

JUSTICE FOR PEACE IN AFRICA

By INGER ÖSTERDAHL*

Abstract: *The article focuses on the International Criminal Tribunal for Rwanda (ICTR) and the Special Court for Sierra Leone. It looks particularly at how the issues of justice and peace are mirrored in the statutes and working of the tribunals. The two African tribunals are compared with the ICC as to the latter's relationship to issues of war and peace on the one hand and to Africa on the other. The article opens with an account of UN Security Council practice relating to justice and peace since the early 1990s when criminal justice emerged as an organizing principle of international action.*

Key words: *criminal accountability, International Criminal Tribunal for Rwanda, Special Court for Sierra Leone, international justice*

A. INTRODUCTION

The issue of international criminal law and individual criminal accountability with respect to serious human rights violations, in war and peace, in international and domestic settings, seems to be here to stay. And so does the larger issue of the relationship and interplay between justice on the one hand and peace and high politics in general on the other, which is always present wherever and whenever war crimes trials are being considered.

This article focuses on international criminal tribunals in Africa: the International Criminal Tribunal for Rwanda (ICTR) and the Special Court for Sierra Leone. It looks particularly at how the issues of justice and peace are mirrored in the statutes and working of the tribunals. The article gives an overview and summary of the activities of these two tribunals to date.

The two African criminal tribunals are compared with the ICC as to the latter's relationship to issues of war and peace on the one hand and to Africa on the other. It so happens that all four current situations under scrutiny by the ICC are found in Africa. The domestic and institutional weakness of many African states generates both wars and the ensuing demand for war crimes trials, in particular internationally sponsored ones at home or in international fora.

Another judicial development in Africa which is of indirect relevance to the discussion in this article is the creation of the African Court of Human and Peoples' Rights – a pan-African Court of human rights like the European or Inter-American one – whose judges have just been sworn in and held their first meeting in July 2006.

The article begins with an account of the way the UN Security Council has approached the

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issue of justice and peace since the beginning of the 1990s. After all, it was the Security Council that started the current trend in international criminal law with the creation of the ICTY in 1993 – perhaps to the regret of some of its permanent members.

In the following three sections of the article a brief account is given of the structure and working of the ICTR, the Special Court for Sierra Leone and the ICC. In the case of the latter, the situation in Darfur, Sudan, is highlighted because it illustrates the nexus of justice and peace in a particularly obvious manner. To the extent possible, the discussion turns on aspects of the tribunals and courts that are related more or less directly to the issue of justice and peace.

B. JUSTICE FOR PEACE IN THE UN SECURITY COUNCIL

1. A WAVE OF RESOLUTIONS

The UN Security Council seems to be convinced that justice favours peace. In the resolutions of the Security Council the issue of the role of justice for peace has gained a prominent position.

The first time the issue was taken up in a resolution was in 1993 in relation to the conflict in the former Yugoslavia where the importance of individual accountability for violations of international humanitarian law was emphasized by the Security Council as a means of removing the threat to the peace constituted by the conflict.¹ The ICTY, according to the Security Council, would enable the aim to be achieved of putting an end to the continuing violations of international humanitarian law occurring within the territory of the former Yugoslavia and of bringing to justice the persons who were responsible for them, and would contribute to the restoration and maintenance of peace.² The tribunal was established as an enforcement measure under Chapter VII of the UN Charter.

Since the creation of the International Tribunal for the Former Yugoslavia, a passage concerning the importance for peace of individual accountability for criminal acts has become almost a standard component of the resolutions adopted by the Security Council in order to deal with threats to the peace. As we can see, the inclusion of a reference to justice, usually in the form of individual criminal accountability, is a rather recent development but once it appeared it quickly established itself as a common feature of Security Council practice.

In 1994, the Security Council established the ICTR with a more or less identical motivation as in the case of the former Yugoslavia.³ In the case of Rwanda the Security Council also stressed the need for international cooperation to strengthen the courts and judicial system of Rwanda, having regard in particular to the necessity for those courts to deal with large numbers of suspects.⁴ Some years after that, in 1999, the Security Council assisted in the estab-

¹ Security Council (SC) Resolution (res.) 808, 22 Feb. 1993.

² SC Res. 808, 22 Feb. 1993, (preamble) pre. paras. 6, 8, 9.

³ SC Res. 955, 8 Nov. 1994, pre. paras. 4, 6-8; see further below section C.

⁴ SC Res. 955, 8 Nov. 1994, pre. para. 9.

lishment of judicial mechanisms and truth and reconciliation commissions for the trial of persons suspected of crimes against international human rights and humanitarian law in East Timor and Sierra Leone.⁵ As in the case of Rwanda, the Security Council also noted the need for international cooperation to assist in strengthening the judicial system of Sierra Leone.⁶ In the case of both Rwanda and Sierra Leone, the Security Council emphasized that a credible system of justice and accountability and the prosecution of persons responsible contribute to the process of national reconciliation.⁷ The UN has also been successfully engaged in trying to influence Cambodia to create the judicial structures necessary to institute legal proceedings against the Khmer Rouge – these became the Extraordinary Chambers in the Courts of Cambodia for the Prosecution of Crimes Committed during the Period of Democratic Kampuchea.⁸ Although the legal basis is different, one could say that the efforts of the UN Security Council to include justice as part of the post-conflict peace-building process culminated in the creation of the said permanent ICC in 1998.

In addition to these concrete measures, the Security Council has pointed out in general the importance of individual accountability for violations of human rights and international humanitarian law in numerous resolutions.⁹

2. AFRICA IN FOCUS

Several of the situations for which the SC urges the importance of individual criminal accountability to restore and maintain peace exist in Africa, largely because most wars today take place in Africa. The latest case in which serious measures have been taken to achieve individual criminal accountability is the Darfur province in Sudan. The Darfur situation was eventually referred to the International Criminal Court (ICC) by the UN Security Council in 2005, somewhat surprisingly considering the staunch opposition of the US to the ICC and considering that, in addition, neither China nor Russia are parties to the ICC Charter.¹⁰ In fact, all sit-

⁵ SC Res. 1272, 25 Oct. 1999, (operative) op. para. 16 on East Timor; and SC Res. 1315, 14 Aug. 2000 and SC Res. 1436, 24 Sep. 2002, op. paras. 10 and 11 on Sierra Leone. On the Special Court for Sierra Leone see further below section D.

⁶ SC Res. 1315, 14 Aug. 2000, pre. para. 11.

⁷ SC Res. 955, 8 Nov. 1994, pre. para. 7; SC Res. 1315, 14 Aug. 2000, pre. para. 7.

⁸ Cf. Agreement between UN and the Royal Government of Cambodia Concerning the Prosecution Under Cambodian Law of Crimes Committed During the Period of Democratic Kampuchea, 6 June 2003 (www.cambodia.gov.kh/krt/pdfs/Agreement%20between%20UN%20and%20RGC.pdf) (visited 29 January 2007). See further Sarah Williams: "The Cambodian Extraordinary Chambers – A Dangerous Precedent for International Justice?" (2004) 53 *International and Comparative Law Quarterly* 227.

⁹ See various Security Council resolutions from 1992 to 2006 on Afghanistan, Burundi, Côte d'Ivoire, Democratic Republic of Congo, Great Lakes Region, Haiti, Iraq, Somalia, Sudan, Timor Leste, and Protection of Civilians in Armed Conflict.

¹⁰ SC Res. 1593, 31 March 2005 (11-0-4); Rome Statute of the ICC (ICC Statute), 17 July 1998, 2187 UNTS 3 (in force 1 July 2002).

uations currently under consideration by the ICC, exist in Africa. The ICC is intended to become the primary international forum for the prosecution of severe humanitarian law criminals. If the ICC is allowed to take on that role in practice, this will relieve the international community of the need to create ad hoc tribunals for particular cases which will have economic and infrastructural advantages among others. One important condition for a case to be admissible before the ICC is that the individual state is either unable or unwilling to prosecute the suspected criminals itself.¹¹ In Africa one of these conditions or both will often apply.¹²

In Africa there is also the less well-known African Court on Human and Peoples' Rights whose Statute entered into force in 2004.¹³ It is supposed to have its seat in Arusha, Tanzania, inheriting the facilities of the ICTR. The judges of the African Court were sworn in and held their first meeting in Banjul, the Gambia, in July 2006. The African Court is not a criminal court but still could be used for trials concerning grave human rights violations, and its jurisdiction theoretically could be extended ad hoc in case of need to cover war crimes.¹⁴

3. JUSTICE AS ORGANIZING PRINCIPLE

In contrast to the resolutions on the importance of individual criminal responsibility emanating from the UN Security Council it can be noted that in Protocol II additional to the Geneva Conventions relating to the protection of victims of non-international armed conflicts (which is the kind of armed conflict that is most common) it is laid down in Article 6 on penal prosecutions that at the end of hostilities, the authorities in power shall endeavour to grant the broadest possible amnesty to persons who have participated in the armed conflict.¹⁵ There seems to be a contradiction between the current rules of international humanitarian law and the law of the UN Security Council.

In case of conflict between the obligations of the states under the UN Charter and their obligations under other international agreements, their obligation under the UN Charter, arguably including under binding UN Security Council resolutions, shall prevail.¹⁶

¹¹ ICC Statute Article 17.

¹² On the ICC see further below section E.

¹³ For the Protocol to the African Charter on Human and Peoples' Rights on the Establishment of an African Court on Human and Peoples' Rights, see the homepage of the African Commission on Human and Peoples' Rights (www.achpr.org) (visited 29 January 2007). The Protocol was adopted in Ouagadougou, Burkina Faso, 10 June 1998.

¹⁴ For a related thought, see Jacob Lily: "Peace with Justice: Options for Bringing to Trial Human Rights Violators in Africa and a Proposed Solution to Cover the Gap in Enforcement Mechanisms Between International Criminal Law and Human Rights Violations" (2002-2003) 6 *Gonzaga Journal of International Law* 1.

¹⁵ Adopted on 8 June 1977, 1125 UNTS 609 (in force 7 December 1978).

¹⁶ UN Charter Article 103. See also the case of T-306/01, *Ahmed Ali Yusuf and Al Barakaat International Foundation v. Council and Commission*, judgment of the Court of First Instance of 21 September 2005, ECR 2005 p. II-3533; and case T-315/01, *Yassin Abdullah Kadi v. Council and Commission*, judgment of the Court of First Instance of 21 September 2005, ECR 2005 p. II-3649.

The focus on individual criminal accountability in international law since the creation of the ad hoc Tribunal for the Former Yugoslavia in 1993 has been so strong that some talk of the “trial model” occupying a dominant position in the international legal discourse.¹⁷ This still holds true in the view of the current author. Implicit in the epithet of “trial model” is also the view that the trial model needs to be complemented by less judicial procedures for exacting responsibility, like truth and reconciliation commissions.¹⁸

Confirming the view that the individual criminal accountability has become a dominant paradigm in international law, some argue that international criminal justice, or international judicial intervention, has become the third dimension in international relations, following diplomacy and the use of force as organizing principles of international action.¹⁹

In order to illustrate the breadth of the range of relevant judicial issues, it deserves to be mentioned that there may be other kinds of legal proceedings than war crimes trials in the post-conflict period with the purpose of coming to terms with past wrongs in order to lay the legal foundation for peace. These proceedings may concern the right to property and land ownership which has to be sorted out in order for refugees to be able to return to their former homes. In the case of Burundi, the Security Council considered that “the return of refugees and internally displaced persons will be a critical factor for the consolidation of the peace process, *and will require a just solution of the issue of land ownership*” (emphasis added).²⁰ Also, in the case of Bosnia-Herzegovina the issue of the restitution of real property has been prominent.²¹ The current article, however, will only deal with war crimes trials. We will now begin by turning to the International Criminal Tribunal for Rwanda.

C. THE INTERNATIONAL CRIMINAL TRIBUNAL FOR RWANDA

1. ORIGIN

The ICTR was established by the UN as one means of restoring peace and security in Rwanda.²² The Security Council states that it is convinced that in the particular circumstances of

¹⁷ Mark A. Drumbl: “Rule of Law Amid Lawlessness: Counseling the Accused in Rwanda’s Domestic Genocide Trials” (1997-1998) 29 *Columbia Human Rights Law Review* 545, 636.

¹⁸ Drumbl, *ibid.*

¹⁹ Kingsley Chiedu Moghalu: “Reconciling fractured societies: An African Perspective on the role of Judicial Prosecutions”, in Ramesh Thakur and Peter Malcontent (eds): *From Sovereign Impunity to International Accountability. The Search for Justice in a World of States* (Tokyo: United Nations University Press 2004) 197.

²⁰ UN SC Res. 1545, 21 May 2004, pre. para. 13; cf. also SC Res. 1564, 18 September 2004, pre. para. 12 on Sudan: “[T]he ultimate resolution of the crisis in Darfur must include the safe and voluntary return of internally displaced persons and refugees to their original homes.”

²¹ See, for instance, Hans van Houtte: “Mass Property Claim Resolution in a Post-war Society: the Commission for Real Property Claims in Bosnia and Herzegovina” (1999) 48 *International and Comparative Law Quarterly* 625.

²² SC Res. 955, 8 Nov. 1994 (13-1 (Rwanda) – 1 (China)).

Rwanda, the prosecution of persons responsible for serious violations of international humanitarian law would contribute to the process of national reconciliation and to the restoration and maintenance of peace.²³ Another reason for the creation of an International Tribunal in the case of Rwanda was that the domestic legal infrastructure and law enforcement system had been destroyed during the conflict.²⁴

RWANDAN SCEPTICISM

Curiously, the Rwandan government ended up opposing the creation of the International Tribunal. Originally, the government of Rwanda had asked for the creation of an International Tribunal with the Security Council.²⁵ The eventual opposition of the Rwandan government towards the creation of the International Tribunal illustrates some of the complexities involved in creating an institution for post-conflict justice. The result in the case of Rwanda was that a Tribunal was created in spite of the opposition of the government of the very country over which the Tribunal would have jurisdiction, a government, moreover, which had been formed by people from the same ethnic group as the one having been the subject of the genocide. During all the years since the creation of the Tribunal the relations between it and the Rwandan authorities have been cool.²⁶

The Rwandan government, who happened to be represented on the UN Security Council when the resolution on the International Tribunal was adopted, advanced the following arguments among others in the Security Council for its vote against the resolution establishing the Tribunal:²⁷ The temporal jurisdiction of the Tribunal only covered the year of 1994 and not the period during which the genocide was planned and “pilot projects” were carried out, all of which had been going on since 1990; certain countries that had taken an active part in the civil war would be in a position to propose judges; the convicted criminals would be imprisoned outside of Rwanda and the same countries who had taken part in the civil war and who had supported the former Hutu regime would be in the position to determine the fate of the detainees imprisoned abroad (the statute of the Tribunal states in Article 26 that 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); the Tribunal, in the view of the Rwandese government, should only try the crime of genocide and thereby prioritize its meagre human and financial resources whereas, according to its statute, the Tribunal was going to try a lot of other crimes as well, in addition to genocide; and, finally, the Rwandese government opposed the Tribunal because the Tribunal would not be entitled to pronounce death sentences and because the seat of the Tribunal would not be in Rwanda.

²³ SC Res. 955, 8 Nov. 1994, pre. para. 7.

²⁴ Cf. Edward Kwakwa: “The International Criminal Tribunal for Rwanda: Making Individuals Account for Grave or Massive Human Rights Violations” (1996) April-June *Africa Legal Aid* 6, 7.

²⁵ Letter dated 28 September 1994 from the Permanent Representative of Rwanda.

²⁶ Alison Des Forges, Timothy Longman: “Legal responses to genocide in Rwanda”, in Eric Stover and Harvey M. Weinstein (eds): *My Neighbor, My Enemy. Justice and Community in the Aftermath of Mass Atrocity* (Cambridge: Cambridge University Press, 2004) 49, 54.

²⁷ UN SC, S/PV. 3453, 8 Nov. 1994, 13–16.

According to others, the reason for the opposition of the government of Rwanda to the International Tribunal in its final form was considerably more prosaic than might appear from the debate in the UN Security Council.²⁸ Citing an unpublished letter from the then Minister of Justice of Rwanda to the UN Secretary General, these observers claim that it was the expectation of the government of Rwanda that the International Tribunal would undertake the investigation and prosecution of most, if not all, of the detainees held in Rwandan prisons.²⁹ The realization that an international tribunal is not equipped to undertake a prosecution of thousands of detainees, these observers write, was probably one of the reasons the government of Rwanda eventually withdrew its support for the International Tribunal.³⁰

2. MANDATE

The Security Council established The ICTR for the purpose of prosecuting persons responsible for genocide and other serious violations of international humanitarian law committed in the territory of Rwanda and Rwandan citizens responsible for genocide and other such violations committed in the territory of neighbouring states, between 1 January 1994 and 31 December 1994.³¹ The crimes considered by the Tribunal are genocide, crimes against humanity and those war crimes that are punishable in a civil war.³² The Tribunal's policy of focusing on the most senior leaders considered most responsible for the crimes has been confirmed by the Security Council.³³

The International Tribunal and national courts in Rwanda and in other countries, have concurrent jurisdiction to prosecute persons for serious violations of international humanitarian law, but the International Tribunal has primacy over the national courts of all states.³⁴

The penalty imposed by the International Tribunal shall be limited to imprisonment.³⁵ As noted above, 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.³⁶ Agreements to provide prison facilities have so far been concluded with Mali, the Republic of Benin, Swaziland, Italy, Sweden and France.³⁷

²⁸ Daphna Schraga and Ralph Zacklin: "The International Criminal Tribunal For Rwanda" (1996) 7 *European Journal of International Law* 501, 504.

²⁹ *Ibid.*, at 503–4.

³⁰ *Ibid.*, at 504.

³¹ SC Res. 955, 8 Nov. 1994, op. para. 1.

³² Article 2, 3 and 4 of the Statute, annexed to SC Res. 955, *ibid.*; see also Roman Boed: "Individual Criminal Responsibility for Violations of Article 3 Common to the Geneva Conventions of 1949 and of Additional Protocol II Thereto in the Case Law of the International Criminal Tribunal for Rwanda", (2003) 13 *Criminal Law Forum* 293.

³³ SC Res. 1534, 26 March 2004, op. para. 5.

³⁴ Article 8 of the Statute.

³⁵ Article 23 of the Statute.

³⁶ Article 26 of the Statute.

³⁷ See www.ictor.org (visited 29 January 2007), "About the Tribunal", "Fact Sheets", "Detention of suspects and convicted persons".

One noteworthy aspect of the Tribunal for Rwanda is the amount of money it consumes, or put another way, the amount of money the international community by way of the UN is prepared to invest in it. The Tribunal for Rwanda is financed through the regular budget of the UN.³⁸ According to the homepage of the Tribunal, for 2006–2007 the General Assembly of the UN decided to appropriate to The ICTR a total budget of USD 269,758,400 gross.³⁹ Observers have noted that by the year 2000, the Tribunal for Rwanda and the Tribunal for the Former Yugoslavia together used more than 10 per cent of the UN regular budget.⁴⁰ The combined biannual budget for 2006–2007 of the two tribunals equals one-seventh of the regular UN budgets for a comparable period.⁴¹

The Tribunal was located outside Rwanda for reasons of security: the atmosphere in Rwanda was considered too charged to allow fair trials of suspected *génocidaires*.

A TRULY INTERNATIONAL TRIBUNAL

The ICTR is truly international with judges coming from all over the world. The Tribunal is international also in the sense that it was created entirely by the UN, in contrast to the Special Court for Sierra Leone.⁴² Of the sixteen permanent judges three are currently from Africa.⁴³ There is thus no dominance of judges from Africa, but at least the majority come from the South. The current prosecutor is African.

The Statute of the Tribunal for Rwanda does not talk of any other kind of adequate representation than the representation of the principal legal systems of the world, but the requirement that the principal legal systems of the world must be represented indirectly at least ensures that all judges will not be “westerners”, but originate from all or almost all continents (Australia currently not being represented).⁴⁴

A Witness and Victims Support Section has been created at the Tribunal.⁴⁵ The concern for these vital but vulnerable categories of people has grown with the growth of the international criminal tribunals. We will see that the ICC strongly emphasizes the interests and protection of victims and witnesses.⁴⁶

The effect of the work of the International Tribunal depends among other things on the way information about the sentencing of the Tribunal is spread in Rwanda. Unfortunately, the

³⁸ Article 30 of the Statute.

³⁹ See www.ictr.org (visited 29 January 2007), “About the Tribunal”, “General Information”.

⁴⁰ Beth K. Dougherty: “Right-sizing International Criminal Justice: the Hybrid Experiment at the Special Court for Sierra Leone” (2004) 80 *International Affairs* 311, 312.

⁴¹ Cf. David Wippman: “The Costs of International Justice” (2006) 100 *American Journal of International Law* 861.

⁴² See further below section D.

⁴³ See www.ictr.org (visited 29 January 2007), “About the Tribunal”, “Fact Sheets”, “Members of the Tribunal”.

⁴⁴ Statute Article 12(3)(c).

⁴⁵ See www.ictr.org (visited 29 January 2007), “About the Tribunal”, “Fact Sheets”, “Witnesses and Victims Support Section”; Cf. Statute Article 21.

⁴⁶ See below section E.

majority of Rwandans are largely uninformed about the Tribunal's work.⁴⁷

3. COMPLETION

According to its latest reports, the ICTR has handed down twenty-seven judgments involving thirty-three accused. Of the accused, twenty-eight were convicted and five acquitted.⁴⁸ Trials involving twenty-two accused are in progress. The total number of persons whose trials have either been completed or are in progress is sixty. According to the plans of the Tribunal for Rwanda, less than ten more accused will be tried before the Tribunal.

A date has been set for the end of the working of The ICTR, namely the end 2010.⁴⁹ All trials are supposed to be completed by the end of 2008. In order to achieve this goal a Completion Strategy has been devised for the Tribunal.⁵⁰ By the end of 2008 it is estimated by the Tribunal that it will have completed trials involving sixty-five to seventy persons.⁵¹ As to the transfer of cases to national courts, the International Tribunal is aware that this may be problematic for different reasons. One difficulty cited by the Tribunal is that many of the suspects are in less-developed countries where judicial systems are under strain to process the cases of their own accused.⁵²

GREAT JUDICIAL ACTIVITY IN RWANDA

On the subject of the transfer of cases to Rwanda in particular, the International Tribunal mentions the death penalty, the lack of which at the International Tribunal was one of the reasons the Rwandan Government opposed the creation of the International Tribunal, and which has been imposed in genocide cases in Rwanda, the Tribunal writes, though only rarely imple-

⁴⁷ Alison Des Forges, Timothy Longman: "Legal responses to genocide in Rwanda", in Eric Stover and Harvey M. Weinstein (eds), above note 26, 49, 56, 62; Timothy Longman, Phuong Pham and Harvey M. Weinstein: "Connecting justice to human experience: attitudes toward accountability and reconciliation in Rwanda", in Eric Stover and Harvey M. Weinstein, *ibid.* 206, 212-213; Victor Peskin: "Courting Rwanda – The Promises and Pitfalls of the ICTR Outreach Programme" (2005) 3 *Journal of International Criminal Justice* 950.

⁴⁸ Completion Strategy of the International Criminal Tribunal for Rwanda, UN Doc. S/2007/323, 31 May 2007, 2 Summary; see also Eleventh annual report of the International Criminal Tribunal for the Prosecution of Persons Responsible for Genocide and Other Serious Violations of International Humanitarian Law Committed in the Territory of Rwanda and Rwandan Citizens Responsible for Genocide and Other Such Violations Committed in the Territory of Neighbouring States between 1 January and 31 December 1994, UN Doc. S/2006/658, 16 August 2006. See also generally Erik Møse: "Main Achievements of the ICTR" (2005) 3 *Journal of International Criminal Justice* 920.

⁴⁹ SC Res. 1503, 28 Aug. 2003; SC Res. 1534, 26 March 2004. The same applies to the closely related ICTY.

⁵⁰ Completion Strategy of the International Criminal Tribunal for Rwanda, UN Doc. S/2006/358, 1 June 2006.

⁵¹ *Ibid.*, at 2, Summary.

⁵² Completion Strategy of the International Criminal Tribunal for Rwanda, UN Doc. S/2006/358, 1 June 2006, para. 40.

mented.⁵³ There is also the issue of the capacity of the Rwandan judicial system to handle new cases, the International Tribunal writes, at a time when it faces difficulties in coping with thousands of local cases connected with the genocide.⁵⁴

Considering the great judicial activity taking place on the domestic level in Rwanda and the low level of knowledge of the work of the International Tribunal, the eventual disappearance of the International Tribunal will most likely not cause any great concern or unrest in Rwanda.⁵⁵ The customary Gacaca trials going on all over Rwanda should increase public awareness at least of this domestic way of making post-genocide justice even if people in general remain largely uninformed of the work of the International Tribunal.⁵⁶ Also, the public may be more apprised of the ordinary domestic trials in current progress in the regular courts in Rwanda than of the International Tribunal. Since there are domestic trials in different forms taking place in Rwanda proper, the need for information about the work of the International Tribunal may not be as acute as if there was no post-genocide justice being made in Rwanda.

D. THE SPECIAL COURT FOR SIERRA LEONE

1. ORIGIN

The Special Court for Sierra Leone ultimately derives from a UN Security Council resolution as well.⁵⁷ The resolution, however, was a response to a request from President Kabbah of Sierra Leone.⁵⁸ In its resolution, the Security Council makes an explicit connection between justice and peace when it

[recognizes] that, in the particular circumstances of Sierra Leone, a credible system of justice and accountability for the very serious crimes committed there would end impunity and would contribute to the process of national reconciliation and to the restoration and maintenance of peace.⁵⁹

There is a particular emphasis on the value of justice as such, in the form of individual criminal accountability, in the resolution: Without any direct connection to the issue of peace, the Security Council

⁵³ Ibid., at para. 41.

⁵⁴ Ibid.

⁵⁵ Cf. above note 47. Cf. also Francois-Xavier Nsanzuwerwa, "The ICTR Contribution to National Reconciliation" (2005) 3 *Journal of International Criminal Justice* 944.

⁵⁶ ICTR Cf. The homepage of the Government of Rwanda www.inkiko-gacaca.gov.rw (visited 29 January 2007).

⁵⁷ SC Res. 1315, 14 Aug. 2000.

⁵⁸ Letter dated 9 August 2000 from the Permanent Representative of Sierra Leone to the United Nations addressed to the President of the Security Council, UN Doc. S/2000/786, 10 August 2000, plus Annex.

⁵⁹ SC Res. 1315, 14 Aug. 2000, pre. para. 7.

[reaffirms] the importance of compliance with international humanitarian law, and [reaffirms] further (emphasis omitted) that persons who commit or authorize serious violations of international humanitarian law are individually responsible and accountable for those violations and that the international community will exert every effort to bring those responsible to justice in accordance with international standards of justice, fairness and due process of law.⁶⁰

AMNESTY FOR PEACE AND TRUTH

Incidentally, a provision on general amnesty was included in the Lomé Peace Agreement of 7 July 1999 concluded between the Sierra Leonean Government and the leading rebel group.⁶¹ In support of the amnesty, the agreement invokes the goal of bringing national reconciliation and lasting peace to Sierra Leone.⁶² The Lomé Peace Agreement preceded by a year the adoption by the UN Security Council of the resolution on the Special Court for Sierra Leone.⁶³ The UN Security Council in its initial resolution on the establishment of the Special Court, however, recalled that

the Special Representative of the Secretary-General appended to his signature of the Lomé Agreement a statement that the United Nations holds the understanding that the amnesty provisions of the Agreement shall not apply to international crimes of genocide, crimes against humanity, war crimes and other serious violations of international humanitarian law.⁶⁴

This rule should in principle apply in domestic courts as well.

Instead of a court of justice, a Truth and Reconciliation Commission (TRC) was originally decided on in the Lomé Peace Agreement of 1999.⁶⁵ The purpose of the TRC would be to address impunity, break the cycle of violence, provide a forum for both the victims and perpetrators of human rights violations to tell their story, and to get a clear picture of the past in order to facilitate genuine healing and reconciliation.⁶⁶ The Truth and Reconciliation Commission for Sierra Leone was established in 2000. It functioned between 2002 and 2003 and delivered its Final Report in 2004.⁶⁷ The Special Court and TRC have never, it seems, managed to establish a fruitful working relationship, but functioned largely in isolation of one another.⁶⁸ Generally, the work of the two institutions, however, does not seem to have collided.

⁶⁰ Ibid., at pre. para. 6.

⁶¹ Peace Agreement between the Government of Sierra Leone and the Revolutionary United Front of Sierra Leone (RUF/SL), available at www.sc-sl.org/documents.html (visited 29 January 2007).

⁶² Ibid., Article IX.

⁶³ Cf. above note 57.

⁶⁴ SC Res. 1315, 14 Aug. 2000, pre. para. 5.

⁶⁵ Article XXVI of the Agreement; SC Res. 1260, 20 Aug. 1999.

⁶⁶ Article XXVI para. 1 of the Lomé Peace Agreement.

⁶⁷ Final Report of the Truth and Reconciliation Commission for Sierra Leone, 2004.

⁶⁸ Ibid., Chapter entitled The Commission and the Special Court.

It was the resurgent unrest despite the preceding amnesty that caused the creation of the Special Court.⁶⁹ Thus the judicial policy-makers seem to have been caught in a trap. On the one hand the disregard for the amnesty provision in the Lomé agreement might cause disappointment among the former combatants which may lead to renewed fighting as well as popular mistrust in the Court. But on the other hand, the parties were resuming the fighting anyway and it might be that a war crimes court would deter the combatants from further fighting.

2. MANDATE

Following an appeal by President Kabbah, the Special Court for Sierra Leone was created by means of an agreement between Sierra Leone and the UN.⁷⁰ The agreement, which was concluded 16 January 2002,⁷¹ spells out the mandate and the organization of the Court in rudimentary terms and makes provisions relating to the immunities and security of the Court and its personnel. A practical but crucial aspect of the creation of the Special Court for Sierra Leone is its financing. In contrast to the International Tribunal for Rwanda, the financing of the Special Court is made up of voluntary contributions.⁷² Voluntary contributions, of course, are a weaker ground to stand on than the relatively safer and more predictable contributions coming by way of the UN budget.

In the budget for 2005/2006 the Registrar stated that the financing of the Court was uncertain after 31 December 2005.⁷³ The total gross budget requirement for 2005/2006 was USD 25,539,700.⁷⁴ This can be compared with the budget of the ICTR which is more than ten times as big.

JUSTICE DESPITE AMNESTY

The mandate and organization of the Court are further developed in its Statute which is annexed to the agreement between the UN and Sierra Leone.⁷⁵ The Special Court has the explicit power to prosecute only the persons who bear the greatest responsibility for serious violations of international humanitarian law and Sierra Leonean law committed in the terri-

⁶⁹ Fifth report of the Secretary-General on the United Nations Mission in Sierra Leone, UN Doc. S/2000/751 31 July 2000, p. 2 para. 9.

⁷⁰ SC res. 1315, 14 Aug. 2000, op. para. 1.

⁷¹ Agreement between the United Nations and the Government of Sierra Leone on the Establishment of a Special Court for Sierra Leone, www.sc-sl.org/documents.html (visited 29 January 2007).

⁷² Article 6 of the Agreement between the United Nations and the Government of Sierra Leone on the Establishment of a Special Court for Sierra Leone; Article 30 of the Statute of the International Tribunal for Rwanda.

⁷³ Special Court for Sierra Leone, Budget 2005-2006, version: 05/06: First Draft, Foreword by the Registrar, 3-4, at www.sc-sl.org/Documents/budget2005-2006.pdf (visited 29 January 2007). No more recent budget is currently available at the homepage of the Special Court.

⁷⁴ *Ibid.*, Introduction, at 5.

⁷⁵ Statute of the Special Court for Sierra Leone, www.sc-sl.org/documents.html (visited 29 January 2007).

tory of Sierra Leone since 30 November 1996.⁷⁶ It can be noted that the temporal mandate of the TRC for Sierra Leone stretched all the way back to “the beginning of the Sierra Leonean conflict in 1991”.⁷⁷ The creation of a TRC and not a court of justice must indicate that a TRC was perceived as less threatening by the parties to the Peace Agreement than a court.⁷⁸ This in its turn may indicate that the investigations and findings of a TRC are not taken as seriously as the proceedings and final verdict of a court of law.

The crimes to be dealt with by the Special Court for Sierra Leone are crimes against humanity, crimes against international humanitarian law that are punishable in a civil war (as in Rwanda) and serious crimes relating to the abuse of girls and the destruction of property under Sierra Leonean law.⁷⁹ The list of crimes over which the Special Court has jurisdiction is similar to that of the ICTR except that the Special Court does not have the competence to prosecute the crime of genocide. This is due to the fact that there was no suspicion of genocide having taken place in Sierra Leone.

The Special Court and the domestic courts of Sierra Leone shall have concurrent jurisdiction, but the Special Court has primacy over the national courts.⁸⁰ As far as this author has been able to find out, no war crimes trials are taking place in the domestic courts of Sierra Leone at the moment.⁸¹ Nor does there seem to be direct contact between the Special Court and the domestic courts.⁸²

As to penalties, under the Statute of the Special Court for Sierra Leone, the imprisonment must be meted out for a specified number of years, thus making imprisonment “for life” impossible.⁸³ The Special Court writes in its Completion Strategy that it is unlikely that sentences will be served in Sierra Leone due to the poor conditions and overcrowding of its prisons compounded by the high incidence of escapes, the current state of the Sierra Leonean law enforcement and security forces, and the frailty of the overall political and security situation.⁸⁴ If sentences could meaningfully be served on the spot, the impact of the Court would

⁷⁶ Article 1 in the Statute, Article 1 in the Agreement, and SC Res. 1315, 14 Aug. 2000, op. paras. 2 and 3; the date relates to the conclusion of the Peace Agreement between the Government of the Republic of Sierra Leone and the Revolutionary United Front of Sierra Leone (RUF/SL) (“Abidjan Accord”), of 30 November 1996, available at www.sc-sl.org/documents.html (visited 29 January 2007).

⁷⁷ Lomé Agreement Article XXVI (1).

⁷⁸ Cf., in the context of democratic transition, Elin Skaar: “Truth Commissions, trials – or nothing? Policy options in democratic transitions” (1999) 20 *Third World Quarterly* 1109.

⁷⁹ Statute Articles 2–5.

⁸⁰ Statute Article 8. Both the Statute of the Special Court for Sierra Leone and the Statute of the ICTR stipulate that the principle that no one shall be tried twice for the same crime applies. Both statutes, however, make noteworthy exceptions to that rule (Article 9 in both statutes).

⁸¹ E-mail correspondence with Peter C. Andersen, Deputy Chief of Press and Public Affairs, Sierra Leone Special Court, 13 June 2005; Dougherty, above note 40, at 327.

⁸² Andersen, *ibid.*

⁸³ Statute Article 19.

⁸⁴ Special Court for Sierra Leone Completion Strategy, UN Doc. A/59/816-S/2005/350, 27 May 2005, Annex 18 May 2005, para. 45.

probably increase. The United Kingdom has recently agreed to let Charles Taylor serve his prison sentence in the UK if he is convicted.

Due to the amnesty provision in the Lomé Peace Agreement, a provision on amnesty was included in the Statute of the Special Court for Sierra Leone.⁸⁵ An amnesty granted to any person having committed acts which seriously violate international humanitarian law shall not be a bar to prosecution before the Special Court.⁸⁶ An amnesty granted to any person relating to violations exclusively of Sierra Leonean law, however, should consequently be a valid bar to prosecution before the Special Court although this is not stated explicitly in the Statute.⁸⁷ The crimes against Sierra Leonean law mentioned earlier over which the Special Court has jurisdiction at least occasionally may be so severe that they probably also amount to violations of international humanitarian law. Questions relating to the violation exclusively of Sierra Leonean law have not arisen before the Special Court so far.

INSECURITY ON THE SCENE OF THE CRIME

The Special Court for Sierra Leone is a mixed – or hybrid - court in that it is neither wholly international, like the Tribunal for Rwanda, nor wholly national.

The Court is located in Freetown in Sierra Leone, i.e. in the very country where the war crimes took place, in contrast to the Tribunal for Rwanda, that is located outside of the scene of the crime. Due to the high tension surrounding the coming trial of Charles Taylor, the Special Court will make use of the possibility to meet away from its seat if necessary for the efficient exercise of its functions.⁸⁸ The trial of Charles Taylor will take place on the premises of the ICC in the Hague.⁸⁹ On a symbolic level it illustrates the close relationship between the ad hoc courts and the permanent ICC. Ultimately, it also illustrates the usefulness of the latter, which has been contested.

There are advantages and disadvantages with the court being located where the war crimes took place. The disadvantages in the case of Sierra Leone largely relate to the security of the Special Court and of victims and witnesses appearing in the Court. According to the President, as the Special Court has become more visible within the community it has emerged, in some people's eyes, as the country's most controversial and contentious organization.⁹⁰ While the situation currently remains outwardly calm, the Special Court believes it faces a security risk from supporters of the detainees who continue to seek an opportunity to disrupt the judicial process.⁹¹ Furthermore, the Court has stated that "[t]here is no doubt that the

⁸⁵ Statute Article 10.

⁸⁶ Ibid.

⁸⁷ Michaela Frulli: "The Special Court for Sierra Leone: Some Preliminary Comments" (2000) 11 *European Journal of International Law* 857, 859, 868–869.

⁸⁸ Article 10 Agreement Between the United Nations and the Government of Sierra Leone on the Establishment of a Special Court for Sierra Leone.

⁸⁹ SC Res. 1688, 16 June 2006.

⁹⁰ 2002–2003, p. 22, available at www.sl-sc.org/documents.html (visited 29 January 2007). Subsequent Annual Reports are also available at www.sl-sc.org/documents.html.

⁹¹ Special Court for Sierra Leone Completion Strategy, UN Doc. A/59/816-S/2005/350, 27 May 2005, Annex (18 May 2005), para. 50.

Court's progress would not have been the same were it not for the significant presence of a strong UNAMSIL Peacekeeping Force. The relationship with the peacekeeping force has been crucial to many aspects of the Court's operations, both within Freetown and also elsewhere in Sierra Leone".⁹² The UNAMSIL stayed in Sierra Leone until 31 December 2005.⁹³ After that the UNMIL in Liberia was authorized to deploy up to 250 military personnel to Sierra Leone to provide security for the Special Court.⁹⁴

A SEMI-INTERNATIONAL COURT

The Special Court is currently composed of eleven judges. Less than half of the judges shall be appointed by the Government of Sierra Leone and the rest shall be appointed by the UN Secretary-General.⁹⁵ It can be noted that the international judges form the majority of the judges. In the Agreement between the UN and the Government of Sierra Leone on the establishment of the Special Court it is stated that the Government of Sierra Leone and the Secretary-General shall consult on the appointment of judges (Article 2 of the Agreement). Five of the current eleven judges are African. Four of the judges are westerners.⁹⁶ The current prosecutor is American. Unlike the Tribunal for Rwanda there is no provision in the Statute of the Sierra Leone Special Court on the representation of different legal systems on the Court, probably due to the merely semi-international character of the Court for Sierra Leone.

One important idea behind having both international and Sierra Leonean staff with the Special Court is for the Court to leave a legacy once its work is done.⁹⁷ A beneficial side effect of hiring locals is that it lowers the budgetary costs of salaries.⁹⁸

3. COMPLETION

The Special Court for Sierra Leone has approved indictments against thirteen persons in total since its inception.⁹⁹ Four of these persons including Charles Taylor are currently on trial

⁹² First Annual Report 2002–2003, p. 31. UNAMSIL stands for United Nations Mission in Sierra Leone.

⁹³ SC Res. 1610, 30 June 2005.

⁹⁴ SC Res. 1626, 19 September 2005. UNMIL stands for United Nations Mission in Liberia.

⁹⁵ Article 12 of the Statute.

⁹⁶ See www.sl-sc.org/chambers.html (visited 29 January 2007).

⁹⁷ In the First Annual Report it is stated that whereas providing an impetus to the restoration of the rule of law in Sierra Leone and to the ending of impunity are the Court's key objectives, it is to be hoped that those laudable aims can be accompanied by more tangible evidence of a lasting impact, through the transfer of equipment, facilities and expertise to the local community (First Annual Report, 28). Part of this legacy, according to the Report, is the development of the Sierra Leonean staff to provide a corps of legal professionals, administrative and support staff, and correctional officers for the future (op. cit., 28). Internships for Sierra Leonean university graduates have also been created (op. cit., 28).

⁹⁸ Dougherty, above note 40, at 325.

⁹⁹ See www.sc-sl.org/cases (visited 9 October 2007); Special Court for Sierra Leone Completion Strategy, UN Doc. A/59/816-S/2005/350, 27 May 2005, Annex (18 May 2005), para. 8.

before the Special Court. The Court has issued judgments in two of the cases involving five accused. Three of the persons indicted have died and one guerrilla leader, Johnny Paul Korma, leader of AFRC (ex-SLA), remains at large.¹⁰⁰

It is indicated in the budget of the Special Court for 2005/2006 and confirmed in the Court's Completion Strategy that the Prosecutor may decide to produce two further indictments which may or may not be linked to Charles Taylor.¹⁰¹

As we have seen, there is a Completion Strategy also for the Sierra Leone Special Court.¹⁰² The original plan of the international community was for the Special Court to complete its work within three years of its inauguration which would mean by the end of June 2005.¹⁰³ This aim has not been achieved. According to estimations in the Completion Strategy, all trials, including any appeals, should be completed by the end of 2006.¹⁰⁴ Now that Charles Taylor has been caught at last and there is a trial of him pending, the Court for Sierra Leone will most certainly function until the trial of Charles Taylor is completed.

It is difficult to say what the likely consequences will be of the closure of the Special Court for Sierra Leone. Given that the Court is portrayed as highly controversial by initiated commentators, people in general may not mind its closure even though there are no compensating domestic war crimes trials going on, as there are in Rwanda. If the security situation undergoes deterioration in Sierra Leone this will hardly depend on the disappearance of the Special Court as such, but if foreign factors at all play a role, rather on the disappearance of the international peace-keeping forces.

E. ICC

1. ORIGIN AND MANDATE

The creation of the ad hoc Tribunal for the former Yugoslavia in 1993 and soon thereafter for Rwanda in 1994, paved the way for the eventual creation, by international treaty, of the ICC in 1998.¹⁰⁵

There are several references, although mostly indirect, to the connection between justice and peace in the Statute of the ICC. One clear connection between justice and peace or rather between lack of justice and lack of peace, is found in the preamble of the Statute. The pream-

¹⁰⁰ Special Court for Sierra Leone Completion Strategy, UN Doc. A/59/816-S/2005/350, 27 May 2005, Annex (18 May 2005), para. 8.

¹⁰¹ Special Court for Sierra Leone, Budget 2005-2006, version: 05/06: First Draft, Foreword by the Registrar, 3.

¹⁰² Special Court for Sierra Leone Completion Strategy, UN Doc. A/59/816-S/2005/350, 27 May 2005, Annex (18 May 2005).

¹⁰³ *Ibid.*, at para. 37.

¹⁰⁴ *Ibid.*, at para. 31; see also Special Court for Sierra Leone, Budget 2005-2006, version: 05/06: First Draft, Foreword by the Registrar, 4.

¹⁰⁵ Cf. above note 10.

ble recognizes that the kind of grave crimes included in the Statute “threaten the peace, security and well-being of the world”.¹⁰⁶ If so the opposite, implicit, position should also be valid, namely that the prosecution of these crimes is beneficial to peace and security.

Rather than the importance of justice for peace, the threat justice may pose to peace is emphasized in other parts of the Statute. The most (in)famous provision in this regard is that allowing the UN Security Council to stop any investigation or prosecution undertaken or projected by the ICC, presumably in the name of peace since the Security Council is the prime defender of international peace and security.¹⁰⁷ The Security Council has made use of this possibility a couple of times in order to prevent any proceedings against persons originating from states not party to the Statute.¹⁰⁸

REFERRAL BY THE UN SECURITY COUNCIL

Another indirect link between justice and peace is found in the Statute of the ICC in the provision on who may refer a case to the Court.¹⁰⁹ The UN Security Council – responsible for international peace and security – is one among several actors who are entitled to make such a referral to the ICC, in the case of the Security Council under Chapter VII of the UN Charter. The Security Council is a privileged actor in this respect, which would seem to confirm that the drafters of the Statute of the ICC considered there to be a strong and potentially mutually beneficial link between justice and peace after all. In contrast to the case where a state party refers a situation to the ICC or the prosecutor decides to initiate an investigation on his or her own initiative, if the UN Security Council refers the situation to the ICC the further ordinary conditions that normally must be fulfilled in order for the ICC to exercise its jurisdiction do not apply.¹¹⁰ Thus, if the Security Council refers a situation to the ICC neither the condition that the state on whose territory the conduct in question occurred must be a party to the ICC Statute, nor the alternative, that the state of which the person accused of the crime is a national must be a party to the ICC Statute in order for the ICC to have jurisdiction, will apply. The Security Council may refer any situation, involving any state’s territory and any individual person to the ICC.

Since it is laid down in the ICC Statute that the Security Council is acting under Chapter VII of the UN Charter when it refers situations to the ICC, it would seem likely that the Security Council must previously have found the situation to constitute a threat to the peace (or breach of the peace or act of aggression which is more unusual). This further reinforces the link between justice and peace. The referral of a situation to the ICC after the Security Council has found that the situation constitutes a threat to the peace, as it did in the case of Sudan for

¹⁰⁶ Preamble para. 3.

¹⁰⁷ ICC Statute Article 16.

¹⁰⁸ SC Res. 1422, 12 July 2002; SC Res. 1487, 12 June 2003; SC Res. 1497, 1 August 2003; and, paradoxically, SC Res. 1593, 31 March 2005. Cf. Robert C. Johansen: “The Impact of US Policy toward the ICC on the Prevention of Genocide, War Crimes, and Crimes Against Humanity” (2006) 28 *Human Rights Quarterly* 301; William A. Schabas: “United States Hostility to the ICC: It’s All About the Security Council” (2004) 15 *European Journal of International Law* 701.

¹⁰⁹ ICC Statute Article 13.

¹¹⁰ Cf. ICC Statute Article 12 (2) and 13 (a) and (c).

instance, makes of the referral one of the measures that the Security Council may take under Article 39 in Chapter VII in order to maintain or restore international peace and security.¹¹¹ The term “international” is to be interpreted broadly in this context. In this sense, then, criminal justice concretely becomes one of the means resorted to in order to attain peace and security.

Since neither the US, China nor Russia were parties to the ICC Statute, it originally seemed unlikely that the Security Council would refer a situation to the ICC in the foreseeable future. Despite this unwillingness on the part of significant Security Council members, constituting the majority of the permanent members, to align themselves with the Court, the Security Council did in fact refer the situation of Darfur in Sudan to the ICC in 2005.¹¹²

The jurisdiction of the ICC encompasses the most serious crimes of concern to the international community as a whole, i.e., genocide, crimes against humanity, war crimes and the crime of aggression.¹¹³ In practice, the ICC will deal with the first three of these categories until an amendment is made to the Statute defining the crime of aggression and the conditions of ICC jurisdiction.¹¹⁴ The ICC thus deals with the same kinds of crimes as the ICTR and the Sierra Leone Special Court, and all other similar international war crimes tribunals that have been established in recent years and earlier in history. Most likely, the ICC will be heavily influenced by the case law developed by the different international tribunals that preceded it, but also by those that still work in parallel with the ICC. The ICC must take into account the developments in the law having occurred as a result of the work of the other tribunals, not least the one for Rwanda.

COMPLEMENTARITY

The jurisdiction of the ICC is complementary to national criminal jurisdictions, i.e. the ICC is only the second best alternative to domestic trials.¹¹⁵ This is a central principle permeating the Statute of the ICC. Still, there are some exceptions to this rule of domestic primacy which serve to make the rule considerably less absolute than it appears at first blush. These exceptions have particular bearing on weak developing states of which there are many in Africa.

With respect to the rule of complementarity, the Court shall determine that a case is inadmissible if the case is being investigated or prosecuted by a state which has jurisdiction unless – and here come the important exceptions – the state is unwilling or unable genuinely to carry out the investigation or prosecution.¹¹⁶ The same rule applies if the case has been investigated by a state having jurisdiction over it and the state has decided not to prosecute the person concerned. The case is therefore inadmissible unless the decision not to prosecute resulted from the unwillingness or inability of the state genuinely to prosecute.¹¹⁷

The exceptions to the rule of complementarity are particularly relevant to the countries in

¹¹¹ On the case of Darfur, Sudan see further below section E.II.

¹¹² SC Res. 1593, 31 March 2005.

¹¹³ ICC Statute Article 5.

¹¹⁴ ICC Statute Article 5, 121 and 123.

¹¹⁵ ICC Statute Article 1, pre. para. 10, and pre. para 4 stressing measures taken at the national level.

¹¹⁶ ICC Statute Article 17 (1) (a).

¹¹⁷ ICC Statute Article 17 (1) (b).

Africa since few African states have a judicial system that would be able to carry out the kind of proceedings envisaged in the Statute of the ICC. Some African states, perhaps the majority, may also be unwilling genuinely to carry out the investigation or prosecution, though in this respect African states are typically not that different from other states. One possibility that has never been considered in the preliminary discussions, to the knowledge of this author, is that the African Court on Human and Peoples' Rights is allowed to carry out investigations and prosecution in cases falling under the jurisdiction of the ICC. Then the cases would stay in Africa – in what could be labelled a semi-domestic setting – instead of having to be investigated and prosecuted in their entirety by someone else. Keeping the proceedings in an African court could increase the legitimacy of the proceedings in the eyes of the African public. The accusation that whites are judging blacks and that the law is applied unequally is not seldom made with respect to the international tribunals created in Africa.¹¹⁸

As in the Statutes of the ICTR and the Sierra Leone Special Court there is a provision in the ICC Statute stating that no one shall be tried twice for the same crime.¹¹⁹ The content of this provision gives expression to a similar kind of thinking that is reflected in the provision on jurisdiction. If the earlier proceedings were not genuine, the rule that no one shall be tried twice does not apply.

The protection of victims and witnesses has been reinforced in the ICC Statute and a Victims and Witnesses Unit has been created by the ICC.¹²⁰ An important novelty in the ICC Statute is that the victims may even participate in the proceedings to a certain extent. The ICC shall permit the victims' views and concerns to be presented and considered at appropriate stages in the proceedings.¹²¹

2. THE CASE OF DARFUR

The four investigations opened so far by the Prosecutor of the ICC concern situations in Africa: the Democratic Republic of Congo, Uganda, the Central African Republic, and Darfur, Sudan.¹²² Here the case of Darfur is addressed because it so obviously illustrates the links between justice and peace.

In his third report on Darfur to the UN Security Council (considering that it was the Security Council that originally referred the situation in Darfur to the ICC), the Prosecutor gives an account of the progress in the investigation of the crimes committed.¹²³ Needless to say, the

¹¹⁸ Cf. Kingsley Chiedu Moghalu: "Justice as a Global Commons: Global Responses to Judicial Challenges in Africa" (African Dialogue II Conference, Office of the United Nations High Commissioner for Human Rights in collaboration with the International Criminal Tribunal for Rwanda, Arusha, Tanzania, 24–26 May 2002) 10.

www.ictt.org/ENGLISH/africandialogue/papers/KingsleyII.pdf, "Events" (visited 29 January 2007).

¹¹⁹ ICC Statute Article 20; cf. above note 80.

¹²⁰ ICC Statute Article 68; www.icc-cpi.int (visited 29 January 2007); see also ICC Statute Article 15 (3) *in fine*.

¹²¹ ICC Statute Article 68 (3).

¹²² See www.icc-cpi.int/cases.html (visited 9 October 2007).

Prosecutor has met with many serious difficulties in carrying out the investigation. Some of these difficulties are due to the fact that the investigative activities have had to take place outside Darfur and, initially, even outside Sudan.¹²⁴ According to the Prosecutor's Report, this is due to the continuing insecurity in Darfur, particularly in light of the complete absence of a functioning and sustainable system for the protection of victims and witnesses.¹²⁵ In August 2006, however, interviews conducted by the ICC were planned to start in Sudan with Sudanese officials who are supposed to provide information relating to the activities of the Government and other parties to the conflict in Darfur. Such interviews have since been carried out on five missions by the Office of the Prosecutor to Sudan.¹²⁶

Some aspects of the ongoing investigation presented in the report of the Prosecutor will be dealt with here, among which will be found such that particularly relate to the relationship between justice and peace.

TARGETED SANCTIONS ON SUSPECTED CRIMINALS

It is interesting to note in the context of justice and peace that the UN Security Council has instituted targeted sanctions against suspected war criminals – on the basis that the situation in Sudan constitutes a threat to the peace – which work in parallel to the criminal investigations carried out by the Prosecutor of the ICC potentially concerning the very same individuals.¹²⁷

Among the crimes committed in Darfur, the Prosecutor mentions direct attacks on humanitarian workers and peacekeepers, including the killing of African Union peacekeepers in 2005 and 2006.¹²⁸

The Prosecutor mentions among the factors affecting the process of case selection the impact of ICC investigations and prosecutions on the prevention of future crimes.¹²⁹ Particular attention, the Prosecutor writes, will be given to investigating the crimes currently affecting the lives and safety of the two million displaced civilians, in an effort to contribute to their protection from further attack and to the delivery of humanitarian aid.¹³⁰ The Prosecutor gives expression to the view that the proceedings before the ICC may prevent the commission of further violent acts, thus that there is a direct link between justice and peace in a general sense.

¹²³ Third Report of the Prosecutor of the ICC to the UN Security Council Pursuant to UNSCR 1593 (2005) (Third Report on Darfur), 14 June 2006, ICC, Office of the Prosecutor. The Third Report has since been supplemented by the Fourth Report of the Prosecutor of the ICC to the UN Security Council Pursuant to UNSCR 1593 (2005), 14 December 2006, ICC, Office of the Prosecutor.

¹²⁴ Third Report on Darfur, 1, 9.

¹²⁵ *Ibid.*, 1.

¹²⁶ See www.icc-cpi.int/library/organs/otp/ICC-OTP_Fact-Sheet-Darfur-20070727_en.pdf (visited 19 April 2007).

¹²⁷ SC Res. 1591, 29 March 2005; cf. also Fourth Report on Darfur, 3–4.

¹²⁸ Third Report on Darfur, 2.

¹²⁹ *Ibid.*, at 3.

¹³⁰ *Ibid.*

PRETENDING DOMESTIC JUSTICE

The Prosecutor describes in his report how the Sudanese state has tried to offset the rules on admissibility in the Statute of the ICC, mentioned earlier in this article, by establishing various judicial mechanisms to deal with the alleged crimes in Darfur.¹³¹ Since the issue is sensitive, the Prosecutor is careful to point out that the admissibility assessment is a case-specific assessment and not a judgment on the Sudan justice system as a whole (although in practice it is).¹³²

After a rather critical evaluation of the judicial efforts of Sudan so far, the Prosecutor of the ICC concludes that it does not appear that the national authorities have investigated or prosecuted, or are investigating or prosecuting, cases that are or will be the focus of the ICC Prosecutor's attention such as to render those cases inadmissible before the ICC.¹³³ In his evaluation of the mechanisms for criminal investigation in Darfur, the Prosecutor notes that there is a reluctance or inability on the part of witnesses and victims to come forward with complaints, and in some cases there are allegations of intimidation and harassment of complainants.¹³⁴ The Prosecutor goes on to say that the lack of any system for protection of witnesses is also a strong disincentive to complainants and presents a serious obstacle to the conduct of any effective national criminal proceedings.¹³⁵

COOPERATION WITH THE AFRICAN UNION AND THE UN SECURITY COUNCIL

The issue of cooperation is dealt with at some length in the Prosecutor's report, illustrating the importance for the success of the ICC of its cooperation with other actors, notably the African Union and the UN Security Council.¹³⁶ The emphasis on cooperation between the ICC and organizations involved in establishing peace and security in Sudan also contributes to illustrating indirectly the link between justice and peace.

PROGRESS IN CONGO, UGANDA, AND CENTRAL AFRICAN REPUBLIC

In addition to the situation in Sudan, as we have seen the ICC Prosecutor has decided to open investigations into three further situations, namely in the Democratic Republic of Congo, Uganda and the Central African Republic.¹³⁷ With respect to the situation in the Democratic Republic of Congo one individual suspected of war crimes has been arrested and with respect to the situation in Uganda five warrants of arrest have been issued but no individual has been apprehended so far.¹³⁸ Reference is made to the case of Uganda in the Report of the ICC Prosecutor to the Security Council on Sudan. During a visit of a delegation from the Office of the Prosecutor in Sudan (in February 2006), the delegation also discussed the situation relating to

¹³¹ Ibid., at 3 and following. Cf. above note 116.

¹³² Ibid., at 6.

¹³³ Ibid., at 7.

¹³⁴ Ibid.

¹³⁵ Ibid.

¹³⁶ Ibid., at 7 and following; see also SC Res. 1593, 31 March 2005.

¹³⁷ See www.icc-cpi.int/cases.html (visited 9 October 2007).

¹³⁸ Ibid.

the Lord's Resistance Army and efforts to apprehend the five LRA commanders identified in ICC arrest warrants issued in 2005.¹³⁹ In the case of the LRA the issue of justice versus peace seems to have become unusually pronounced and may eventually bring Article 53 (2) (c) to the fore on the possibility not to prosecute because a prosecution is not in the interests of justice "taking into account all the circumstances".¹⁴⁰ Also, hypothetically, Article 16 on deferral by the UN Security Council of prosecution at the ICC might come into play. How the ICC would respond to such a deferral is another matter as is the issue of how the ICC would respond if Uganda wishes to withdraw the case. The charges in the case of Uganda are crimes against humanity and war crimes. All the situations except the one in Sudan were referred to the ICC by the states themselves where the situation is located.

F. CONCLUSION

On each and every single point taken up in this article a comparison in depth could be made (and not only between the ICTR and the Special Court for Sierra Leone, but with other similar bodies around the world). This concerns the origins of the tribunals, their legal foundation and the legal-technical aspects of their work, their interaction with local jurisdictions, their relation to and effect on the surrounding society – or on the entire world in the case of the ICC.

As to the justice for peace connection, there is actually not much in the statutes of the war crimes tribunals under study that directly confronts the issue of justice and peace. The Statute of the Special Court for Sierra Leone touches on the dilemma when it lays down that an amnesty granted in respect of the international crimes included in the Special Court's jurisdiction shall not be a bar to prosecution. In the Statute of the ICC the issue of justice and peace is more squarely confronted, most importantly with the possibility of deferral by the UN Security Council, but also with the involvement of the Security Council as one of several possible actors who may refer a situation to the Court. In the former instance, justice is presumably regarded as a threat to the peace, whereas in the second instance justice is presumably regarded as a prerequisite of peace.

Indirectly, most aspects of the workings of the war crimes tribunals both as far as institutional arrangements and substantive case law are concerned arguably do have a bearing on the justice and peace issue. It must be presumed that ultimately the concern with individual crim-

¹³⁹ See Third Report on Darfur, 9; see also Tim Allen: *Trial justice: the ICC and the Lord's Resistance Army* (London: Zed Books, in association with International African Institute 2006); Payam Akhavan: "The Lord's Resistance Army Case: Uganda's Submission of the First State Referral to the ICC" (2005) 99 *American Journal of International Law* 403.

¹⁴⁰ According to the *New York Times*, the UN Under-Secretary General for Humanitarian Affairs and Emergency Relief, Jan Egeland, after talks with the LRA leader Joseph Kony, considers "the stickiest issue" to be the arrest warrants issued by the ICC against Kony and four of his commanders. Again according to the *New York Times*, Kony says he will not surrender if he faces the risk of being arrested while the Ugandan government says it will support dropping charges if Kony first surrenders. (*New York Times*, 13 November 2006, Section A, 3.

inal responsibility in a post-conflict setting must have wider causes than the meting out of punishment in individual cases. As David Wippman puts it, rather crudely but entirely aptly,

[w]hether we are getting value for money [with respect to the Rwanda Tribunal and the ICTY] depends on the extent to which one believes that the trials serve their purposes, which include not just justice for victims, but larger societal goals, such as deterrence and national reconciliation [i.e. peace in the short and in the long run].¹⁴¹

The word “believes” is particularly interesting in this context because it is a fact that there is as yet no systematic empirical knowledge concerning the impact of judicial proceedings in a post-conflict situation on society as a whole. If one thinks that this aspect of judicial post-conflict justice is indeed important or even indispensable in order to justify the creation of the many judicial mechanisms for trying war crimes currently, then one should also be interested in investigating whether there are any (positive) effects on society of the war crimes trials, and if so what these effects are.

As a lawyer one may content oneself with studying the typically “legal” dogmatic issues involved in and arising from the activities of the war crimes tribunals. And indeed most or all studies by lawyers of the work of the many international or semi-international war crimes tribunals are of this kind. There is little generalization, little explicit comparison and few cross-disciplinary elements in the legal studies.¹⁴²

Given the wealth of legal literature dealing with the inner workings of the newly created war crimes tribunals and courts, maybe the time has come to expand legal scholarship to a second generation of study of the tribunals, focusing more on the interplay between these institutions and the surrounding society and approaching the issue of “value for money”; simply put whether justice is indeed good for peace (if it has to be). This issue, of course, can be refined in almost infinite ways by allowing different aspects of the judicial proceedings to correlate with different kinds and phases of peace and reconciliation. The studies may further look backwards in history or forward, aiming at constructing new and more practicable methods of handling and checking the international crimes.

Once lawyers take on these kinds of issues – and we should, instead of handing them over to others to investigate – researchers would realise that they needed other tools and methods than the traditional legal, dogmatic ones, to equip them to answer in a scientific and systematic way the fundamental questions relating to the interplay of judicial proceedings in war crimes cases and the development of society in general outside the court-room.

¹⁴¹ Wippman, above note 41, at 880.

¹⁴² Recent exceptions to this rule are William A. Schabas: *The UN International Criminal Tribunals – The former Yugoslavia, Rwanda and Sierra Leone* (Cambridge: Cambridge University Press, 2006); and Mark A. Drumbl: *Atrocity, Punishment, and International Law* (Cambridge: Cambridge University Press, 2007).