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THE ROLE OF THE INTERNATIONAL CRIMINAL TRIBUNALS IN THE PROMOTION OF PEACE AND JUSTICE: THE CASE OF THE INTERNATIONAL CRIMINAL COURT

I. THE SCOURGE OF WAR

The force behind the establishment of the United Nations Organisation was the founding father's determination "to save succeeding generations from the scourge of war, which twice in [their] life time [had] brought untold sorrow to mankind."[1] However, over sixty years since this solemn undertaking, war and armed conflicts continue to plague our planet and to inflict untold woe, sorrow and suffering to millions of its inhabitants. In this respect the Human Rights Committee at its sixteenth session in 1982 also observed that: "War and other acts of mass violence continue to be a scourge of humanity and take the lives of thousands of innocent beings every year."[2] The plenipotentiaries at the Rome Diplomatic Conference of the ICC similarly bemoaned the fact that during the

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[1] Paragraph 1 of the Preamble to the UN Charter.

[2] Human Rights Commiteee, General Comment No. 6: The Right to life, 30 April 1982, para. 2, at http://www.unhchr.ch/tbs/doc.nsf/0/84ab9690ccd81fc7c12563ed0046fae3?Opendocument.

last century "millions of children, women and men [had] been victims of unimaginable atrocities that deeply shock the conscience of humanity."[3] It also noted that "such grave crimes threaten the peace, security and well-being of the world."[4] It is invariably in the course or under the cover of war that these atrocities are committed. This is so because war tends to bring out the worst in the people of every ethnic group – be they Africans, Asians or Europeans, as recent events in the African great Lakes region, the Far East and the Balkans confirm.

Speaking for myself, virtually in all my lifetime, there has not been a period when there has not been one form of armed conflict in my region, the East-Central African region. There has not been a period when there was no refugee movement. Millions are widowed, orphaned or left destitute. Many live in refugee camps, in internally displaced (IDP) camps or in "safe villages," which are anything but safe. Even as I speak, millions of people in the region continue to die, to be maimed and to live in want and in fear. I have personally spent nights in the bush to avoid the wrath of marauding soldiers. I have also experienced terror following an act of aggression from a powerful neighbouring state.[5] To end this state of misery and wretchedness, peace is an imperative; it is an absolute necessity.

But, then, what is peace? Clearly, peace involves a cessation of hostilities and a laying down of arms; it involves disarmament, demobilization and the reintegration of the fighting forces into one national army. But this is not all that peace is about. If this were so, then, it would not be lasting peace. This kind of peace might be likened to a house built on shifting sand, which is transient. Belligerents would cease hostilities for tactical purposes only. They would make peace only to prepare for war. They would then make war to make peace. The cycle of violence, of sorrow and of suffering would continue unabated.

1.1 *How then Does One Achieve Lasting Peace?*

With the experience of the Treaty of Versailles, and all its inequities, still fresh in their minds, the founding fathers of the United Nations recognized that an unjust peace is a recipe for future disaster. A peace

[3] Para. 2 of the Preamble to the Rome Statute to the International Criminal Court.

[4] Para. 3 of the Preamble to the Rome Statute of the International Criminal Court.

[5] See Daniel D. Ntanda Nsereko, "Bringing Aggressors to Justice: From Nuremberg to Rome" 4 *University of Botswana Law Journal* 4–32, (2005).

process that ignores the underlying causes of the war or conflict is just a bandage on a festering wound that sooner or later breaks open. People or groups who may for the time being appear defeated and whose legitimate concerns are not addressed by the peace process will, at the earliest opportunity, denounce the process and take up arms again in pursuit of their interests. Victims, who have suffered in the course, or as a result, of the conflict and who do not receive justice from the peace process, may also, resort to self-help measures to vindicate their perceived rights. These measures will inevitably disrupt the so-called peace and lead to a return to violence and to further victimization. No wonder that King Solomon in the Book of Proverbs counsels rulers of all generations that: ''By justice a king gives a country stability, but one who is greedy for bribes tears it down.''[6] Hence the slogan: ''No peace without justice.''

It was in recognition of this truism that the founding fathers of the United Nations wrote into the Charter that the maintenance or restoration of peace, which was to be central to the organization's objectives, must be achieved ''in conformity with *principles of justice* and international law.''[7]

What, then, are the principles of justice? What is justice? Philosophers, from Aristotle to Roscoe Pound, have posited varying ideas on the concept of justice. Taken in its broader sense, justice is action in accordance with the requirements of some law.[8] In its narrower sense, justice is fairness. It is action that pays due regard to the proper interests, property, and safety of one's fellows.[9]

For present purposes we shall adopt the definition found in the *Shorter Oxford English Dictionary*. According to this definition, justice is the ''maintenance of legal, social or moral principles by the exercise of authority or power; assignment of deserved reward or punishment; giving due desserts.''[10] At the heart of justice is the existence of law. Indeed, according to ancient Hebrew thinking, law was the standard of justice, since both proceeded from God.

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[6] Proverbs 29:4, NIV. See also Proverbs 21:15, ''When justice is done it brings joy to the righteous but terror to the evil doers.''

[7] Art. 1(1) of the UN Charter.

[8] James W. Vice, *Neutrality, Justice, and Fairness* (Loyola University Chicago, 1997).

[9] Nicholas Rescher, *Distributive Justice* (Washington, D.C.: University Press of America, Inc., 1982), p. 5.

[10] *Shorter Oxford English Dictionary*, 5th ed. (Oxford University Press 2002), at p. 1473.

According to more modern thinking, "The law of the State can be said to be right, and to partake of the quality of justice, if it secures and guarantees, for the greatest possible number of citizens, the external conditions necessary for the greatest possible development of the capacities of their personality, and in so doing it acts in accordance with the general principle of liberty, equality and fraternity and cooperation."[11]

The *raison d*'être for the existence of a state is to protect its inhabitants and their rights. In fulfilling this sacred duty the state must treat the inhabitants justly: it must reward virtue and punish vice; it must take measures against anyone that deals unjustly toward them and to provide redress for any injustice suffered. One of these measures is to punish those individuals, including state officials, who act unjustly toward fellow inhabitants, by trampling underfoot the law that protects their human rights and freedoms. It was this thinking that informed the resolve of the plenipotentiaries at the Rome Diplomatic Conference not to allow perpetrators of heinous crimes to go unpunished and to set up the ICC to try and punish them.

Now, in what ways does punishment serve the ends of justice? It does so in the following ways: (i) it serves as condemnation or as a stamp of public disapproval of the wrong doer's conduct; (ii) it teaches the wrongdoer that engaging in such conduct does not pay; (iii) it thereby serves to induce in him a resolve to refrain from similar conduct in the future; it thus deters the wrongdoer and other prospective wrongdoers. The Rwanda Tribunal recently echoed this principle when passing life sentences on a man it had convicted of genocide and extermination as a crime against humanity. It said:

> In view of the grave nature of the crimes committed in Rwanda in 1994, it is essential that the international community condemn them in a manner that carries a substantial deterrent factor against their reoccurrence anywhere, whether in Rwanda or elsewhere.[12]

The Trial Chamber of the Yugoslav Tribunal in the *Kupreškić* case, in considering that, in general, retribution and deterrence are the main purposes to be considered when imposing sentences in cases before the International Tribunal, stated that:

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[11] *The Oxford Companion of Law* (Oxford University Press, 1980), at p. 691.

[12] *Prosecutor v. Kamuhanda*, Case No. ICTR-99-53A-T, 22 January 2004, Judgment and Sentence, para. 754.

The purpose is to deter the specific accused as well as others, which means not only the citizens of Bosnia and Herzegovina but persons worldwide from committing crimes in similar circumstances against international humanitarian law.[13] The Trial Chamber is further of the view that another relevant sentencing purpose is to show the people of not only the former Yugoslavia, but of the world in general, that there is no impunity for these types of crimes. This should be done in order to strengthen the resolve of all involved not to allow crimes against international humanitarian law to be committed as well as to create trust in and respect for the developing system of international criminal justice.[14]

The fourth aim of punishment is reforming the wrongdoer and helping him to turn into a productive and law-abiding member of the community – for the good of the community.

The Trial Chamber in the Čelebići case concluded that:

A consideration of retribution as the only factor in sentencing is likely to be counterproductive and disruptive of the entire purpose of the Security Council, which is the restoration and maintenance of peace in the territory of the former Yugoslavia. Retributive punishment by itself does not bring justice.[15]
[...]
Deterrence is probably the most important factor in the assessment of appropriate sentences for violations of international humanitarian law.[16]

The last aim, and which is often ignored, is to vindicate the victims and their rights, to assuage their injured feelings and to bring about healing, which is vital to peaceful life and reconciliation in the community. Revenge is the last resort of persons who are denied due process. As the history of past genocides illustrates, when there is no justice in response to the extermination of a people, the result is that

[13] *Prosecutor v. Anto Furundžija*, Case No. IT-95-17/1, Judgement, 10 December 1998, para. 288. In discussing its sentencing policy, the Trial Chamber went on to state: "It is the mandate and the duty of the International Tribunal, in contributing to reconciliation, to deter such crimes and to combat impunity. It is not only right that *punitur quia peccatur* (the individual must be punished because he broke the law) but also *punitur ne peccatur* (he must be punished so that he and others will no longer break the law). The Trial Chamber accepts that two important functions of the punishment are retribution and deterrence".

[14] *Prosecutor v. Zoran Kupreškić, Mirjan Kupreškić, Vlatko Kupreškić, Drago Josipović, and Dragan Papić*, Case No. IT-95-16-T, Trial Chamber Judgement, 14 January 2000, para. 848.

[15] *Prosecutor v. Zejnil Delalić, Zdravko Mućić aka Pavo, Hazim Delić, and Esad Landžo aka Zenga*, ("Čelebići"), Case No. IT-96-21-T, Trial Chamber Judgement, 16 November 1998, para. 1231.

[16] *Ibid.*, para. 1234.

victims are led to take the law into their own hands, both to exact retribution and to draw attention to the denied historical fact.[17]

A sound system of law is indispensable to the existence of justice. Admittedly, justice may be achieved by means other than through the courts, for example through administrative measures, truth and reconciliation commissions and traditional justice mechanisms.[18] I do nevertheless submit that, at least for the type of violations committed on a large scale, justice is better achieved through the courts of law. This is because the courts are staffed by men and women with knowledge of the law, who have experience and impartiality and are permanently devoted to deciding disputed issues of culpability and of punishment. Additionally, because of their training, experience and habit, the judges seek to discover and apply general rules fairly; their decisions are public and may be subject to appeal, public comment and professional scrutiny and criticism. Above all, their decisions are reasonably ascertainable and predictable.[19]

II. PEACE VERSUS JUSTICE

Let us also briefly address the apparent tension between peace and justice. In another proverb, King Solomon observed: "When justice is done it brings joy to the righteous but terror to the evil doers."[20] The relevance of this observation to our discussion is that while we argue that justice is vital to lasting peace, potential recipients of justice, terrified by the prospects of being indicted, convicted and punished as they deserve, may refuse to lay down their weapons or to end hostilities. Thus justice may be seen as an impediment to peace. Would it therefore be legitimate to stay the course of justice for the sake of peace? This raises the issue of amnesties. Because this is a sensitive

[17] Fourth Annual Report (1997) of the ICTY.

[18] Such mechanisms exist among the Acholi people of Uganda. They include: *Culo Kwor*, compensation to atone for homicide; *Mato Oput*, a rite that involves acknowledgement of wrong-doing by the offender, offering of compensation by the offender and a ceremony at which a symbolic drink is shared by the offender, the victims and members of the clan. At the ceremony the offender crushes an egg to symbolize a new beginning and then steps over a bamboo stick, the *opobo*, signifying a leap from the past to the present. As a climax to the ceremony both the offender and his victims drink a brew made from the herbs of the *oput* tree, to signify that they accept the bitterness of the past and promise never to taste such bitterness again.

[19] See generally *The Oxford Companion of Law*, *supra* note 11, at. p. 691.

[20] Proverbs 21:15 NIV.

and current issue at the ICC, I cannot say much. I can however posit some general principles on the matter.

Every state in the exercise of its sovereignty and in accord with its constitution and laws has the right to grant amnesty to individuals charged before its courts with various criminal offences. For a state emerging from a period of conflict, amnesties may be vital to its efforts to restore peace and to promote reconciliation. Nevertheless, from a human rights point of view, amnesties to individuals who have committed particularly serious offences, need to be approached with deliberate caution. Such amnesties should be granted on a case-by-case basis and under predetermined and accessible criteria.[21] Even then the individual concerned must own up to his past criminal conduct and offer an apology to his victims and to the public at large. Generally speaking, therefore, blanket amnesties should not be countenanced. They tend to breed and foster impunity. The Inter-American Court of Human Rights supports this stance. In a number of cases it has held that amnesty laws, statutes of limitations and grounds for exclusion of criminal responsibility are unacceptable insofar as they prevent the investigation and prosecution of those responsible for committing serious violations of human rights, such as torture, summary executions, and forced disappearances, and other such crimes that are prohibited and are non-derogable under international human rights law.[22]

However, from the stand-point of customary international law, there already exists a respectable body of legal opinion to the effect that a state's right to grant amnesty does not extend to persons who are suspected of having committed crimes against the law of nations or

[21] For an interesting discussion on the topic, see Louise Mallinder, "Exploring the Practice of States introducing Amnesties: Study submitted for the International Conference, 'Building a Future on Peace and Justice', Nuremberg, 25–27 June 2007, at http://www.peace-justice-conference.info/download/WS4-Mallinder_NurembergStudy_070502.pdf. See also Kai Ambos, "The Legal Framework of Transitional Justice: Study submitted for the International Conference, 'Building a Future on Peace and Justice', Nuremberg, 25–27 June 2007, at http://www.peace-justice-conference.info/download/Ambos_NurembergStudy_070512.pdf.

[22] This obligation was first indicated in Velazquez Rodriguez v. Honduras, Reparations and Costs. Judgment of July 21, 1989. Series C No. 7, but was later followed and developed in other cases, in particular Caso 19 Comerciantes vs. Columbia, Sententica de 5 de julio de 2004, Corte I.D.H., (Ser.C) No. 109 (2004); Gomez Paquiyauri v. Peru, Sentencia de 8 de julio de 2004, Corte I.D.H., (Ser.C) No.110 (2004); and Caso Masacre Plan de Sanchez vs. Guatemala, Reparaciones (Art. 63.1 de la Convencion Americana Sobre Derechos Humanos), Sentencia de 19 de noviembre de 2004, Corte I.D.H., (Ser. C) No. 116 (2004).

delicta jus gentium.[23] These are "the most serious crimes of concern to the international community as a whole." In respect of these crimes, customary international law imposes a duty on every territorial state to prosecute or extradite the suspects to other states that may be ready and willing to prosecute them, under the *aut dedere aut judicare* principle.[24] Additionally, since all states have a duty to suppress these type of crimes, customary international law also vests in every state the authority to try and punish their perpetrators by invoking the universality principle. The preamble to the Rome Statute is strewn with language that echoes this point of view. It reads:

> Recognizing that such grave crimes threaten the peace, security and well-being of the world, Affirming that the most serious crimes of concern to the international community as a whole *must not go unpunished* and that their *effective prosecution must be ensured* by taking measures *at the national level* and by enhancing international cooperation, Determined to *put an end to impunity* for the perpetrators of these crimes and thus to contribute to the prevention of such crimes, Recalling that it is the *duty of every State to exercise its criminal jurisdiction* over those responsible for international crimes (emphasis added).

Therefore in the light of this stance of the law, if a state were to grant amnesty to a person suspected of having committed ICC-type crimes it would be violating its duty to the international community as a whole.

Based on the above principle, then, a state cannot by granting amnesty to an individual suspected of any of these crimes preclude other states from trying that individual through the exercise of the universality principle. As the Special Court for Sierra Leone opined, "a state cannot sweep such crimes into oblivion and forgetfulness which other states have jurisdiction to prosecute by reason of the fact that the obligation to protect human dignity is a peremptory norm and has assumed the nature of obligation *erga omnes*."[25] Similarly, the state cannot preclude international courts such as the ICC from

[23] See Decision on Challenge to Jurisdiction: Lome Accord Amnesty, *Prosecutor v. Kallon et al*, Case No. SCSL-2004-15-AR72(E),13 March 2004 and the authorities cited therein.

[24] See Gerhard Werle, *Principles of International Criminal Law* (T.M.C. Asser Press, The Hague, 2005) at pp. 57–65. See also Case Concerning the Arrest Warrant of 11 April 2000 (Democratic Republic of the Congo v. Belgium), Judgment of 14 February 2002, 2002 ICJ Reports.

[25] *Ibid.*, para. 71.

exercising their jurisdiction over the same individual where their jurisdiction is otherwise well-founded.[26]

Finally, and from the perspective of the Rome Statute, whether or not an amnesty granted by a state to a suspect that is subject to the Court's jurisdiction constitutes "inability or unwillingness" on the part of that state to exercise jurisdiction under the complementarity principle, is a matter for the Court to decide. This assertion is born out by the chapeau to Article 17 of the Statute that provides that "Having regard to paragraph 10 of the Preamble and article 1, *the Court shall* determine that a case is admissible..."

III. ROLE OF INTERNATIONAL TRIBUNALS

What then is the role of the international criminal tribunals in all of this? Normally and arising out of the territoriality principle, states have power to assume jurisdiction over crimes that are committed on their territory; this power is inherent in their sovereignty. Under the nationality principle they would also have jurisdiction over serious offences committed by their nationals abroad. Under the passive nationality or protective principle they would also have jurisdiction over offences committed against their nationals outside their territory. Under the universality principle, they can also assume jurisdiction over international crimes irrespective of where they are committed and irrespective of the nationality of the perpetrators or the victims. Perpetrators of such crimes are considered to be enemies of mankind, *hostis humanis*; and all states have not only a right but also a duty to suppress such crimes by prosecuting and punishing the perpetrators. However, in the exercise of their sovereignty states can delegate the task of trying a particular type of offence to an international body. This was done after World War II and, more recently, after the conflicts in the Balkans, in Rwanda, Sierra Leone, Timor-Leste and to a less extent Cambodia. Additionally, the types of crimes we are dealing with are international crimes: they involve conduct that is universally recognized as criminal and which is considered a grave matter of international concern and for that reason "cannot be left within the exclusive jurisdiction of the State that would have control over it under ordinary circumstances."[27] Moreover, because

[26] *Ibid.*, at para. 71; Judgment *Prosecutor v. Furundžija*, Case No. IT-95-17/1-T, 10 December 1998, at para. 61.

[27] In r*e List and Others*, (1953) 15 *Ann. Dig.* 632 at 636.

of the complexity and widespread nature of the violations in question and the expertise and resources that may be needed for their investigation, the state concerned may not have the capacity to do so; and hence the need to refer the matter to a better-resourced body. Additionally, where serving state officials and functionaries are the perpetrators, it would be expecting too much of their states to be able to transparently conduct fair proceedings against them. Lastly, where suspects belong to an ousted regime attempts by the new authorities to bring them to justice might be interpreted as victors' justice - which is unsatisfactory. It would be better, then as happened in the former Yugoslavia, Rwanda, Sierra Leone, Timor-Leste and Cambodia that an independent, detached and international or semi-independent body is set up to try those suspects.

Concerning these tribunals, particularly the ICTY and the ICTR, we need to highlight three salient points. The first point is that the UN Security Council set them up in exercise of its peace and security powers under chapter VII of the Charter. It determined that the situations obtaining then both in the former Yugoslavia and in Rwanda constituted a threat to international peace and security.[28] The Council set up the tribunals to prosecute and punish individuals who were responsible for the monstrous crimes committed in the two countries in the course of the armed conflicts as a way of halting those crimes and with the hope that their prosecution and punishment would contribute to the restoration and maintenance of peace and to reconciliation in the two countries. The second point is that these tribunals shared their jurisdiction with national courts of the countries that formerly constituted Yugoslavia and Rwanda: in other words they had concurrent jurisdiction over the same crimes. It is nevertheless stipulated in the statutes of the tribunals that the tribunals have primacy over the national courts in cases where both the tribunals and the national courts assert their jurisdiction at the same time. The third point is that in as much as the tribunals' mandate is limited to specific geographical situations and to specific time frames, they provide only selective justice. There have been situations in other parts of the world where equally egregious atrocities have been committed, the peace has been disturbed and the situations merited similar international reaction, but nothing was done. This *ad hoc*

[28] See para. 4 of the preamble to the Security Council Resolution 827 of 25 May 1993 with respect to the ICTY; and para. 5 of the preamble to the Security Council Resolution 955 of 4 November 1994 with respect to the ICTR.

approach to international criminal justice left much to be desired; it was a glaring shortcoming of the *ad hoc* tribunals.

It is now legitimate to ask: to what extent have the *ad hoc* tribunals contributed to peace in those countries in which they have jurisdiction or in the world in general? It is true that there has been a cessation of hostilities in those countries. However, with the exception of the former Yugoslavia, the hostilities had already ceased when the tribunals were established. Could it be said that the tribunals' work has contributed to the consolidation of peace in those countries, in the sense that the peace has held and that there has not been a resumption of hostilities? What of justice in the sense that we defined that concept above? Have the underlying causes of the conflicts been satisfactorily addressed? Have the victims of the conflicts received adequate reparations, if any? It is probably too early for us to say; it might be better to leave these questions to future historians. What is sure, however, is that the tribunals have served to spread the message in the affected countries and beyond that no one is above the law. James Beattie in his poem titled *Law* laconically captures the *status quo ante* thus:

Laws, as we read in ancient sages
Have been like cobwebs in all ages
Cobwebs for little flies are spread
And laws for little folks are made
But if an insect of renown
Hornet or beetle, wasp or drone
Be caught in quest of sport or plunder
The flimsy fetter is sunder.[29]

To the lovers of justice, the good news is that the international "cobweb" cannot be easily torn asunder by the likes of the "hornet or beetle, wasp or drone." At the alter of International Justice the ground is level. Kings and plebeians, rulers and the ruled, rich and poor must, in absolute equality, account for their conduct. The indictment of leading politicians, including serving heads of state and government, and of powerful military and business leaders confirms this axiom. It serves to remind all of us of the old adage: "be you so high, but the law is above you"! We expect that in the coming months and years this message will be echoed abroad with an ever-increasing crescendo.

As we speak the *ad hoc* tribunals have almost run their course. They are under strict instructions from the Security Council to wind up and to close

[29] James Beattie (1735–1803).

down their operations by 2012. But the international community owes much to these tribunals and to the men and women who staff them. They have served as trailblazers for the ICC. Their experience and jurisprudence has already proved to be of inestimable value to the ICC. In many respects the ICC does not have to re-invent the wheel but carry on, with the necessary adaptations, with what the tribunals have invented.

IV. THE INTERNATIONAL CRIMINAL COURT

The ICC is, in a number of significant respects, an improvement on the *ad hoc* tribunals. I mention only six.

First, the ICC is a treaty-based body, suggesting that state cooperation with the Court is voluntarily assumed and will hopefully be readily forthcoming.

Second, the ICC is a global body with a global mandate; its jurisdiction is not restricted to one geographic area; its jurisdiction extends to crimes committed on the territory or by nationals of 106 nations; it could indeed cover the whole globe, since the UN Security Council has power to refer any situation to the Court. This is a kind of justice that is not just for them but for all of us.

Third, the ICC is permanent; its reach in the future is infinite. The good thing about the Court's potential perpetual existence is that it serves to put on permanent notice all would-be tyrants and transgressors of international humanitarian law that there is in The Hague a prosecutor who is watching and monitoring their actions and who has power to bring them to justice when it is appropriate to do so; there are also judges ever at the ready to try them and, if they find them guilty, to punish them.

Fourth, the Statute recognizes victims and their rights as part of the justice equation. In accord with the UN Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power,[30] the Statute requires that the Court and its organs treat victims with compassion and respect for their dignity; that they inform them fully of the progress of the proceedings; that they allow them to air their views at appropriate stages of the proceedings where their personal interests are affected; and when possible offer them compensation for the harm, loss and suffering they have experienced as a result of the crimes committed against them.

[30] Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power, adopted by General Assembly resolution 40/34 of 29 November 1985, at http://www.unhchr.ch/html/menu3/b/h_comp49.htm.

As for the payment of compensation, it is unlikely that the accused persons who, on conviction, are primarily responsible for the payment will be able to do so.[31] This is so because of the sheer number of the victims: they number in thousands. Luckily, the Statute provides for a Trust Fund "for the benefit of victims of crimes within the jurisdiction of the Court, and of the families of such victims." The Fund is already in place. States, organisations and individuals, in a spirit of social solidarity, by contributing to the Fund will veritably make it possible for the victims to realize their right to compensation, albeit symbolically only – because the Fund will not be able to compensate them fully for their loss and suffering.

All in all, then, under the ICC regime victims are not to be victimized again by the justice system; they are not to be passive observers, as is the case under many national criminal justice systems. They are active partners, stakeholders and beneficiaries of the international criminal justice system. Fair, just and compassionate treatment of the thousands of victims of the type of crimes that fall under the mandate of the ICC brings about healing and goes a long way to ensure lasting peace, harmony and reconciliation in the affected regions.

However, given that victim participation in proceedings before an international criminal tribunal is previously uncharted territory, it falls to the judges of the ICC to steer a careful path in balancing the competing interests of justice to victims against the right of the accused and the international community to a fair and expeditious trial. Throughout the pre-trial and trial phases the concept of "appropriateness of participation" and rights of the defence has to be addressed by the pre-trial or trial chamber; as well as the modalities of victims' participation. The ICC has thus-far chosen to determine these matters on an individual, case by case basis, but no doubt over time, a pattern may emerge whereby guidelines can be developed, as is foreseen under the Statute. In this respect the Appeals Chamber in a landmark decision has already decided that the natural victims entitled to participate in the proceedings and as defined under rule 85(a) of the Rules of Procedure and Evidence, are those who have suffered personal harm; such harm must be linked to the charges confirmed against the accused; such harm includes indirect harm, for example, harm suffered by a child as a result of harm directly inflicted on

[31] Article 75(2) provides that "The Court may make an order directly against a convicted person specifying appropriate reparations to, or in respect of, victims, including restitutions, compensation and rehabilitation. Where appropriate, the Court may order that the award for reparation be made through the Trust Fund provided for in article 79."

its parents; and that victims may, with the permission of the Trial Chamber, and within prescribed parameters, lead evidence pertaining to the guilt or innocence of the accused and may also challenge the admissibility or relevance of evidence at the trial proceedings. In answer to expressed fears by both the prosecution and the defence that this species of participation would diminish the Prosecutor's role in the proceedings and prejudice the accused, the Chamber said the following:

> The Trial Chamber has correctly identified the procedure and confined limits within which it will exercise its powers to permit victims to tender and examine evidence: (i) a discrete application, (ii) notice to parties, (iii) demonstration of personal interests that are affected by the specific proceedings, (iv) compliance with disclosure obligations and protection orders, (v) determination of appropriateness and (vi) consistency with the rights of the accused and a fair trial. With these safeguards in place, the grant of participatory rights to victims to lead evidence pertaining to the guilt or innocence of the accused and to challenge the admissibility or relevence of the evidence is not inconsistent with the onus on the Prosecutor to prove the guilt of the accused nor is it inconsistent with the rights of the accused and a fair trial... [32]

Yet to be resolved are the modalities of participation by anonymous victims who are also witnesses.[33]

Fifth, the Rome Statute has in some significant ways also made more secure the rights of the accused. Two examples are cited to substantiate this assertion.

The first example relates to the procedures for confirming the charges. Under the procedures that obtain at the *ad hoc* tribunals, particularly the ICTY and the ICTR, charges against the suspect are heard before the suspect's arrest and in his absence.[34] Not so at the ICC. According to

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[32] Appeals Chamber, *Prosecutor v. Lubanga Dyilo*, Judgment on the appeals of The Prosecutor and The Defence against Trial Chamber I's Decision on Victim Participation of 18 January 2008, Case No. ICC-01/04-01/06 OA 9 OA 10, 11 July 2008.

[33] See generally Pre-Trial Chamber I, *The Prosecutor v. Germain Katanga and Mathieu Ngudjolo Chui*, Decision on Victims' Requests for Anonymity at the Pre-Trial Stage of the Case, 23 June 2008; Trial Chamber I, *Prosecutor v. Lubanga*, Decision on certain practicalities regarding individuals who have the dual status of witness and victim, 5 June 2008.

[34] For example, Article 20 of the ICTY Statute provides that "1. The judge of the Trial Chamber to whom the indictment has been transmitted shall review it. If satisfied that a *prima facie* case has been established by the Prosecutor, he shall confirm it. If not satisfied, the indictment shall be dismissed. 2. Upon confirmation of the indictment, the judge may, at the request of the Prosecutor, issue such orders and warrants for the arrest, detention, surrender or transfer of persons and other orders as may be required for the conduct of the trial."

Article 61 of the Rome Statute, the hearing for the confirmation of the charges must be held in the presence of not only the Prosecutor but also of "the person charged as well as his or her counsel."[35] Additionally, the Statute requires that within a reasonable time before the hearing, the charged person must be provided with a copy of the indictment as well as the evidence on which the Prosecutor intends to rely at the hearing. And, as we shall see presently, the Prosecutor must also disclose to the charged person material that contains evidence that tends to exculpate the charged person. At the confirmation hearing the charged person may object to the charges, challenge the evidence presented by the Prosecutor, and even adduce evidence in his favour.[36] These provisions enable the charged person to impugn the prosecution evidence as not being sufficient to establish "substantial grounds to believe that the [charged] person committed the crime charged;" they thereby afford the charged person an opportunity to oppose the confirmation of charges that may be flimsy and to seek early release. They also protect the charged person, even at this preliminary stage of the proceedings, from trial by ambush.

For completeness, though, it should be noted that a suspect may waive his right to be present at the confirmation hearings. He may do so by addressing a written request to the Pre-Trial Chamber. The Chamber, if satisfied that the suspect "understands the right to be present at the hearing and the consequences of waiving this right," may grant the request.[37] The Pre-Trial Chamber in *Prosecutor v. Katanga et al* granted Mr. Katanga's request to be absent from the rest of the confirmation proceedings, having satisfied itself that he was "fully aware of the consequences of this waiver of his right" and that his absence would not cause "any prejudice to him, his defence, or to the right to a fair and expeditious trial."[38]

The second example relates to disclosure to the accused of exculpatory evidence. Article 54(1) (a) of the Statute explicitly obliges the Prosecutor to "investigate incriminating and exonerating circumstances

[35] According to Article 61(2) the confirmation hearing may take place in the absence of the charged person only when that person has waived his right to e present, or has fled or cannot be found and all reasonable steps have been taken to secure his or her appearance before the Court and to inform the person of the charges and that a hearing to confirm those charges will be held.

[36] Article 61(6).

[37] Rule 124(2) of the Rules of Procedure and Evidence.

[38] See Pre-Trial Chamber I, *The Prosecutor v. Germain Katanga and Mathieu Ngudjolo Chui*, ICC-01/04-01/07-T-46-ENG ET WT 11-97-2008 1-46 NB PT 7/11/2008, at p. 24.

equally.'' Article 67(2) similarly requires the Prosecutor to disclose to the defence ''as soon as practicable'' any evidence that the Prosecutor may obtain as a result of the investigation and which the Prosecutor believes ''shows or tends to show the innocence of the accused or to mitigate the guilt of the accused, or which may affect the credibility of the prosecution evidence.'' The ICC Prosecutor, unlike his counterparts under some national criminal justice systems, must not hide such evidence from the defence or from the Court; the evidence does not belong to the Prosecutor; it belongs to the public and is collected at public expense for the proper administration of justice. Justice, it should be emphasized, is not limited to the guilt of the accused; it includes his innocence as well.

In *Prosecutor v. Katanga, et al.*,[39] Judge Steiner cautioned the Prosecutor against disabling himself from fulfilling his disclosure obligation by ''gathering in an extensive manner''[40] material that may be subject to non-disclosure agreements with information providers.[41] According to Trial Chamber I, this was the case in *Prosecutor v. Thomas Lubanga Dyilo*.[42] In the *Lubanga* case the Prosecutor was unable to disclose to the defence or to the Court over 200 documents

[39] Pre-Trial Chamber I, *Prosecutor v. Germain Katanga and Mathieu Ngudjolo Chui*, Decision Requesting Observations concerning Article 54(3)(3)(e) Documents Identified as Potentially Exculpatory or Otherwise Material for the Defence's Preparation for Confirmation Hearing, Case No. ICC-01/04-01/07, 2 June 2008.

[40] Judge Steiner said at para. 28 that ''Given the difficulties of securing the providers' consent within a reasonable time…, the Prosecution willingly assumes a considerable risk if it continues gathering in an extensive manner materials pursuant to article 54(3)(e) of the Statute, rather than doing so only in exceptional or limited circumstances.'' In her Decision on Article 54(3)(e) Documents Identified as Potentially Exculpatory or Otherwise Material to the Defence's Preparation for the Confirmation Hearing, *Prosecutor v. Germain Katanga and Mathieu Ngudjolo Chui*, 20 June 2008, at para. 46 Judge Steiner stated that ''the Prosecution has recklessly accepted, as a matter of course, thousands of documents from numerous providers pursuant to the said provision.''

[41] Article 54(3) (d) authorizes the Prosecutor to ''Enter into such arrangements or agreements, not inconsistent with this Statute, as may be necessary to facilitate the cooperation of a State, intergovernmental organization or person.'' Article 54(3) (e) also authorizes the Prosecutor to ''*Agree not to disclose*, at any stage of the proceedings, *documents or information* that the Prosecutor obtains on the condition of confidentiality and solely for the purpose of generating new evidence, *unless the provider of the information agrees*.'' Emphasis supplied.

[42] See Trial Chamber I, *Prosecutor v. Thomas Lubanga Dyilo*, Decision on the consequences of non-disclosure of exculpatory materials covered by Article 54(3)(e) agreements and the application to stay the prosecution of the accused, together with certain other issues raised at the Status Conference on 10 June 2008, Case No. ICC-01/04-01/06, 13 June 2008.

containing exculpatory evidence and obtained on condition of confidentiality, because the information providers, mostly the UN, refused to waive the condition. He however contended that as long as he was able to disclose "the bulk" of the exculpatory material in his possession, the summaries of the documents that he could not diclose as well as other material containing information analogous to the information in the undisclosed documents he would have discharged his disclosure obligation.[43] The Trial Chamber rejected the contention and "vacated" or postponed the hearing of the case *sine die*. In doing so the Chamber said:

> This is an international criminal court, with the sole purpose of trying those charged with 'the most serious crimes of concern to the international community as a whole' and the judges are enjoined, in discharging this important role, to ensure that the accused receives a fair trial. If, at the outset, it is clear that essential pre-conditions of a fair trial are missing and there is no sufficient indication that this will be resolved during the trial process, it is necessary – indeed – inevitable that the proceedings should be stayed. It would be wholly wrong for a criminal court to begin, or to continue, a trial once it has become clear that the inevitable conclusion in the final judgment will be that the proceedings are vitiated because of unfairness which will not be rectified... There is, therefore, no prospect, on the information before the Chamber, that the present deficiencies will be corrected.[44]

The Chamber subsequently stayed the proceedings and ordered the immediate and unconditional release of the accused, saying that "on the basis of the available information, a fair trial is impossible, and the entire justification for his detention has been removed. It would be unlawful for the Chamber to order him to remain in what, in reality, would be preventative detention or to order conditional release."[45]

All this goes to show the Court's resolve to honour the letter and spirit of the Rome Statute that guarantees to the accused a fair and expeditious trial at which all the accused's rights are respected. It is

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[43] However, in her Decision on Article 54(3)(e) Documents Identified as Potentially Exculpatory or Otherwise Material to the Defence's Preparation for the Confirmation Hearing, *supra* note 40, Judge Steiner held that for purposes of confirming the charges disclosure of the bulk of exculpatory material as well as material containing information analogous to that contained in the undisclosed documents is sufficient to discharge the Prosecutor's disclosure obligation. She however rejected the summaries.

[44] *Ibid*., at para. 91.

[45] Trial Chamber I, *Prosecutor v. Lubanga*, Decision on the release of Thomas Lubanga Dyilo, Case No. ICC-01/04-01/06, 2 July 2008 at para. 34.

only when the trial is fair and abundantly appears to be so that its legitimacy will be accepted by the international community. And it is only then that the ends of peace will be advanced.

Sixth, the Rome Statute vests the ICC with power to punish individuals who commit aggression, a crime that is outside the mandate of the *ad hoc* tribunals. Aggression is a crime that violates your right and my right to peace and security. As the Nuremberg Tribunal rightly pointed out, crimes against international law are not committed by abstract entities, called states, but by individuals with flesh and blood, and it is by punishing such individuals that the rules of international law can be enforced. Now, the Rwanda Tribunal and some writers have characterised genocide as "the crime of all crimes." True, genocide is a particularly heinous crime. I do nonetheless wish to suggest that aggression is equally, if not more horrendous than genocide. According to the Nuremberg Tribunal, aggression is "the supreme international crime different from other war crimes in that it contains within itself the accumulated evil of the whole."[46] There is no denying that once war breaks out, it is more likely than not that the forces of evil that it unleashes will result in the commission of genocide, crimes against humanity, war crimes and other outrages such as rape, abuse of children and plunder of resources. That is the reason why, again according to the Nuremberg Tribunal, "right thinking people all over the world repudiate and abhor aggressive wars."[47]

As suggested by the Nuremberg Tribunal, mechanisms must be put in place for trying and punishing individuals, who mastermind, order or wage aggressive war. The ICC will be able to do that once a definition of the crime and the conditions for the Court's exercise of jurisdiction over the crime are set out and incorporated into the Statute. This is a major task awaiting the Assembly of States Parties at the Review Conference. It is hoped, though, that such definition and conditions will uphold and not undermine the independence, integrity and credibility of the Court.[48]

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[46] Judgment of the International Military Tribunal for the Trial of German Major War Criminals, 1 Trial of Major War Criminals Before the International Military Tribunal 171, 186 (1946).

[47] *In re Krupp & Others* (1953) 15 Ann. Dig 680. US Military Tribunal at Nuremberg.

[48] See Daniel D. Ntanda Nsereko, "Defining the Crime of Aggression: An Important Agenda Item for the Assembly of States Parties to the Rome Statute of the International Criminal Court", *Acta Juridica Journal* 256–286 (2003), [University of Cape Town, South Africa].

As was done with respect to the *ad hoc* tribunals, it is also legitimate to ask: to what extent has the ICC to date contributed to the peace, security and well-being of the world as it was set up to do? Only five years in existence, it cannot in fairness be expected to have accomplished much. But its impact is already beginning to be felt in some regions of the world. According to Luis Moreno Ocampo, the Prosecutor,

> Deterrence has started to show its effect as in the case of Cote d'Ivoire, where the prospect of prosecution of those using hate speech is deemed to have kept the main actors under some level of control; in Colombia, legislation and proceedings against paramilitary were influenced by the Rome [Statute] provisions; ... arrest warrants have brought parties to the negotiating table; ... exposing the criminals and their horrendous crimes has contributed to weaken the support they were enjoying...[49]

This is an encouraging report. We can, however, increase the Court's beneficial impact tenfold or even more by extending its jurisdiction and visibility to all corners of the world. We must strive for the universal ratification of or accession to its Statute. We must blanket the entire globe with law. With a world that is suffused with law, and the ICC as its most visible symbol, there will be no safe havens for perpetrators of aggression, genocide, crimes against humanity or war crimes. Therefore, let states, in partnership with civil society, continue their commendable efforts of sensitising the global community to the absolute need for universal ratification of the Statute. They should not relent until all nations, big and small, have come on board the ICC and have accepted law to be better than war.

Additionally, states and everyone of goodwill should assist in the enforcement of the Court's orders and processes. For instance, over a year ago the Court issued a number of warrants for the arrest of certain suspects. Eight of these warrants remain unexecuted. And in one of the cases before the Court, the Trial Chamber requested states to identify, trace, freeze and seize any property belonging to the accused for the ultimate benefit of victims – in case reparation is ordered. To date only a handful of states have responded to the request. All of this makes the Court appear a laughing stock, particularly in the eyes of the sceptics and of its detractors.

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[49] Luis Moreno Ocampo, "Building a Future on Peace and Justice: The International Criminal Court." Speech delivered at the Nuremberg Conference of Peace and Justice, 25–27 June 2007, at http://www.icc-cpi.int/library/organs/otp/speeches/LMO_nuremberg_20070625_English.pdf, 13 *Zeitschrift fur Internationale Strafrechtsdogmatik* 491 (2007).

V. CONCLUDING REMARKS

The central focus of this paper has been peace. The Human Rights Committee at its sixteenth session in 1982 reminded states of their "supreme duty to prevent wars, acts of genocide and other acts of mass violence causing arbitrary loss of life."[50] We have noted the contribution of the *ad hoc* tribunals and of the ICC toward the fulfillment of this duty: mostly through the deterrent effect of the prosecution and punishment of those responsible for heinous crimes that "threaten the peace, security and well-being of the world." The *ad hoc* tribunals have played their part and are soon to close. The ICC is still in its infant stages and has yet to make its impact. States Parties have a monumental duty to play to ensure its success by: (a) cooperating fully with its organs; (b) by assuming their primary responsibility in prosecuting the crimes under its jurisdiction and thus help to offload from the Court some of its heavy global responsibilities and at the same time help to combat the impunity gap; and (c) by adopting an acceptable definition of the crime of aggression and setting out credible conditions under which the Court will exercise jurisdiction over it.

States must simultaneously prevent war and other acts of mass violence, in the prophylactic sense, by addressing the root causes of war and mass violence. These causes include territorial expansionism, hegemonism, militarism, fundamentalism, racism, intolerance and all other societal inequities for which people resort to war. Additionally, states must pursue policies of good neighbourliness; in tackling either internal or external problems they must endeavour to resolve them by peaceful means through law and not war. They must engage those they have differences with in continuous dialogue, not with militaristic posturing. As the Batswana say, "*ntwa kgolo ke ya molomo"* – it is better to jaw-jaw than to war-war.

Citizens of the world yearn for that era spoken of by Prophet Isaiah when:

> [N]ations will beat their swords into ploughshares
> and their spears into pruning hooks.
> Nation will not take up sword against nation,
> Nor will they train for war any more.[51]

[50] General Comment No. 6, *supra* note 2, para. 2.

[51] Is. 2: 4, NIV.

Yes, during that era the exorbitant resources currently being expended on war and armaments will be spent on producing more food, ensuring availability of clean water, preventing and treating diseases, alleviating poverty and want, as well as providing free and universal primary and secondary education. A people that are denied these basic needs cannot be said to be at peace.