INTRODUCTION

Ladies and Gentlemen:

It is a great honour to us that you have chosen the International Criminal Tribunal for Rwanda as the venue of the Second Dialogue on Africa. I am fully aware of the significance of these Dialogues and of the responsibility they entail. The task assigned consists in examining the African Continent, inflicted as it is with war and violence, in order to try and find some remedies to the current culture of impunity. At the very least, the Arusha dialogue marks an important milestone. Firstly, due to the venue you have chosen, whose history inspires a great deal of respect. Also due to the prestigious panel of prominent experts on African issues, who, over three days, will give voice to their views. And lastly, due to the importance of the issues to be discussed, which are at the very core of the judicial and criminal foundations of law.

I think you will agree that we can limit ourselves at this stage to making an empirical analysis of the correlation existing between impunity, national reconciliation and justice. At the outset, we note that those concepts are moral before being judicial. A great deal of work has been done on the perverse effects of impunity.\(^1\) The African Union chose democracy, human rights and the rule of law as its fundamental principles. Article 4 (O) of the Constitutive Act of the Union proscribes impunity and political assassination. Other provisions of the same article reinforce that proscription and condemn unconstitutional changes of government, acts of terrorism and subversive activities.

Impunity has political, juridical and moral aspects when the offences committed are of a serious nature.

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It prevents peaceful co-existence between national communities, and constitutes a major obstacle to the evolution of democracy. Gone are the days when people believed in wiping the slate and starting anew. Indeed, we note that the road to national reconciliation is long and full of pitfalls, pitfalls that are largely linked to all the uncertainties that the three-day dialogue will have the tremendous merit of highlighting. Uncertainties as to the significance attached to the connection between reconciliation, impunity and justice. There is uncertainty as regards the way the trilogy is perceived. There is also uncertainty regarding justice – impunity – national reconciliation, insofar as impunity does not automatically lead to national reconciliation. Finally, there is uncertainty as regards the justice – impunity – national reconciliation trilogy that people sometimes brandish without always fully weighing the consequences.

The crusade against impunity is fraught with shortfalls. There are judicial shortfalls that are due to an attitude that has allowed the legal obstacles to prosecution to be tackled only partially. There are also factual shortfalls when the justice system finds itself in a negative power relationship. Indeed, the transition to democracy and peace in many states under dictatorships or suffering from internal conflicts is achieved through negotiations with perpetrators of horrendous crimes. While the latter may still have a certain capacity to do harm, they demand and often obtain legal absolution for their crimes as the price of their surrender or of reconciliation.

For the battle against impunity to be well organized requires the reinforcement of judicial instruments and a genuine will to eliminate the often political obstacles thereto. I now wish to examine the issues of national reconciliation (I), the need to combat impunity (II) and the role of the judicial system (III).

I. THE ISSUES PERTAINING TO NATIONAL RECONCILIATION

I wish to begin by recalling the lack of unanimity as to the definition of the term reconciliation. In Civil Law, the term was used to refer to the agreement by spouses to effectively and knowingly resume a relationship after a separation. Public International Law has given the term another meaning. Reconciliation is defined as an agreement or transaction renouncing, either unilaterally or reciprocally, all claims. The solution to the dispute does not lie in a judicial decision but rather in an agreement between the parties themselves.

In the African context, which is characterised by recurrent political and institutional crises, the term reconciliation, accompanied by the adjective “national”, is still a vague, not to say dangerous term, vis-à-vis the objectives sought. Reconciliation is inseparable from the exigencies of justice, fairness and reason. In Africa, reconciliation under the palaver tree was the usual practice to settle family or neighbourhood conflicts. In African culture, reconciliation between persons or ethnic communities has always existed and co-existed with feelings of hatred and vengeance. In recent years, many instances of sham reconciliation have occurred, and human rights activists are upset each time the word is used. The paradox is that it is the oppressive political systems who, after having plundered the State’s meager resources, put down political opponents and the popular revolt, perverted political morals and trampled on fundamental human rights, then talk of national reconciliation. The situation is further complicated by the unprecedented fact that the tormentors must cohabit with their victims. Although national reconciliation is an unavoidable prerequisite for building spaces of peace, it must not be achieved in defiance of the rule of law.
Reconciliation remains a perilous, uncertain undertaking when aimed at simply eliminating the traces of disgraceful, inhuman acts. In many chaotic political situations, taking the road to reconciliation simply means obliterating the past. National reconciliation should be based on truth. The various perpetrators of violations consider that whatever is past is past and must no longer impinge on the present or the future. Victims must forgive and forget. Although, in exceptional circumstances, such as in South Africa, where the formation of the Truth and Reconciliation Commission has eased political and social tensions resulting from the Apartheid regime, such an experience cannot be applied across the board. We all recall that when the ANC won the elections, certain people who were bruised and frustrated by the apartheid regime called for the Whites to be thrown into the sea.

Under South African law, understanding has primacy over vengeance, reparation has primacy over retaliation, and the human spirit has primacy over retribution. In order to move forward on the road to reconciliation and reconstruction, amnesty was granted to those who committed serious acts in the past. One of the main purposes of the Commission was to facilitate the granting of amnesty to persons who made full public revelations regarding politically-motivated acts. In order to defuse the accumulated hatred, it was suggested to decree amnesty for perpetrators of acts of violence. It is no doubt legitimate to demand the prosecution of the people responsible for such acts, but the cure would no doubt be worse than the disease and would perpetuate the conflict. The international community had declared the apartheid political system to be a crime against humanity, and rightfully so, and all those who participated in the odious apartheid system should have been prosecuted. The ANC was of the view that such a move would complicate the political situation. The tormentors were able to externalize their guilty conscience and thus feel as if they were given a new lease on life. The methods used by post-Apartheid South Africa with the Truth and Reconciliation Commission were akin to collective therapy.

Amnesty is meant to defuse tensions, rather than to seek miracle solutions that would end political violence. Its ultimate objective is to bring the main parties in the political chaos to the negotiating table to find together how to turn the page and, in the absence of honourable surrender, identify ways to defuse tension. The handshake between two sworn enemies or irreconcilable leaders often masks delaying tactics. For example, in 1992, on the eve of the general elections, the dramatic handshake between the protagonists in the Angolan civil war, namely Jonas Savimbi of UNITA, and President Dos Santos of MPLA, did not bring an end to the massacre of civilian populations or the hostilities.

Such is also the case in Rwanda, where, in 1994, on the eve of the genocide, a Commission on National Unity and National Reconciliation existed but could not prevent the serious and widespread violations which led to the death of hundreds of thousands of people. It will be recalled that the Commission had been established by the 1993 Arusha Accords and was tasked with creating the necessary conditions for peace and reconciliation.

Alas, we instead witnessed one of History’s greatest tragedies. NUNCA MAS – never again. The new Rwandan authorities have apparently taken account of the need for unity as well, beyond the imperative of reconciliation. To that end, they adopted Law No. 3.99 of 12 March 1999 that instituted the Commission for National Unity and Reconciliation. The Commission serves as a forum where Rwandans debate the causes of
their divisions and ways to strengthen unity and sustainable reconciliation of the Rwandan people. Another major innovation undertaken by the Rwandan Authorities consists in the creation of the Gacaca courts whose ambitions are several: not only to bring forth the truth, but also to bring justice closer to the public at large by relying on traditional values that can contribute to promoting reconciliation.

While it is true that some initiatives have been successful, an example being the National Conference in Benin, which led to the strengthening of democracy and political alternation, others have met with mixed success, examples being Togo, the Democratic Republic of Congo, Côte d’Ivoire, Sierra Leone etc.

By and large, it is the impunity which is attributable to the absence of rule of law that prevents national reconciliation. Indeed, seeking the truth on offences, demanding justice and meting out appropriate punishments does not preclude national reconciliation. For reconciliation to take root in political morals, there is first a need for truth, then justice and finally to consider forgiving. That helps drive away the demons of vengeance or private justice. There is a need to ensure that reconciliation is not the ideological mantel of injustice, the cement used to cover the cracks that have developed within society. Considering that the law, rights and justice are closely connected, reconciliation cannot be achieved by deliberately forgetting the acts committed, but rather by punishing such violations.

II. THE NEED TO FIGHT IMPUNITY

Impunity is usually defined as the failure to punish violations of established norms. It is, in a sense, the act of not being punished, hiding from or escaping punishment either due to circumstances or to the law. The question that is usually asked is how to punish those who commit serious violations at a time when a State sets out to democratize public life. This is a matter of great concern for many African countries, which must reconcile a politically violent past with the pursuit of national reconciliation. The commitment of States to human rights cannot be credible unless the State puts an end to the conditions that destroy values and thus perpetuate impunity. What should be done with those responsible for serious violations of human rights? The human rights map shows that the African political environment is characterised by violence at the top most level.

The states which have achieved a degree of political stability are crumbling, conventional armies have been replaced by militias and guerilla groups that specialize in looting and political assassinations, warlords enlist children in their armies for some of the most horrendous tasks, and the despots who torment their people enrich themselves by pillaging their meager resources. Impunity stifles and criminalizes public life. The battle against impunity requires a thorough and impartial investigation into violations of the law and the identification of the perpetrators in order to punish them. It casts doubt as to States’ international commitment to respect fundamental rights and to punish those responsible for violating them, and is an issue in several African States where security forces have overthrown legally constituted governments or refuse to submit to the civilian authorities. For a long time, crimes were committed under the aegis of government and, in many cases, those responsible for such crimes were not prosecuted and the crimes generally fell into official oblivion.

Impunity occurs sometimes by legal means (by adopting measures of amnesty, of clemency, of pardon, of mercy or any other measure taken to prevent the Prosecution of perpetrators of violations) and sometimes \textit{de facto} (refusal to undertake investigations to determine the facts, refusal of the Courts to punish perpetrators because of political motives or through intimidation). It is becoming disconcertingly prevalent in Africa where it is considered that, after a period of conflict, the best way to achieve peace and national reconciliation is to shroud it in oblivion, without first having elucidated it. That has allowed many leaders with blood on their hands and the tormentors of their peoples to remain as unavoidable partners in achieving peace, with the consequent trivialization of serious violations of human rights and serious breaches of international humanitarian law.

The general advance of criminal impunity has allowed the involvement of a significant part of the population in war. Criminal violence, in armed conflict and rebellions, is in large part due to impunity for the crimes committed.\(^3\) Impunity remains the deepest wound afflicting Africa. Not only has that phenomenon afflicted the four corners of the Continent, but it has taken root in society and in the vital sectors of African states. The direct consequence has been the emergence of a small caste of younger millionaires where the great majority of the population is foundering in destitution. Corruption is both a social scourge and a national peril. In the face of the full extent of the tragedy, with millions of Africans dying of hunger, the small minority of the wealthy continues the systematic plundering of national resources. Such conduct should be characterized as a crime against humanity.\(^4\) The danger in the link between corruption and organized crime in Africa is the institution of all-encompassing corruption. The negative aspects of corruption and criminal impunity are two issues that cannot be reconciled with democratic principles. It is necessary to find efficient methods of prevention, suppression and prosecution, both internationally and internally. The two phenomena are closely connected.

The difficulty in coming to grips with impunity is due to the depth of secrecy and silence that surround it. Impunity is one of the major ingredients of criminality, of which no one knows anything and of which no one speaks. It is a cancer that is consuming African states. The leaders, with their policy of systematic plunder of national wealth encourage favouritism. Work, merit and competence are sacrificed on the altar of impunity.\(^5\) The fear of losing political power compels corrupt leaders to corrupt the democratic process. It is true that repressive government measures are not enough to stop the scourge, incentives are necessary that involve the independent press, the judicial system, a vigilant parliament and civil society. The judicial system is not spared by the scourge and African judges and other members of the legal profession, ill trained and underpaid, are under strong social pressure to take decisions that are sparing and in favour of offenders. The battle against impunity must be total. International Tribunals have an important role to play. A perfect example is Sierra Leone where, when initiating the agreement between the government of Sierra Leone and the RUF rebels, suspected of serious violations of international humanitarian law, the Special Representative of the United Nations Secretary General expressed very specific reservations in respect of the impunity guaranteed to the

\(^3\) Refuges No. 12, Vol. 2, 1998, p. 27.
\(^4\) Pierre Péan, \textit{"L'argent noir, corruption et développement} [Black money, corruption and development], pp. 9-13.
rebels in the agreement. The battle against impunity is in essence a dynamic process inasmuch as criminals are forever seeking new strategies to discreetly pursue their activities.

III. WHAT SORT OF JUDICIAL SYSTEM TO ERADICATE IMPUNITY?

The judicial system is generally defined as the body of institutions exercising justice: the Courts, Judges, Jurists, Tribunals, etc.

Since the end of the Second World War, and the adoption of the Geneva Conventions of 1949 and the addition of two Protocols in 1977, as well as the adoption of a Convention on Genocide in 1948, the International Community has shown its commitment to end the culture of impunity.

The end result of this long process has been the creation of an International Criminal Court, marking a new era in the evolution of International Justice that begun with the Nuremberg and Tokyo Trials. The establishment of the ad hoc International Criminal Tribunals to try the perpetrators of massive atrocities committed in former Yugoslavia since 1991 and in Rwanda in 1994 brought strength to the campaign against impunity. Africa’s first contact with the globalisation of justice was through the International Criminal Tribunal for Rwanda, which consecrates the African dimension of global justice and the introduction of the concept of individual responsibility in non-international armed conflicts. The Judgements pronounced by the Tribunal have had an important impact on the entire Continent, characterized as it was for several decades by a culture of impunity. Indeed, the 1999 Lusaka Accords, regarding the conflict in the Democratic Republic of Congo, went as far as to provide for the surrender for trial before the Arusha Tribunal, of belligerents suspected of having taken part in the genocide.

Africa will not be able to long resist the rising waves of the globalisation of justice. It would be fully in its interests to adopt the concept of universal jurisdiction—the assertion by any State of its right to try the perpetrators of violations of human rights such as genocide, crimes against humanity and war crimes, wherever they are perpetrated and whatever the nationality of the perpetrators or the victims. African States however, like most other States have still not integrated into national legislation the principle of universal jurisdiction. The concept of universal jurisdiction perfectly illustrates the globalisation of justice.

In spite of the current crises in the judicial systems of several states, Africa continues to proclaim its commitment to the independence of the judiciary and takes an active part in United Nations activities regarding the independence and impartiality of the judiciary. Viewing how high offices in the judiciary are filled, and the factors that explain the asymmetry between impartiality and how they are appointed, African judges, in the main, can only enjoy relative independence with some chinks of a parent impartiality. Impartiality, competence and independence must be the first attributes of a judge, before any other attributes. African judges must have perfect mastery of the norms in force in the field of human rights, and international doctrine and jurisprudence.

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in order to be able to clearly identify any violations. They must have a great aptitude to grasp present trends in the evolution of international law regarding human rights and humanitarian law.

In order to ensure the proper administration of justice it is necessary for judges to be truly independent. African judges will have to be highly experienced and have reached a stage of maturity that allows them to be genuinely independent. The exercise of justice by inexperienced persons incurs the risk of backsliding. A judge’s first concern must always be for fairness. He must always be mindful of the need for a fair application of the norm and eschew arrogating to himself the power to ignore or to modify the norm. Nothing, however, prevents him from ensuring its proper adaptation. The impartiality of African judges is of recurrent concern. The issue of the independence of judges is again to the fore in African States in the wake of several scandals involving the political establishment and the judiciary. One of the main factors in the dysfunction of the African judicial system is the distant and artificial character of the judge’s role. Faced with the crisis in judicial institutions, some do not hesitate to express the view that it is in the flagrant contradiction between modern justice and traditional justice that the true causes of the backsliding in the administration of justice can be found. African judges, because of filial respect or convenience, more often than not revert without reservation to the jurisprudence of former days.

The role of African judges is very important in the process of instituting the rule of law. It is necessary to institute safeguards to protect constitutional rules. In Africa, the confusion of powers remains the principle cause of the crisis in the judicial system. The personalisation of disputes has reached a point where any application for review of an administrative decision is seen as being malicious towards the administrative authority. African judges must eschew any culpable complicity with the executive branch. They must throw off the tutelage that certain unpopular governments attempt to impose on them and even take the risk of opening Pandora’s Box in the name of justice and of the battle against impunity.

The independence of the judiciary is a sine qua non for the proper, independent and impartial administration of justice. There is need to ensure that judges’ decisions are not subject to any review other than the review proceedings provided for under law. In order to end political instability and the culture of impunity, it is imperative that the role of the army in a democratic society be defined. Indeed, an institutional crisis automatically ensues when the army takes power. Article 4 of the Constitutive Act of the African Union proscribes political assassinations, impunity and unconstitutional changes of government.

CONCLUSION

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8 Ibid, p. 50.
9 Gérard Conac, Afrique contemporaine, no. 156, p. 18.
10 Alban Coulibaly, op. cit., p. 58.
The end of impunity will be achieved through the strengthening of the rule of law in all its practical aspects, whether institutional, legislative or procedural. The international community must be mobilized whenever principles of justice are systematically violated. The political transitions underway on the continent, and the proper political alternations that have already taken place, have brought constitutional governance to many African States where the rule of law is recognized and binds the rulers and the ruled. Throughout the continent, democracy is acquiring its letters patent of nobility. Democracy must not be a simple matter of electoral window-dressing or of judicial pomp. Several factors, such as political opposition without democratic principles, judges in tutelage to political power and subject to influence, apathetic voters without any deep convictions, electoral results tending towards unanimity, are all signs of truncated democracy.

Our truths merely are and always will be conditional truths, tributary to the economic, political and geostrategic environment in which we live. Tributary also to the recent past and the historic convulsions that have marked our nations. Tributary to political morals, tributary, in short, to a judicial culture that we have inherited. It would be both foolhardy and unsafe to sacrifice all those human and humanistic values on the altar of impunity and national reconciliation.