Justice as a Global Commons: Global Responses to Judicial Challenges in Africa

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At the African Dialogue II Conference Convened by the Office of the United Nations High Commissioner for Human Rights on the theme “Promoting Justice and Reconciliation in Africa”: Challenges for Human Rights and Development

At the International Criminal Tribunal for Rwanda, Arusha, Tanzania

24-26 May 2002

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I. INTRODUCTION

In discussing the global response to enhance justice and reconciliation in Africa, it is important to answer the question: why is a global response and international cooperation necessary? The standard view is that international justice --- and judicial cooperation in that context – is necessary in cases of mass human rights crimes where national judicial institutions are unable for lack of capacity or lack of independence to render justice for such crimes.

But it is also increasingly the case that, as the events of September 11, 2001 in the United States and their aftermath suggest, that certain crimes, including international terrorism, are beyond the ability of any one judicial system to handle exclusively. International judicial cooperation – a global response – is thus made necessary by the transnational nature or the global affront such crimes represent even when they are relatively localized in their planning and commission.

The point is made to demonstrate the need for, and validity of, a global response to certain crimes no matter where in the world they may be committed and no matter how powerful or weak the States in which they are committed may be. Africa’s need for a global response to enhance justice and reconciliation in the continent is only more accentuated because of the weakness of many judiciaries in the continent by virtue of their lack of capacity or independence, or both.

A global response is also necessary because justice is – or should be – an integral ingredient of peace building and peacekeeping in Africa and conflict zones in other parts of the world. It is an important weapon in the international community’s “peace-seeking” arsenal, as aptly captured in the phrase “no peace without justice”. It is demonstrated in the global interventions in the former Yugoslavia and Rwanda – in the former through a combination judicial intervention, the use of force and diplomacy, and in the latter through judicial intervention. As well, we have the recent example of Sierra Leone where there has been a global response of peacekeeping and judicial intervention. The cry for justice by those who have been wronged has been rightly identified by the Office of the High Commissioner for Human Right’s Concept paper for this conference as being at the heart of all conflicts in Africa today.

II. POLITICS AND POLICY IN GLOBAL RESPONSES

The reality, of course, is that global response to judicial challenges around the world, including in Africa, depends largely on political will. The problem of the political selectivity of international justice is a well-known one. Political will to intervene judicially in Africa existed in
the case of the Rwandan genocide and the conflict in Sierra Leone, but does not appear to exist in relation to Burundi, the Democratic of Congo and Angola.\(^2\)

In the case of the DRC and Burundi, the political and policy choices that the international community has made have high significance for the prospects for long-term peace and reconciliation in the Great Lakes region. While the genocide and other serious violations of humanitarian law that occurred in 1994 are unquestionably a key factor in the conflicts in the region, they remain only part of a larger picture – one that includes the historical and contemporary culture of impunity that has afflicted the countries of the region.

The need for a global response appears particularly acute, but has nevertheless not been met. The closest that international policy has come to acknowledging the need for a comprehensive package of justice for the Great Lakes region are informal discussions of the possibility of extending the mandate of the International Criminal Tribunal for Rwanda to cover crimes committed in the context of the civil wars in those countries.

Despite the positive contributions of the ICTR to the process of deterring impunity in the region, some observers have wondered about the potency of that deterrent effect given the conflicts and impunity in DRC and Burundi that have not been addressed. This is a significant limitation to the overall effectiveness of the Tribunal, especially considering the United Nations Security Council’s objective of deterring such crimes and contributing through the work of the ICTR to the maintenance of peace. As is well known the situations in these countries are significantly linked and so cannot be effectively addressed each in isolation of the others. The Lusaka Peace Accords signed the warring parties in the DRC provide for the hand-over to the ICTR for trial Rwandan militia who participated in the Rwandan genocide and are now involved in the conflict in the DRC. Whether this provision if implemented will address the wider problem in the region effectively remains to be seen.

The remit of the Tribunal, both in time (it is limited to events in 1994) and geographical space is a matter that is solely within the purview of the Security Council, which established the Tribunal and can amend its jurisdiction should the political will exist to do so. However, given the experience of the ICTR even with its limited mandate, it would not be realistic to widen the Tribunal’s remit without provided a significant corresponding increase in resources for that purpose. This is again a question of political will among United Nations member states.

\(^2\) In the case of Angola, the debate has been overtaken by the death of Jonas Savimbi, largely seen as the chief protagonist of the conflict there. Savimbi’s death directly resulted in an end to the war and has doused the previously held view that he should have been put on trial for war crimes. The cessation of hostilities notwithstanding, the United Nations has made clear that any amnesties granted by the Angolan government as part of the peace process will not be recognized under international humanitarian law for violations of such international laws.
All of this leads into the issue of “donor fatigue” as a factor in global responses to enhance justice and reconciliation in Africa the supposedly high price of international justice – and some amount of cynicism about what such justice actually delivers in relation to its price tag – has dissuaded many donor countries from supporting the creation of more ad hoc international tribunals to cover DRC and Burundi, or to widen the remit of the ICTR to do so.

But, even as it must be recognized that States have the right to decide how to utilize their resources in the international arena, is this parsimoniousness helpful? Is its acuity enhanced in relation to judicial challenges in Africa? It is obvious that there is understandably little or no financial restraint when national interest is involved in a quest for justice, international or domestic. The Lockerbie trial, which lasted for several weeks and involved two Libyan defendants on charges of responsibility for the 1988 bombing of a plane with scores of passengers who were all killed -- undoubtedly a heinous crime – cost in excess of $50 million. That sum is only slightly less than the annual budget of the ICTR, which has 50 defendants and over 900 staff, and twice the operating budget of the Special Court for Sierra Leone for the next two years.

The point here is not that it is wrong for States whose citizens were killed by an international crime to expend so much money and other resources in such a short period of time to bring the perpetrators to justice. It is indeed a most appropriate policy choice. Charity, as the popular saying goes, begins at home. The point is that, considering the resources available to several States in the international community, and the weakness of judicial structures in countries such as the DRC and Burundi, a global response to the needs of these societies for justice – so necessary for the reconciliation of their war-torn societies -- is a wise investment at comparatively little cost.

Mention needs also to be made of the role of the establishment of a permanent International Criminal Court in decisions on global responses to judicial challenges in Africa. The ICC will cost a significant amount of money to set up and operate. States that are actively involved in this process – financially as well as politically – may feel that, in a competition for limited resources, it may be more cost-effective in the long run to invest in a permanent mechanism of global judicial response. The bottom line, in either scenario, is that several conflicts in Africa that were generated or sustained by the need for justice will not get the judicial response they deserve in order to be fully resolved.

It is also necessary to address the question of preventive responses to situations in order to prevent mass crimes, and reactive responses that seek to punish perpetrators after the fact. The reality is that, regardless of the obvious benefits of prevention, global responses will be mainly, even if not exclusively, reactive. One reason for this is again the competition for the prioritization of resources. The cost of a mass crime that is prevented by appropriate – including,
if necessary, forceful – global action may not be quantifiable on a policy calculus and thus may be seen as not justifiable for preventive intervention. Even where the averted cost of such preventive action is quantifiable, calculations of national geo-strategic interest may leave Africa relatively low on the totem pole of priorities.

For these reasons, to the extent that there is a global response to the needs of justice and reconciliation, such responses will be mainly after the fact. The responsibility for prevention, therefore, weighs heavily on African countries and societies themselves. It is a responsibility Africa should take seriously because it is a duty that, in reality (as opposed to morality) it owes itself far more than the global community owes it. The emphasis on the rule of law and respect for human rights in the New Partnership for Africa’s Development (NEPAD) is a welcome recognition of this reality. Applying that conceptual recognition in practice is the challenge in the years ahead.

III. LEGAL DIMENSIONS OF GLOBAL RESPONSE: STATE COOPERATION WITH INTERNATIONAL CRIMINAL TRIBUNALS

The very idea of international criminal justice for violations of international humanitarian law is predicated for its workability on the cooperation of States with the international criminal tribunals. It could not have been otherwise, for these tribunals do not have the self-enforcing mechanisms available to national courts. They have no police force and no prisons of their own. The classic case study of international judicial cooperation for human rights crimes in Africa is the International Criminal tribunal for Rwanda, which is the first international court to pursue justice for genocide, crimes against humanity and war crimes in Africa.

The legal basis for the cooperation of States with the ICTR is provided in Article 2 of Security Council resolution 955. In Article 2, the Council decided that all States shall cooperate fully with the International Tribunal and that consequently all States shall take any measures necessary under their domestic law to implement the provisions of the resolution and the Statute of the Tribunal. Article 2 provided that implementing the provisions of the resolution and the Statute included the obligation of States to comply with requests or orders issued by a Trial Chamber under Article 28 of the Statute.

Article 28 of the Statute (Cooperation and Judicial Assistance) provides:
1. States shall cooperate with the International Tribunal for Rwanda in the investigation and prosecution of persons accused of committing serious violations of international humanitarian law.

2. States shall comply without undue delay with any request for assistance or an order issued by a Trial Chamber, including but not limited to:
   (a) The identification and location of persons;
   (b) The taking of testimony and production of evidence;
   (c) The service of documents;
   (d) The arrest or detention of persons;
   (e) The surrender or the transfer of the accused to the International Tribunal for Rwanda.

Several States, mostly in Africa, Europe and North America have extended cooperation to the ICTR as envisaged by the Statute of the Tribunal. Under international law, decisions of the United Nations Security Council are binding on Member States, and the Tribunal was established under the Council’s peace enforcement powers in Chapter VII of the United Nations Charter. Article 48 of the Charter obligates member States to support decisions of the Security Council by cooperating in their implementation.

**Monism and Dualism in international law and State cooperation with the ICTR**

If decisions of the Security Council ought to be automatically binding on States, why does Article 2 of Resolution 955 request States to take any measures necessary under their domestic law to implement the provisions of the resolution and the Tribunal’s Statute? Are the decisions of the Security Council somehow, then, subordinate to the domestic laws of Member States? Certainly, the answer is no, for the reasons that follow. The first part of the answer to this seeming -- but artificial -- contradiction lies in Article 2 itself, in which the Security Council “Decides” that all States shall cooperate fully with the International Tribunal (second emphasis added). Both words are mandatory in law. The second part of the answer is that, in making it mandatory for states to take necessary measures under their domestic law, the Council, intentionally or not, makes a practical recognition of the theories of monism and dualism in the relation between international law and municipal law.

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3 Individuals sought by the Tribunal have been arrested in, and transferred from the following States so far: Belgium, Benin, Burkina Faso, Cameroon, Cote d’Ivoire, Denmark, France, Kenya, Mali, Namibia, Netherlands, South Africa, Switzerland, Tanzania, Togo, United Kingdom, United States, and Zambia.
According to monism, international law and state laws are mutually reinforcing aspects of one system – law in general. Monists believe that all law is a single system of legal rules that are binding – whether on states, on individuals or on non-State entities. Dualists believe that the juridical origins of state law and international law are fundamentally different – the source of state law being the will of the state itself, and that of international law being the common will. Thus, in the dualist view, for international law to apply within the domestic sphere, it needs to be enabled, empowered, or validated by domestic legislation.

The practical impact of the monist and dualist attitudes to international law, which in any event is far more relevant in relation to the law of treaties, on the work of the ICTR is that it tends to condition how national institutions, including judicial institutions and law enforcement agencies, react or pro-act to the needs or requests of the International Tribunal for judicial cooperation or assistance. States with a dualist approach believe that, to facilitate effective cooperation with the ICTR, it is necessary to adopt enabling domestic legislation. States with a monist perspective to international law and relations see no legal impediment to cooperating with the International Tribunal’s requests for arrests of suspects in their territory and their transfer to the Tribunal at Arusha. On the whole the ICTR has had a high degree of cooperation from States, which accounts for the high success rate the Tribunal has achieved in apprehending high-ranking former Rwandan officials who took refuge in various countries. In some instances, legal challenges in domestic courts, in the rare instance of a protracted nature, have delayed the transfer of accused persons to the ICTR.

Irrespective of whether or not a State is monist or dualist, as the Secretary-General of the United Nations stated in the formative stages of the Yugoslavia Tribunal,

> “The establishment of the International Tribunal on the basis of a Chapter VII decision creates a binding obligation on all States to take whatever steps are required to implement the decision”.

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5 A State may not adhere to the dualist view and yet not extend full cooperation to the Tribunal for political or other non-legal reasons. This situation was encountered in a number of countries in the early years of the work of the Tribunal.
6 In the Elizaphan Ntakirutimana case, a former Seventh Day Adventist pastor indicted by the ICTR and arrested in the United States in September 1996 challenged his surrender to the Tribunal all the way to the U.S. Supreme Court, but ultimately without success. He was transferred to the ICTR in March 2000.
Furthermore, as stated by a respected publicist in a discussion of international tribunals and the operation of municipals courts,

“The fact that municipal courts must pay primary regard to municipal law in the event of a conflict with international law, in no way affects the obligations of the state concerned to perform its international obligations”.

Thus, while enabling legislation in the national sphere for state cooperation with the ICTR is welcome and encouraged, the obligation of States to cooperate with the Tribunal remains binding.

Cooperation in the Enforcement of Sentences

An important area of cooperation with the ICTR by African countries is that of the enforcement of sentences imposed by the Tribunal. Perhaps even more than the arrest of indicted persons and suspects in their territories, the enforcement of sentences is important because it creates a sustained impact in the judicial systems of African countries that cooperate with the Tribunal in this sphere of its judicial work. This is because such cooperation requires the sustained adherence to minimum standards of international human rights for prison conditions that simply do not exist in many African countries.

Article 26 of the Statute of the Tribunal provide: “Imprisonment shall be served in Rwanda or any of the States on a list of States which have indicated to the Security Council their willingness to accept convicted persons, as designated by the International tribunal for Rwanda. Such imprisonment shall be in accordance with the applicable law of the State concerned, subject to the supervision of the International Tribunal for Rwanda”.

So far, the United Nations, through the Tribunal, has signed Agreements for the Enforcement of Sentences with three African countries: the governments of Benin, Mali and Swaziland. The political will shown by these African countries is commendable. The Tribunal has shown a policy preference to enforce its sentences in African countries because of a belief that the imprisonment in African prisons of persons who committed genocide and other serious human rights crimes against Africans would increase the impact of the work of the ICTR on the African continent.

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8 Shearer, op.cit., p.78.
However, in the practical application of these agreements lies another area of need for a global response to support cooperation. Many African countries are not in a position to bear the costs associated with hosting international prisoners according to minimum international standards. Thus the Tribunal has had to request financial assistance from the United Nations and donor governments to address this problem that threatens the long-term sustainability of the enforcement of the Tribunal’s sentences. Thus far, however, no concrete material support has been received from any donor government.

From the foregoing, it is obvious that through the cooperation and judicial assistance it receives from States, many of the instances being high-profile cases, the ICTR has contributed to the promotion of international humanitarian law in the cooperating States. This is particularly true of African States, where violations of humanitarian law persist as a major problem.

*The Special Court for Sierra Leone and State Cooperation: Issues of Concern*

There is no question that international cooperation with the ICTR’s quest for justice for the mass crimes in Rwanda has been facilitated by the fact that it operates under the enforcement powers of the Security Council, which clearly indicate the obligation of States to provide judicial assistance to the Tribunal. On one hand, it could be said that such a “trial run” in international justice in the continent has conditioned African States to cooperate with international judicial institutions. This will be expected to affect the cooperation of these countries with other judicial institutions such as the Special Court for Sierra Leone and the African Court for Human and Peoples Rights when it becomes operational.

There is, however, no guarantee that this scenario will be borne out in practice. It is in this context that the apparent absence of mandatory cooperation provisions binding States other than Sierra Leone in the legal architecture of the Special Court is a cause for concern for some observers and practitioners of international criminal justice. The Statute of the Special Court makes no provision for such cooperation. The Agreement Between the United nations and the Government of Sierra Leone on the Establishment of a Special Court for Sierra Leone provides for such cooperation and judicial assistance by the government of Sierra Leone, but this does not oblige other governments to do the same. It remains to be seen if, in cases where suspects may be taking refuge in third countries, such countries will cooperate in the international quest for justice in Sierra Leone through the Special Court.
III. COOPERATING TO STRENGTHEN NATIONAL JURISDICTIONS

This paper is not an unrestrained advocacy of international justice at the expense of the responsibility of national judicial systems as courts of first resort. International criminal courts should be courts of last resort. The establishment of justice and a culture of the rule of law in Africa will require a radical strengthening of national judicial systems and a fine balance between justice at the national and international levels.

One of the most important reasons why emphasizing international justice at the expense of justice at the national level is the question of contextual relevance, or ownership of judicial process. There can be no question that a sense of ownership of judicial processes facilitates the quicker establishment of a human rights culture. There has been some debate as to whether trials by international criminal tribunals is not tantamount to “legal colonialism” of developing countries or “judicial imperialism” by the developed countries that have invariably tended to be the most vocal supporters of such courts.  

The argument for the necessity of international justice in certain circumstances has already been made. Nevertheless, concerns about judicial imperialism appear valid. Trials that are not contextually relevant, at least to some degree, run the risk of promoting internationalist agendas that fail to impact the situation they were created to address. Another aspect of the question of “judicial imperialism” is the inherent political conflict that may arise in the context of the International Criminal Court if African countries do not strengthen their judiciaries. Their citizens and that of other developing countries with weak judiciaries could then become the main defendants at the ICC in the future because there is no basis for the complementarity of the ICC to such jurisdictions.

But it is equally important to develop national jurisdictions for another important reason: when mass crimes are committed, effectively functioning national courts are essential because the numbers of potential defendants can be huge and international tribunals are established to try the most important persons believed to be responsible. They are not inherently structured to be render speedy justice for large numbers of defendants because the numbers of judges in a typical

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9 It should be noted that Rwanda in 1994 requested the establishment of the ICTR, and that Sierra Leone also canvassed for a mixed international and national-jurisdiction Special Court. These requests are a recognition of the unique impartiality of such international tribunals.
international criminal tribunal is far smaller than in national jurisdictions. The upshot is thus that a certain division of labour between national and international tribunals remains necessary.

It is important to note that the task of ensuring the establishment of national judiciaries with well trained and independent judges is as much a function of political will of African leaderships to respect the rule of law as it is that of the civil society in African countries. In order words, the necessary global response and international cooperation to enhance justice and reconciliation in the continent is a challenge for multiple actors and not only the state.

V. CONCLUSION

The judiciary is key to the establishment of the rule of law in Africa. The African renaissance will remain a mirage without justice and the rule of law. It is the absence of accountability and the rule of law that is the root cause of Africa’s problems. This is why it is vital that the continent must assume a larger responsibility for the global response to the need for justice in the continent than has been the case recent years. If justice or the lack of it represents the difference between Africa’s progress, on the one hand, and its stagnation and retrogression, on the other, then the future of our continent may lie in whether it can move from a culture of impunity to one of accountability.