority and mandate of the International Court of Justice. If a case is not referred by the Security Council, the Pre-Trial Chamber must determine admissibility by satisfying a series of tests. These tests, outlined in Article 17 of the Statute, seek to establish whether an investigating State is unable or unwilling to proceed. If the case has already concluded, the tests seek to discover whether due process was observed. Of great sensitivity, are instances where the Court may have to determine whether a decision resulting from a national proceeding was made in order to shield persons concerned.²¹ While States or an accused, may challenge the Pre-Trial chamber's determination, it still is the Court, which remains the ultimate adjudicator of what is admissible, and not the State in question.

Thus, the Court has the foundations of an equitable international law enforcement body, endowed with numerous powers that seemed unrealistic in 1994 when the International Law Commission proposed its draft statute. Nonetheless, the challenges that the Court will face are significant. Above all, whether it will have the capacity to avoid marginalization of some cases in favor of others; whether it will bare up against the global media's own trials, particularly avoiding victor's justice; and whether it will effectively become a people's court accessible to victims of all creeds. In this respect, the fact that victims will have *locus standi* before this Court is a promising safeguard.²²

The international community has moved from an environment when *order* was imposed by war, to an environment where war was technically prohibited and *order* was to be enforced by the Security Council. It seems that there are increasing de-

21. *Id.* art. 17.

22. Under article 15(3) of the Rome Statute, victims may make representations before the Pre-Trial Chamber, at the time when the Prosecutor, if it has reasonable grounds to believe that an investigation may be necessary, must seek authorization from the Pre-Trial Chamber to undertake such investigations. *Id.* art. 15(3).

mands that *order* be imposed by independent but inclusive enforcement bodies; such is the case in international criminal law.

II. UTILITY OF JUSTICE: DETERRENCE, PUNISHMENT,
RECONCILIATION, OR THE RESTORATION AND
MAINTENANCE OF PEACE?²³

The preambles of the statutes of the *ad hoc* Tribunals as well as the statute of the International Criminal Court provide us with the intentions behind the creation of these jurisdictions. Their legal foundations differ enormously. The Tribunals are Security Council institutions,²⁴ created under Chapter VII of the Charter.²⁵ The International Criminal Court is a treaty-based organization. It was negotiated at length by the U.N. member States, with the benefit of considerable civil society presence from the preparatory phases before the Rome Conference, to the working group sessions of the Conference itself.

The Preambles of the Rwanda Tribunal and the International Criminal Court share a primary concern for serious international humanitarian law violations.²⁶ Both seek to prosecute or punish those responsible for such crimes.²⁷ Both institutions

23. Elements taken from the preamble of the ICTR Statute. ICTR Statute, *supra* note 2, annex.

24. The International Criminal Tribunal for Rwanda was established by Security Council Resolution 955 on November 8, 1994. *See id.*; *see also* International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the Former Yugoslavia since 1991, U.N. Doc. S/RES/827 (1993), *amended by* U.N. Doc. S/RES/1166 (1998); U.N. Doc S/RES/1329 (2000) (noting that International Criminal Tribunal for the Former Yugoslavia ("ICTY") was established by the Security Council acting under Chapter VII of the U.N. Charter).

25. Defense counsel of both Tribunals have contested the legality of the Security Council in creating the judicial organs, as well as the lack of competence of the organs to pronounce upon such legality of the Security Council actions. *Prosecutor v. Dusko Tadic*, Case No. IT-94-1, Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction (Oct. 2, 1995).

26. ICTR Statute, *supra* note 2, pmbl. (stating concern about "genocide and other systematic, widespread and flagrant violations of international humanitarian law" occurring in Rwanda); Rome Statute, *supra* note 4, pmbl. (noting that this century has witnessed "atrocities that deeply shock the conscience of humanity").

27. Rome Statute, *supra* note 4, pmbl. Paragraph 4 of the Preamble states: "Affirming that the most serious crimes of concern to the international community as a whole must not go unpunished and that their effective prosecution must be ensured . . ." *Id.*; ICTR Statute, *supra* note 2, pmbl. The Preamble of the ICTR Statute states: "Acting under Chapter VII of the Charter of the United Nations, 1. *Decides* hereby, having received the request of the Government of Rwanda (S/1994/1115), to establish

recognize that the commission of such grave crimes threatens peace.²⁸

In the case of the Rwanda Tribunal, the determination, in the Preamble of the Statute, that “the situation continues to constitute a threat to international peace and security”²⁹ amounts to a determination under Article 39 of the United Nations Charter that there has been a breach to international peace and security. This determination confirms the legal basis of the Tribunal in Chapter VII of the Charter, in which it is mandated to decide what measures, not involving the use of armed force, should be employed to give effect to its decisions.³⁰

The Preamble of the Rwanda Tribunal takes prosecution of those responsible a step further. It places emphasis on ending the commission of such crimes, “convinced that in the particular circumstances of Rwanda, the prosecution of persons responsible for serious violations of international humanitarian law would enable this aim to be achieved and would contribute to the process of national reconciliation and to the restoration and maintenance of peace.”³¹

In this regard, the Rwanda Tribunal’s convictions of high-ranking officials, such as the prime minister of the 1994 interim government, Jean Kambanda, who was sentenced to life imprisonment on September 4, 1998,³² have rendered the principle of

an international tribunal for the sole purpose of prosecuting persons responsible for genocide and other serious violations of international humanitarian law” *Id.*

28. Rome Statute, *supra* note 4, pmbl. Paragraph 3 of the Rome Statute Preamble states: “Recognizing that such grave crimes threaten the peace, security and well-being of the world.” *Id.*; ICTR Statute, *supra* note 2, pmbl. The ICTR Preamble states: “Determining that this situation continues to constitute a threat to international peace and security.” *Id.*

29. ICTR Statute, *supra* note 2, pmbl.

30. U.N. CHARTER art. 41.

31. ICTR Statute, *supra* note 2, pmbl.

32. Jean Kambanda, prime minister of the interim government of Rwanda (1994), was arrested on July 18, 1997 in Nairobi, Kenya and transferred to the United Nations Detention Facility (“UNDF”) in Arusha the same day. At his initial appearance he pled guilty to the six counts contained in the indictment, namely genocide; conspiracy to commit genocide; direct and public incitement to commit genocide; complicity in genocide; crimes against humanity (murder), punishable under Article 3(a) of the Statute; and crimes against humanity (extermination), punishable under Article 3(b) of the Statute. After verification as to the validity of the guilty plea, Jean Kambanda was convicted and sentenced to life imprisonment on September 4, 1998 for genocide and crimes against humanity. See *Prosecutor v. Jean Kambanda*, Case No. ICTR-97-23-S, Judgment and Sentence, paras. 39-40, Part VI (Verdict) (Sept. 4, 1998). His subsequent appeal against conviction and sentence was quashed on October 19, 2000. See *Jean Kam-*

individual criminal responsibility a universal reality. The operations of the Tribunal have thus impacted the process of national reconciliation and contributed to the restoration and maintenance of peace. Political and military leaders on the continent are aware of Tribunal's operating international criminal jurisdiction, and refer to it in diverse forums. The Lusaka Accords of 1999, seeking to put an end to the conflict in the Democratic Republic of Congo, contained a provision for the handing over of genocide suspects involved in the war to the Arusha Tribunal for Trial. Similarly, President Mkapa of the United Republic of Tanzania, when appointed as Southern African Development Community ("SADC") representative for peace and reconciliation, referred to the operations of the Arusha Tribunal in the context of the war in Angola.³³

In contrast to the Tribunal's pursuit of reconciliation and peace, the International Criminal Court emphasizes principals of non-intervention and relies on the carefully constructed concept of complementarity, alluded to in the Preamble, and later defined in articles 17 to 19 of the Rome Statute.³⁴ Furthermore, the Preamble of the International Criminal Court reminds States of their duty to exercise criminal jurisdiction over those responsible for international crimes.

Complementarity provides a delicate framework in which international justice may be exercised without unduly interfering in the internal affairs of a State. The State in question may be able and willing to exercise its own jurisdiction over the crimes committed. In fact, another State may also exercise universal jurisdiction over the case. The International Criminal Court thus remains on the one hand remote and deferential to the will of the exercising State, while it ultimately determines admissibility where justice would otherwise not be done.

Complementarity provides for the State or the Court to take action. A middle ground has recently developed in the model of

banda v. The Prosecutor, Case No. ICTR-97-23-A (Oct. 19, 2000). Jean Kambanda, along with five other detainees, were transferred to Mali on December 12, 2001 where they will serve their sentences.

33. Despite these references, the International Criminal Tribunal for Rwanda only has a mandate to prosecute persons responsible for crimes "[c]ommitted in the Territory of Rwanda and Rwandan Citizens responsible for genocide and other such violations committed in the territory of neighboring States, between 1 January 1994 and 31 December 1994." ICTR Statute, *supra* note 2.

34. Rome Statute, *supra* note 4, arts. 17-19.

the Special Court for Sierra Leone. This court will be an independent court, staffed by a mixed international personnel of judges, prosecutors, and investigators as well as Sierra Leone staff, judges, and prosecutors.

Providing external assistance to national justice systems, or undertaking any other activity other than the pursuit of justice through due criminal process, has been generally deemed *ultra vires* in respect of the mandate of the International Criminal Tribunal for Rwanda, notwithstanding its Preamble, which might indicate such needs.³⁵ Involvement in such activities, particularly in a post-conflict atmosphere, entails sensitive political considerations, which may taint the impartiality of the court, or weaken civil society ownership of the reconciliation process. In the particular circumstances of Sierra Leone, a more hybrid model was deemed appropriate.

While the International Criminal Court cannot realistically adopt such a hybrid model, the participation of victims as an integral part of international criminal justice should render the activities of the Court more relevant to any national reconciliation process,³⁶ allowing victims as well as the accused to gain ownership of the international process. Legitimacy and relevance for victims, the accused, and national civil society generally will prove cardinal for the success of the future International Criminal Court. The key to avoiding victor's justice may be found therein. The importance of integrity and structural strength of the Court to deal with the tests of trial are further highlighted.

The physical remoteness of the International Criminal Court from future real case scenarios raises some concern. Victims' access to the Court is of fundamental importance in allowing concerned individuals to gain ownership. In this regard,

35. ICTR Statute, *supra* note 2, pmb1. The ICTR Statute stresses "the need for international cooperation to strengthen the courts and judicial system of Rwanda, having regard in particular to the necessity for those courts to deal with large numbers of suspects" *Id.*

36. Article 15(3) of the Rome Statute states: "[i]f the Prosecutor concludes that there is a reasonable basis to proceed with an investigation, he or she shall submit to the Pre-Trial Chamber a request for authorization of an investigation, together with any supporting material collected. Victims may make representations to the Pre-Trial Chamber" Rome Statute, *supra* note 4, art. 15(3).

article 3 of the Statute,³⁷ allowing the Court to sit elsewhere, should be considered with utmost seriousness, in relation to the rights of individual victims of specific crimes to participate in the proceedings and to seek redress.

The only access for third parties to participate in the proceedings of the Tribunals is through the presentation of *amicus curiae* briefs in accordance with Rules 74 of both Tribunals. However, as the Rule outlines, the *amicus* brief may only be admitted with leave of the Chamber, if it is considered "desirable for the proper determination of the case."³⁸ Recognizing the importance of such participatory elements, and being reminded in their very names that they are Tribunals *for* the former Yugoslavia and *for* Rwanda, these institutions have established information outreach programs. The outreach programs sensitize potential witnesses about the functioning of the Tribunals. These programs also attempt to bring the proceedings closer to civil society, informing people of what directly concerns them in an effort to bridge the gap between the remoteness of the Tribunals from the tense post-conflict regions over which they have jurisdiction.

As part of the Rwanda Tribunal's outreach program, Rwandan judges, journalists, victims groups, civil society groups, parliamentarians, lawyers, and students have made extended visits to the Tribunal. In September 2000, the Tribunal inaugurated the ICTR Information and Documentation Center in Kigali. This center provides a base for public information initiatives in Rwanda. It contains a research library with internet facilities, hundreds of books relevant to the study of international criminal justice, and a repository of both documentary and audiovisual material on the work of the Tribunal in Kinyarwanda, French, and English. The information center has been a great success, receiving hundreds of visits per week. Further to this

37. *Id.* art. 3(3) (providing that "[t]he Court may sit elsewhere, whenever it considers it desirable, as provided in this Statute.").

38. Both Tribunals provide that: "A Chamber may, if it considers it desirable for the proper determination of the case, invite or grant leave to any State, organization or person to appear before it and make submissions on any issue specified by the Chamber." International Criminal Tribunal for Rwanda, Rules of Procedure and Evidence, Rule 74, U.N. Doc. ITR/3/REV.1 (1995) [hereinafter ICTR Rules of Procedure and Evidence]; International Criminal Tribunal for the Former Yugoslavia, Rules of Procedure and Evidence, Rule 74, U.N. Doc. IT/32/REV.21 (1994) [hereinafter ICTY Rules of Procedure and Evidence].

initiative the establishment of ICTR Radio broadcasts of the proceedings, as well as educational programs on law and human rights is envisaged as part of the program.

While the Preambles of the Tribunals and the International Criminal Court refer to peace and the deterrence of further crimes, their most important mandate is the provision of equitable and impartial justice. Deterrence, reconciliation, and the maintenance of peace will be logical consequences of equitable and impartial justice. The challenges will be in whether the Prosecutor can independently exercise his or her functions in a highly mediatized and politicized environment, whether the accused, presumed innocent, will have an effective defense and fair trial, and whether victims will have access to the process as intended in the Statute.

III. EXECUTION OF INTERNATIONAL CRIMINAL JUSTICE: CONSIDERATIONS FOR THE INTERNATIONAL CRIMINAL COURT

A. *The Seat of the Court*³⁹

The operational logistics required in running trials for the crimes in question, have led both *ad hoc* Tribunals to establish operational field offices. These facilitate investigations, collection and preservation of evidence, the calling of witnesses, and other practical matters.

For instance, at the commencement of the trial of Ignace Bagilishema⁴⁰ in the first week November 1999, the Judges of Trial Chamber and the parties traveled to Kibuye Prefecture in Western Rwanda for a *locus in quo* visit of the sites referred to in the indictment. This was the first such visit by an international criminal jurisdiction and enabled the judges to see first hand

39. Rome Statute, *supra* note 4, art 3. Article 3 provides that:

1. The seat of the Court shall be established at The Hague in the Netherlands ("the host State").
2. The Court shall enter into a headquarters agreement with the host State, to be approved by the Assembly of States Parties and thereafter concluded by the President of the Court on its behalf.
3. The Court may sit elsewhere, whenever it considers it desirable, as provided in this Statute.

Id.

40. Ignace Bagilishema was acquitted on June 7, 2001. See *Prosecutor v. Ignace Bagilishema*, Case No. ICTR-95-1A-T, Judgment (June 7, 2001).

where the events allegedly occurred. This exercise greatly facilitated the testimony and examination of witnesses during the proceedings. For instance, the visit allowed a first hand experience of the calm and quiet nature of rural Rwanda, and revealed the fact that sound can travel great distances due to the hilly terrain. Cultural and contextual specificities are often central to the interpretation of evidence, and such visits may prove to be useful in the context of future situations brought before the International Criminal Court.

B. *Logistics of Witness Travel and Protection*

The appearance of witnesses for trial has been an area of great learning for both Tribunals. From January 1997 to December 2001, the Rwanda Tribunal heard 362 prosecution witnesses, and 101 defense witnesses. The overwhelming majority of witnesses called upon to date have never traveled abroad before, do not have valid travel documents, or are refugees. In order to avoid stop-overs in third countries, and to reduce travel costs, the Rwanda Tribunal operates its own small airplane, facilitating transport of the witnesses from Rwanda and the Diaspora to Arusha.

The International Criminal Tribunal for the former Yugoslavia, in Rule 71 *bis* of its Rules of Procedure and Evidence provides for testimony by video-link.⁴¹ This technology is very promising, but, as it may have drawbacks, it should not be assumed that it will be able to replace live testimony.

It is noteworthy that eighty-five to ninety percent of witnesses, both prosecution and defense, have benefited from protective measures ordered by a Trial Chamber. Virtually all States today run national witness protection programs of some sort. These generally provide protective measures and relocation programs for prosecution witnesses only. The special nature of international criminal justice calls for protective measures for defense witnesses also.

National witness programs are highly developed in Europe and North America, and formal State cooperation, regarding relocation in particular, has been obtained by the International

41. ICTY Rules of Procedure and Evidence, *supra* note 38, Rule 71 *bis* (stating that “[a]t the request of either party, a Trial Chamber may, in the interests of justice, order that testimony be received via video-conference link”).

Criminal Tribunal for Yugoslavia in the form of eleven cooperation agreements with States. The negotiation of similar agreements between the International Criminal Tribunal for Rwanda and the same States has so far been inconclusive.

In this respect, the Witness and Victims Support Unit of the Rwanda Tribunal undertakes numerous arrangements, which in the case of the International Criminal Tribunal for Yugoslavia, are provided by the relevant authorities of the Netherlands government. The Witness and Victims Support Section maintains safe houses, and relocates witnesses after testimony when necessary. The operational experience of the Rwanda Tribunal in the area of international witness protection will surely be of much relevance for the future International Criminal Court. It seems that to begin with, as with the Rwanda Tribunal, the International Criminal Court may have to rely upon commercial air travel, where the identity of the witness may have to be revealed. Thus, the Court will have to employ new creative measures in arranging for travel documents in order to ensure the safety of witnesses.

As is noted in the areas of victim access and witness protection, there are real challenges to the operation of international criminal justice without the infrastructure of a State, able to provide information to citizens, or able to provide police forces to ensure witness protection. Another area of relevance is the guarantee of an effective defense. The Tribunals have put in place legal aid programs to ensure the rights of the accused, and have gained much experience in this area.

C. Defense Counsel

Defense counsel has a key role to play in defending the case against accused individuals. In order to preserve the integrity and impartiality of the International Criminal Court, it is crucial not to fall into the trap of asserting victor's "justice." In a world dominated by global media, it is of vital importance that while the international community may pre-judge a case or a situation on the basis of facts and arguments presented by the media, these must not be confused with due legal process, and the need to prove an individual guilty beyond all reasonable doubt. The equality of counsel between the parties is sacrosanct and the experience of the Tribunals has shown that the world has little pa-

tience or sympathy for the rights of the accused if it believes the individual to be guilty before his or her trial commences. It is a fundamental duty to ensure a system of defense that is fair and equal. The legal aid program of the International Criminal Court should be established early on in a neutral environment. In any event it should be in place before the referral of the first situation to the Court. Miscarriages of justice occur in every jurisdiction. It is equally, if not more important to ensure a system of justice that will not put innocent people behind bars, as well as a system of justice that will convict those responsible.

International criminal jurisprudence is only in its infancy, and it can only develop in a healthy manner if it is tested and tried equally by parties involved, fostering a trusted, strong, and equitable system.

In this respect, defense counsel, called upon to defend suspects or accused, are entitled to examine evidence presented by the Prosecution, to take testimony and statements, and to collect evidence of their own. In our experience we have learned that as a result of the conflicts in the Great Lakes, ninety percent of potential defense witnesses are refugees, in refugee camps in the Diaspora, or in countries around the world. Thus, defense team members may need to travel, not only in countries where they might not be welcome, but also in the difficult terrains of refugee camps and other third countries. It may also be the case, that counsel has refugee status himself or herself. While such status in no way detracts from a defense counsel's professionalism as a lawyer, the stigma of refugee status, combined with the association with an accused of the most heinous crimes imaginable, renders the maintenance of equality with Prosecution an undeniable challenge.

D. *Detention*

Another area of work in the international criminal jurisdiction, traditionally governed by a Ministry of Justice or Ministry of Interior, and quite separate from the Courts, is prison facilities and detention policies. The Tribunal's Rules of Detention⁴² include detailed provisions covering reception, accommodation,

42. Rules Covering the Detention of Persons Awaiting Trial or Appeal before the Tribunal or Otherwise Detained on the Authority of the Tribunal, June 5, 1998 [hereinafter Rules of Detention].

personal hygiene, clothing, food, physical exercise, recreational opportunities, and medical services provided to detainees, meeting international standards of detention.⁴³

Experts from the International Committee of the Red Cross (“ICRC”) monitor these conditions on a six-month basis under an existing agreement with the Tribunal. The ICRC’s reports have consistently commented positively on the standards of detention of the Tribunal, confirming that they meet the required international standards.

At the Tribunals, detention of persons awaiting trial or appeal is quite distinct from detention in the execution of sentence. In the experience of the Tribunals, the costs and logistics relating to the enforcement of sentences should be considered at an early stage. In view of Rule 201 and 203 of the Draft Rules of Procedure and Evidence of the International Criminal Court,⁴⁴ as well the Tribunal’s Directive on the Designation of a

43. Standard Minimum Rules for the Treatment of Prisoners, *adopted by* the First United Nations Congress on the Prevention of Crime and the Treatment of Offenders, held at Geneva in 1955, and *approved by* the Economic and Social Council by its resolution 663 C (XXIV) of 31 July 1957 and 2076 (LXII) of 13 May 1977 [hereinafter Standard Minimum Rules]; The Body of Principles for the Protection of all Persons under any Form of Detention or Imprisonment, U.N. Doc. A/Res/43/173 (1988) [hereinafter Body of Principles]; Basic Principles for the Treatment of Prisoners, U.N. Doc. A/RES/45/111 (1990).

Under the Standard Minimum Rules: The detention cell must comply with adequate standards of hygiene, minimum surface area, air volume, lighting, heating, and/or ventilation (where applicable) (Article 10); Windows must be sufficiently large to provide enough natural light to allow the detainee to work or read (Article 11a); Sanitary facilities must allow the detainee to satisfy his natural needs at the moment he so desires in a humane and decent manner (Article 12); Adequate shower and bath facilities (Article 13); All locations used on a regular basis by the detainee must satisfy minimum standards of cleanliness (Article 14); Provision of the means to maintain personal hygiene (Articles 15, 16); Provision of adequate clothing and bedding (Article 17, 18, 19); Provision of adequate nutrition and drinking water (Article 20); and Provision of access to open air space and the opportunity of physical exercise (Article 21). Standard Minimum Rules, *supra*.

Under the Body of Principles: Right to translated documents and an interpreter where the convicted person does not adequately understand the language used by the authorities responsible for his detention (Principle 14); Right to communicate with family and counsel (Principle 15); Right to adequate facilities to communicate with counsel (Principle 18); Right to medical examinations and care (Principle 24); and Right to obtain, within limits of available resources, reasonable quantities of educational, cultural, and informational material (Principle 28). *See* Body of Principles, *supra*.

44. *Finalized draft Text of the Rules of Procedure and Evidence*, Rules 201, 203, U.N. Doc. PCNICC/2000/1/Add.1 (Nov. 2, 2000).

State for the Enforcement of Sentence and the relevant International Conventions, it must be considered that enforcement of sentence may take place in a State within the Region that the crimes took place, in order to ensure reasonable proximity to the perpetrator's family. At the Rwanda Tribunal, agreements on the enforcement of sentences have been concluded with Mali, Benin, and Swaziland to date, while extensive efforts have been made to secure such agreements with other States in the Region.

The legal instruments regarding detention standards are cited in the Preamble of the agreements on the enforcement of sentences signed with States. It must be noted that detention in a designated State, remains a "detention" under the authority of the Tribunal. Issues regarding commutation of sentence and early release, remain within the ambit of the jurisdiction of the Tribunals.

E. *Victims Access and Participation*

As victims may make representations to the Pre-Trial Chamber at the earliest stages of investigation, as provided in article 15(3), the Witnesses and Victims Support Unit, referred to in article 43(6) of the Rome Statute,⁴⁵ will need to have its core functions in place from the establishment of the Court.

The bridge between the international jurisdiction and the local context, which the Court may have jurisdiction over, is particularly relevant with respect to victims' access to the Court. No matter where the International Criminal Court may sit, information regarding the right of victims to appear before the Court will need to be disseminated widely and as early as possible. The importance and subtleties of ensuring widespread and early information about the Court and access to its Chambers cannot be over emphasized. In this respect, the overriding difficulty in the

45. Rome Statute, *supra* note 4, art. 43(6). Article 43(6) states:
The Registrar shall set up a Victims and Witnesses Unit within the Registry. This Unit shall provide, in consultation with the Office of the Prosecutor, protective measures and security arrangements, counselling and other appropriate assistance for witnesses, victims who appear before the Court, and others who are at risk on account of testimony given by such witnesses. The Unit shall include staff with expertise in trauma, including trauma related to crimes of sexual violence.

Id.

execution of international criminal justice is the lack of usual State structures to support its needs.

The dissemination of information will be of great importance if we are to expect victims to know of the existence of the Court, and their right to appear before it at various stages. Such dissemination is subject to a number of policy considerations. For instance, according to Article 15(3) of the Rome Statute, "if the Prosecutor concludes that there is a reasonable basis to proceed with an investigation, he or she shall submit to the Pre-Trial Chamber a request for authorization of an investigation, together with any supporting material collected. Victims may make representations to the Pre-Trial Chamber"46 However, once the proceedings have reached even this early phase, dissemination of information targeted at the civilian population may prejudice the work of the Prosecutor.⁴⁷ A further consideration, in a post conflict environment, is to ensure that victims from all sides have access to information, even in a potentially sensitive atmosphere.

CONCLUSION

The international society's pursuit of international criminal justice entails the creation of a stateless jurisdiction with international scope that holds individuals, rather than States, responsible. As the institutions mandated to exercise international criminal jurisdiction begin to develop their operations, it becomes clear that the execution of justice entails a wide range of policy decisions normally undertaken by the State, in terms of legal aid, policing, education, and information, to mention but a few areas. The International Criminal Court may draw upon the wealth of operational experience of the Tribunals in these ar-

46. Rome Statute, *supra* note 4, art. 15(3).

47. *Id.* art. 18. Article 18, entitled Preliminary Rulings regarding admissibility, states:

When . . . the Prosecutor initiates an investigation pursuant to articles 13(c) and 15, the Prosecutor shall notify all States Parties and those States which, taking into account the information available, would normally exercise jurisdiction over the crimes concerned. The Prosecutor may notify such States on a confidential basis and, where the Prosecutor believes it necessary to protect persons, prevent destruction of evidence or prevent the absconding of persons, may limit the scope of the information provided to States.

Id.

eas,⁴⁸ but will nonetheless continue to develop its own practice just as the definition, purpose, and execution of justice will continue to evolve over time.

Thus, we are witnesses of the long path in the development of international law, the pursuit of justice and its enforcement. The International Criminal Tribunal for Rwanda is only a first pioneering example of the enforcement of international criminal justice. Experience and debate will further shape the delivery of international justice, providing further evidence that our international society is truly alive. If international justice is going to have a relevance to ordinary people, the International Criminal Court, in its own efforts to address justice, peace, and reconciliation, will have to develop its own operational capacity in order to become a useful tool for civil society as well as an integral part of it.

48. For further information on the operations of the International Criminal Tribunal for Rwanda and its contributions to the Preparatory Commissions for the establishment of the International Criminal Court, see Press Release, International Criminal Tribunal for Rwanda, Registrar Urges Solid Foundations for International Criminal Court, ICTR/INFO-9-2-286.EN (Oct. 3, 2001), *available at* <http://www.ictcr.org>, and Adama Dieng, Address by the Registrar of the International Criminal Tribunal for Rwanda, to the Preparatory Commission for the International Criminal Court during its eighth session (Oct. 1, 2001), *available at* <http://www.ictcr.org>.