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Topic: ICC Statute Preamble

Level: Introductory

Date of recording: 28 September 2017

Place of recording: Johannesburg, South Africa

Duration of recording: 22:48

PURL of film: www.cilrap.org/cilrap-film/preamble-goldstone/

PURL of English transcript: www.legal-tools.org/doc/3c54ab/

Before dealing with specific articles of the Preamble to the Rome Statute for the International Criminal Court, a few words by way of introduction. Before the early 1990s International Criminal Law had lost its importance. After it was used at the Nuremberg Tribunal after the Second World War, it really went into limbo and it took the war in the former Yugoslavia to galvanize the Security Council in 1993 to establish the first ever truly international criminal court, the International Criminal Tribunal for the former Yugoslavia. That was followed the following year in 1994 by the establishment of the International Criminal Tribunal for Rwanda, also set up by the Security Council. Both of those tribunals are referred to usually as the *ad hoc* tribunals. They began a new interest in International Criminal Law and it was really the successes of those two *ad hoc* tribunals that led to the international community establishing the permanent International Criminal Court at a conference held in Rome in the middle of 1998. The International Criminal Court would not I believe have come about but for the relative successes of the *ad hoc* tribunals. They advanced international criminal law. They used international criminal law which had pretty much been neglected in the previous decades. Very importantly, they showed that international criminal courts, staffed by judges from around the world, by prosecutors from around the world, they established that such a court could in fact hold fair trials, fair international criminal trials. I now turn to consider some of the specific articles of the Preamble of the Rome Statute for the International Criminal Court.

Preamble [article] one states that “Conscious that all peoples are united by common bonds, their cultures pieced together in a shared heritage, and concerned that this delicate mosaic may be shattered at any time”. The very first Preamble demonstrates the concern of the international community that international criminal law should be seen to be universal.

If women are raped in eastern Asia, or in southern Africa, or anywhere else in the world, their victimhood is the same, it’s no different. So too, murder and other serious war crimes, the victims having commonly normal human reactions of being diminished or being demeaned, of being put through painful experiences, and for loved ones, of having members of their family

taken from them in grossly unlawful ways. The very idea of genocide is a horrible concept of evil leaders, civilian and military, deciding to put an end to the existence of a whole people or a part of a whole people.

I turn now to the second article of the Preamble. It reads as follows: “Mindful that during this century millions of children, women and men have been victims of unimaginable atrocities that deeply shock the conscience of humanity”. Clearly, the reference is to the 20th century. Bear in mind that this Statute was written and approved at the meeting in Rome [at the end] of the 20th century. It is a sad reflection that the persistence of the committal of these huge crimes to which reference is made in this Preamble have continued into our present 21st century. Of course, in the 20th century, one thinks of the genocides that accompanied the Second World War, the Holocaust; the genocide committed in Cambodia and in Iraq, and the terrible wars that plagued the African continent, but it continues now in Syria and Myanmar. One of the things we can learn from the war crimes that are being committed over many centuries is that it can happen anywhere. It would be a huge mistake to consider that only some peoples of the world are capable of committing genocide and not others. Where there is fear and dehumanization of people, international war crimes follow almost like night follows day.

I turn now to the third article of the Preamble. It reads, “Recognizing that such grave crimes threaten the peace, security and well-being of the world”. It should be borne in mind that in most cases egregious war crimes being committed in one country spill over into neighboring countries. If one looks at the genocide that accompanied the Rwanda killings in the middle of 1994, one sees today in our present day the results of destabilization in other countries of the Great Lakes and particularly in Burundi and the Democratic Republic of the Congo.

The Security Council used its peremptory powers under Chapter 7, namely the setting up of a peacekeeping tool, to put an end to a threat to international peace and security. It recognized that the genocide in Rwanda was spilling over into neighboring countries. In the former Yugoslavia the wars, particularly in Bosnia and Herzegovina, resulted in hundreds of thousands of refugees moving into other countries in Europe. Over 300,000 of them ended up in Germany in the middle 1990s.

One aspect of the Security Council that I should mention with regard to this Preamble, this third article to the Preamble to the Rome Statute for the International Criminal Court, is the disappointing, certainly to me, the disappointment of the Security Council not following through on the actions it takes.

Under the Rome Statute as we’ll see, the Security Council is given the power to request the International Criminal Court to undertake investigations and prosecutions into particular areas of concern to the Security Council, and particularly where there is a threat to international peace and security. It was under those provisions that the Security Council requested the International Criminal Court to undertake investigations into Sudan arising from the war crimes being committed in the Darfur province of that country, and a couple of years later into Libya. The International Criminal Court accepted both referrals and expended a lot of time, energy, and money on investigating them. Then both countries, [particularly] Sudan under the Presidency of Omar Al-Bashir demeaned the Security Council. It refused to recognize or act on the referrals and the Security Council did nothing, absolutely nothing, to ensure that its own peremptory resolution was respected by the target country, Sudan.

In the case of Libya, the Libyan government refused in many cases to cooperate with the International Criminal Court. One would’ve expected the Security Council to use its powers

including boycotts and trade embargoes to enforce the effects of its own resolution, and particularly in the case of Sudan. They didn't do that, and the result is that the International Criminal Court has had to put the Sudan situation on ice. It's been shelved for the time being because of the lack of cooperation from Sudan and some other countries, but particularly the Security Council.

The other problem I have with the Security Council referrals is they bow to the American demand that the costs of the referral should be born 100% by the International Criminal Court, and that not one cent of United Nations funds should be used for referrals made by the Security Council on behalf of the whole United Nations. The second problem I have is that, again bound to the United States demand, the Security Council referral is not binding on any member states of the United Nations other than those who have ratified the Rome Statute for the International Criminal Court. That obviously arose because of the United States not wishing [to subject] itself in any way to any orders or requests of the International Criminal Court.

I turn to the sixth article of the Preamble to the Rome Statute for the International Criminal Court. It reads as follows, "Determined to put an end to impunity for the perpetrators of these crimes and thus to contribute to the prevention of such crimes". Well until the *ad hoc* tribunals were set up, there was truly impunity for international war criminals. The only courts generally speaking that had jurisdiction to try them were their own domestic courts, and unfortunately many war criminals were regarded in their homes as war heroes rather than criminals, and they were no domestic trials or investigations into war crimes committed prior to the setting up of the two *ad hoc* tribunals in 1993 and 1994 respectively.

The importance of withdrawing impunity is primarily to provide some solace, some acknowledgment, some recognition of the victimhood of the millions of victims who suffered as a result of war crimes committed over the decades and indeed over the centuries.

The hope of the Security Council and the international community was that withdrawing impunity would also, as the article of the Preamble suggests, would also be a reason to reduce the number of war crimes that that are committed, to be some way of inducing some leaders, some military leaders, some civilian leaders to think twice before committing war crimes. Whether the International Criminal Court and the Rome Statute has had a deterrent effect is of course difficult, if not impossible to prove. It's difficult always to prove a negative, but [there is] some anecdotal evidence that it has had a deterrent effect. When the Croatian Army went in to reclaim its own regions that had been overtaken by the Serb Army in what was called Operation Storm, the leaders of Croatia, President Tudman and the Army leaders warned the armies that they should not commit war crimes. They were very conscious of the existence of the International Criminal Tribunal for the former Yugoslavia, and they didn't want to aggravate the situation that existed in any event of war crimes having been committed. Unfortunately, in Operation Storm the Croatian Army did commit war crimes, but I would suggest that they would've been more serious had the warnings not being given by their leaders not to commit war crimes.

In the case of Colombia, in a very different situation on a very different continent, in Latin America, there can be no question that the Colombian government was very concerned about the investigation, the preparatory investigation by the Chief Prosecutor of the International Criminal Court into possible war crimes having been committed in Columbia. I have no doubt that the presence of the International Criminal Court, and of course the fact that Columbia had ratified the Rome Statute, has played a very positive role leading to the present negotiated settlement

between the government of Columbia and [the] rebel movements FARC and ELN. So, there is some evidence of deterrence and I have little doubt, and certainly it's my great hope that there will be more deterrence coming from the ICC in the years to come.

The seventh paragraph of the Preamble to the Rome Statute provides as follows, it says "Recalling that it is the duty of every State to exercise its criminal jurisdiction over those responsible for international crimes". The International Criminal Court has often been referred to as a court of last resort. It is subject to the provisions which appear later in the Rome Statute, the provision for complementarity. The idea is — and this is very clearly stated, and is really a basis of the Rome Statute — is that the International Criminal Court is a Court of last resort. That nations are expected to investigate and prosecute war crimes committed within the jurisdiction of their own domestic courts at home.

With the *ad hoc* tribunals, it was the other way around. Because of the powers of the Security Council, the *ad hoc* tribunals had primacy. The *ad hoc* tribunals could decide what cases should be heard by them in Arusha in the case of the Rwanda Tribunal, and in The Hague in the case of the Yugoslavia Tribunal, they could decide what cases they would hear and what cases should be left to the jurisdiction of domestic courts.

The International Criminal Court is exactly the other way around. If domestic prosecutions are instituted in good faith, that robs the International Court of any jurisdiction. So the first investigation that is made by the Prosecutor of the International Criminal Court is to determine whether there are domestic proceedings being set afoot, whether they have been set afoot in good faith and in earnest, and not as some sort of dishonest way of shielding their own people from the International Criminal Court. If there are these good-faith investigations and prosecutions, as I've just said, that robs the International Criminal Court of its jurisdiction.

I would mention in this regard too, the unhappy situation that the larger and more powerful states who are members of the United Nations have not joined in the International Criminal Court. They have not ratified the Rome Statute for the International Court Criminal Court. I refer in particular to Russia, to China, to India, and the saddest of all, the United States. I suppose it's common to large states that they don't like international courts and international institutions looking over their shoulders and second-guessing their own civilian leaders — or their own civilian leaders or their military leaders. It's the attitude of the powerful and it's an exercise of their sovereignty, and it demonstrates their objection to having their sovereignty in any way compromised. Of course, in some cases, it does suit such countries to accept invasions of their sovereignty, when it comes to overflight rights under the International Convention [on] Civil Aviation, all countries have to accept under that convention the right of civilian aircraft to overfly their airspace. When it comes to the international postal and telegraphic conventions, all countries accept the obligation to have postal items delivered in their own countries even if they come from countries at which might be temporarily at war. It's very much an *a la carte* menu for members of the international community as to which international situations, international institutions, or international courts they are prepared to accept and obviously in making those decisions, not unexpectedly, governments act in what they perceived to be the self-interest of their own countries.

I turn to the eighth paragraph of the Preamble, it provides that "Reaffirming the Purposes and Principles of the Charter of the United Nations, and in particular that all States shall refrain from the threat of the use of force against the territorial integrity or political independence of any State, or in any other manner inconsistent with the Purposes of the United Nations". So, here a

limit is put on the use of force unlawfully. The Rome Statute provides for the recognition of the crime of aggression which is different from the other crimes contained in the Rome Statute.

The other crimes all relate to the manner in which war is fought, but the crime of aggression relates to the very act of making war and recognizes that it's not an absolute right that nations have of making war, unless it's excused in two respects under the Charter of the United Nations: it must either be in self-defense; or it must be authorized by the Security Council acting under a Chapter 7 resolution.

The definition of aggression was a sticking point at the Rome Conference and it was put in, aggression was put in as a crime, but it's applicability was postponed to the first review conference which was only held [over 10 years later], in 2010, in Kampala in Uganda. At that Conference, surprisingly there was unanimity on the definition of aggression and the provisions of the amendments that were agreed to at Kampala are still to come into force. Whether they will, is still a matter of doubt because it requires the consent of a large number of the members of the Assembly of States Parties [of the] International Criminal Court. Those countries, those are 124 countries that have thus far agreed to the jurisdiction of the International Criminal Court.

I've already mentioned the idea of complementarity. It's to be found in the eleventh article of the Preamble, which provides, "Emphasizing that the International Criminal Court established under this Statute shall be complementary to national criminal jurisdictions". It's important, I would suggest, in order for complementarity to work as it should, for the International Criminal Court to be far more proactive in what is understood by the expression "positive complementarity". It's important for countries in which war crimes are committed, or likely to be committed, to have the capacity to investigate themselves, to have them prosecuted in their domestic courts, and it should be the work of the international community, including the International Criminal Court, to assist countries, particularly developing countries to build up their own capacity which would enable them more efficiently and more swiftly to investigate war crimes committed in their own country.