Office Of The High Commissioner For Human Rights

in collaboration with

The International Criminal Tribunal for Rwanda

“African Dialogue II”

Promoting Justice and Reconciliation in Africa: Challenges for Human Rights & Development

A Delicate Balance: Justice and Reconciliation

Welcome Address by Justice Navanethem Pillay

President of the ICTR
It is with great pleasure that I welcome so many distinguished guests to participate in the second “African Dialogue”, a conference organized by the Office of the High Commissioner for Human Rights in collaboration with the International Criminal Tribunal for Rwanda. The theme of this conference is dialogue - dialogue - about justice and reconciliation: two distinct but interrelated objectives in post-conflict societies. This theme is timely in view of the renewed initiatives to promote African regional economic and political cooperation and is timeless in view of the continuing challenges to human rights in Africa and throughout the world. It is thus my privilege to invite all participants to engage in the “African Dialogue” and to examine, on the basis of our shared collective experiences, ways and means to promote both justice for victims and peace building in societies scourged by human rights abuses.

The Creation of the International Criminal Tribunal for Rwanda: A Response to Impunity for Human Rights Abuses

More than half a century has now passed since the ashes of the Holocaust gave birth to the Nuremburg and the Tokyo Tribunals and inspired the Universal Declaration of Human Rights, adopted in 1948 by the United Nations. Significantly, the preamble of the Universal Declaration of Human Rights reminds us that “disregard and contempt for human rights has resulted in barbarous acts which have outraged the conscience of mankind” and that “human rights should be protected by the rule of law”. However, in spite of the development of international humanitarian law in the last century, the response of the international community against crimes against humanity, until very recently, has repeatedly been marked by impunity rather than enforcement of the rule of law. There was no international accountability when 30,000 people disappeared in Argentina, two million people were massacred in Cambodia’s killing fields, 750,000 were slaughtered in Uganda, 100,000 Kurds were gassed in Iraq, 75,000 peasants were murdered by death squads in El Salvador, and when an alleged 800,000 Tutsis and Hutus were killed in Rwanda.

Not until the advent of the two ad hoc international criminal tribunals for Rwanda and former Yugoslavia did the rule of law emerge as a real response to human rights abuses. Following Nuremburg and Tokyo, the international community tolerated fifty years of impunity in which more than 170 million civilians were killed by their own governments with no hope of bringing their killers to justice. Then, in the last decade, the Security Council of the United Nations, freed from its cold War paralysis, responded to the mass atrocities committed in two parts of the world - in the former Yugoslavia and in Rwanda - and created two ad hoc tribunals to “put an end to … genocide and other systematic, widespread and flagrant violations of international humanitarian law …”. The Security Council was “convinced that … the prosecution of persons responsible for such acts and violations … would contribute to the process of national reconciliation and to the restoration and maintenance of peace.”

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The Imprint of the ICTR on International Criminal Justice

As a result of the jurisprudence of the two Tribunals, international criminal justice has become a reality. Insofar as the focus of our conference is Africa, it is appropriate, I believe, to underscore the work in the African ad hoc tribunal, the International Criminal Tribunal for Rwanda, or commonly called the ICTR, of which I have been elected President. The ICTR and Rwandan national courts have concurrent jurisdiction, and criminal prosecutions are ongoing at the international and national levels. In the six years that the ICTR has been functioning, it has brought fifty-nine accused persons into custody, including leaders of the Rwandan government and military. The ICTR has delivered eight judgements with sentences ranging from 12 years to life imprisonment. One person, Ignace Baglishema, was acquitted in June 2001. The Prosecutor has appealed the Judgement, and it is expected that the Appeals Chamber will render a final decision on Mr Baglishemas’s case in early July of this year.

There are presently twenty-one accused on trial in eight different cases, and another trial will begin on June 17th of this year. Now in its second four-year term, the ICTR has thus tried, or is currently trying, nearly half of the individuals who have been brought into custody in Arusha. Such positive developments, to be truly appreciated, must be seen in light of the Tribunal’s early years of hardship, when all resources were limited or even non-existant: legal staff, offices, a library, a detention facility, courtrooms, and computers.

How soon the ICTR will be able to finish its caseload depends on how many accused will continue to be indicted by the Prosecutor and whether or not the Security Council will grant the Tribunal's recent request for eighteen ad litem judges to assist the trial process.

The judgements issued by the Tribunal have already made an imprint on the development of international criminal jurisprudence. For example, the first ICTR judgement rendered in 1998 in Prosecutor v. Jean-Paul Akayesu has become a landmark case in regard to crimes of sexual violence. It is the first time that an individual has been found guilty of rape as an act of genocide. It also marks a departure from “mechanical” definitions of rape, toward one more in line with the experiences of victims.

The Akakesu Judgement was the first conviction of genocide in history by an international judicial court. This ICTR Judgement concluded that rape constitutes genocide, in view of the evidence that acts of sexual violence against women in the Taba commune in Rwanda were perpetrated with the intent to destroy in whole, or in part, the Tutsi ethnic group. Significantly, on the basis of the facts of the Akayesu case, the Tribunal determined that genocide against Tutsis and moderate Hutus occurred in Rwanda in 1994.

In a subsequent case, former Prime Minister Kambanda also recognised, in pleading guilty, that genocide had occurred in Rwanda in 1994. He further

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2 Prosecutor v. Jean-Paul Akayesu, Case No. ICTR 96-4-T, Judgement, Tr. Ch. 2 September 1998.
acknowledged that genocide was planned at the highest civilian and military levels of government. It is noteworthy that the ICTR is the first international criminal tribunal to bring to justice a former head of government. Indeed four years before the current ICTY trial of Milosevic, former President of the Yugoslav Federation of Serbia and Montenegro, the ICTR sentenced the former Prime Minister of Rwanda, Jean Kambanda, to life imprisonment. The Kambanda Judgement is significant, for it represents a new accountability of political leadership at the national level with regard to a prime minister. Similarly, other Judgements rendered by the Tribunal represent accountability of leadership at a regional level with regard to the Prefet Clement Kayishema and at a community level with regard to the bourgmestre Jean Paul Akayesu. These three ICTR cases brought against government officials challenge the traditional notion of sovereign immunity and recognize that heads of State may be prosecuted for violations of human rights.

The cases tried before the two *ad hoc* tribunals represent a new accountability for gross abuses of human rights and offer promise for justice in the face of so many fundamental violations. It is also noteworthy that Judgements rendered by the Tribunals have already begun to influence the rule of law, both international and national. For example, the *Akayesu* Judgement was cited as authority by the House of Lords in its decision regarding the former President of Chile, Pinochet, charged with gross abuses of human rights. Justice, which is an essential element of reconciliation and resolution of ethnic conflict, cannot be compromised.

**The Delicate Balance Between Justice and Reconciliation**

The ICTR in Arusha, like the ICTY in the Hague, is playing a most significant role in the creation of international criminal jurisprudence and in establishing international procedural norms, which will influence the development of the permanent International Court. The strengths and weaknesses of the two *ad hoc* tribunals are evident from their experience. On the one hand, they offer us a new avenue of recourse in a world that desperately needs the rule of law as an alternative to the use of force. On the other hand, weakness of the *ad hoc* tribunals, have been addressed by the creation of the International Criminal Court. One such weakness concerns victims and witnesses. Accordingly, Article 68 (c) of the ICC addresses this problem and provides not only for protection but for participation by victims and witnesses in trial proceedings. Their participation may contribute toward reconciliation and toward raising awareness of the work of the Tribunal in local regions.

We have a long way to go in establishing the rule of international law. Nevertheless I am excited to be living at this moment in the historical development of human rights. Institutional protections such as sovereign immunity are finally coming under serious question, and institutional mechanisms are finally becoming available to hold those accountable, even at the highest level, for human rights violations.
Accountability: As significant – perhaps even more significant – than an international tribunal, are domestic courts, whether in Rwanda or in other States that have suffered mass atrocities. Domestic trials, which ensure fair and equal treatment under the law, are an authoritative means of rendering the truth and bringing the perpetrators of humanitarian crimes (genocide, crimes against humanity, or war crimes) to justice. Domestic trials may generate a comprehensive record of the nature and extent of violations, their planning and execution, the fate of individual victims, who gave the orders and who executed the orders. ⁴

Yet domestic courts, in post-conflict situations, may be unable to guarantee fair and equal treatment to accused persons and to administer the high volume of cases. Under such circumstances, the International Criminal Court, which will soon be a reality, may serve as a viable mechanism of retributive justice to prosecute alleged planners and leaders of humanitarian crimes.

There is growing recognition that retributive justice should not be the sole means for addressing violations of humanitarian law. To promote both justice and reconciliation, there should be a balance of retributive and restorative justice mechanisms, which include allowing victims to participate in the proceedings, providing compensation to victims for their injuries, and establishing Truth Commissions – which were used in my country of South Africa, following the end of the apartheid regime.

South Africa opted for a Truth Commission as an expedient measure to address atrocities committed by the past regime. Supporters of a Truth Commission maintained that a process of public truth-telling was an essential component of the healing process. Only through public and collective acknowledgement of the horrors of past human rights violations would it be possible for South Africans to establish the rule of law and a culture of human rights. Thus, the Government decided that a Truth and Reconciliation Commission would be an appropriate mechanism for addressing the past. The Commission was charged with establishing the causes, nature, and extent of all gross violations of human rights committed during the thirty-four year period from 1 March 1960 to 10 May 1994. The Commission was authorised to grant amnesty where appropriate, to allow victims of violations to recount their stories to the nation, to make recommendations on reparations and rehabilitation of victims, and to compile a comprehensive report on its findings.

In post-apartheid South Africa, where there had been no substantial military conflict prior to the change of the regime, pursuing reconciliation through Truth Commissions rather than through domestic trials seemed to be appropriate.

Other post-conflict societies may find that one or a combination of several mechanisms of retributive and restorative justice are appropriate, in view of their

distinctive past histories and current situations. In selecting ways and means to respond to violations of international humanitarian law to promote both justice and reconciliation, circumstances unique to each State should be considered.

In fact, Rwanda represents an example of a post-conflict society that is using several transitional justice measures, in concert, to carve out a path between retributive and restorative justice. In addition to the trials of the ICTR, against alleged planners and leaders of the Rwandan genocide, and domestic courts, there are the newly created Gacaca courts. In view of the 120,000 persons in custody on suspicion of crimes committed in 1994, the Rwandan government has taken the innovative step to create the Gacaca, or a people’s court, which is modelled on a traditional Rwandan system of rendering justice. Ordinary citizens of sound moral character, who have been elected by local communities, are being trained as people’s judges to decide crimes which were allegedly committed in their communities. The Gacaca courts, which will try all but the most serious genocide crimes, may serve a similar cathartic purpose as a Truth and Reconciliation Commission. The community will hear the stories of both the alleged victims and perpetrators of the crimes. By acknowledging the suffering of victims and their families, and allowing both victims and accused persons to tell their stories, the Gacaca courts may facilitate national reconciliation and impart to the citizens a sense of dignity and empowerment that may help them move beyond the pain of the past. In addition to promoting reconciliation, the Gacaca courts may promote justice by imposing punishment, moral condemnation, sanctions, and victim compensation.

The example of the Gacaca courts illustrates that there are many creative ways and means, sometimes fostered by NGOS, to promote justice and reconciliation in Rwanda and in other post-conflict societies.

Yet, in the aftermath of mass atrocities, retributive justice rendered by an international tribunal, such as the ICTR, the ICTY, or the International Criminal Court, is vitally necessary to help end impunity. Heinous crimes which go unpunished may be seen to encourage continued violations of human rights and to hinder any national reconciliation. So too domestic prosecutions that may be perceived as victors’ revenge.

An international tribunal serves as the standard bearer of international humanitarian norms and serves as a neutral adjudicator. Specifically, the ICTR, in view of the delicate balance between justice and reconciliation, is cautious to ensure that it is not a victor’s court. Despite the necessity to work closely with the Rwandan government to facilitate the flow of witnesses and documentary evidence, the Tribunal makes every effort to safeguard the rights of all accused persons brought before it, as provided in Article 20 of the Statute. The Tribunal, under its jurisdictional mandate, also adjudicates the cases of all accused persons, whatever their ethnic or political background, that have been properly indicted by the Prosecutor.

The Tribunal, in tandem with Rwandan domestic courts, the Gacaca court, and extra-judicial mechanisms, is working to promote justice and foster
reconciliation. Yet, perhaps even more significantly, the Tribunal serves by virtue of its very existence as a beacon of hope in a new legal order in which there is no safe haven for those who commit human rights violations. If the ICTR - as well as the ICTY - achieve the delicate balance between justice and reconciliation, they shall have advanced peace, the protection of fundamental rights, and the observance of the rule of law.

From the ashes of the holocaust, from the mass graves in Rwanda and the Balkans, hope has been kindled that international jurisprudence will address legal and moral humanitarian violations. If we succeed in establishing a new legal order in which there is no tolerance of impunity for abuses of human rights, we shall have breathed new life into international law. This new legal order will include the International Criminal Court, and may perhaps also include international regional courts, such as an African Court of Human Rights (proposed by the Organisation of African Unity) to afford regional rights protection. Now is an exciting moment in the history of human rights in which we are building the pillars of an emerging international criminal system of justice. It is also a crucial historical moment in which we have the opportunity to breathe life into the Universal Declaration of Human Rights and the African Charter on Human and Peoples’ Rights.