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Topic: ICC Statute Preamble

Level: Introductory

Date of recording: 12 August 2017

Place of recording: The Hague, the Netherlands

Duration of recording: 27:47

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

PURL of English transcript: www.legal-tools.org/doc/f2817d/

Hello, my name is Rod Rastan. I work as a Legal Advisor in the Office of the Prosecutor at the ICC and I am speaking in my personal capacity in relation to the Preamble. This is a first in a series of videos, related to giving an introductory overview to provisions of this Statute. They had not intended to be overly comprehensive, but just to highlight some of the key elements.

So, let us get started. And, I have a number of documents open on my screen, so if you see my eyes straying from the camera, it is just that I am reading materials. Just in terms of the background to the Preamble, in case you are interested, in the 1994 ILC Draft, there was - International Law Commission's Draft Statute, that formed the basis of negotiation - there was a preamble there and it was very short; and had three provisions:

1. The first was a reference to desiring further international co-operation; to enhance the effect of prosecution, suppression of crimes of international concern. So, a reference to co-operation and enhancing prosecutions.
2. Second, emphasizing that the Court to be established is intended to exercise jurisdiction only over the most serious crimes of concern to the international community as a whole.
3. And, the third reference, to complementarity, that the Court is intended to be complementary.

So, of course, we see those three concepts recalled in the Preamble, as it stands today. And then the commentary to the ILC's draft, by the ILC, it just says that "the purpose of the preamble is intended to assist in the interpretation and application of the Statute, in particular the exercise of its powers under article 35", and, that was the provision related to admissibility. So, the idea that the Preamble is intended to assist the interpretation and application of the Statute, of course, is consistent with the general thrust of treaty interpretation, as you see in the Vienna Convention on the Law Treaties. As you know, in article 31 of the Vienna Convention, reference is made there to different sources of interpretation and - sorry, I lost the reference now - within that, you see, of course, a reference to the fact that the preamble forms part of the treaty, and it is a means by which the object and purpose of the treaty has to be interpreted. So, this notion of the role of the preamble in the interpretation of the treaty has been recalled many times, by different judicial bodies. The

ICJ has recalled it numerous times in its interpretation of different treaties; and, of course, in the context of the Rome Statute.

This is also being a notion that has been recalled by, particularly, the Appeals Chamber, that has recalled the general rules of interpretation from the Vienna Convention and recalled that the object and purpose and “the wider aims of the treaty” may be gathered from its preamble and the general tenor of the treaty, and so on. This is the decision in the *DRC situation* judgment on extraordinary review, in case you are interested. It is Decision 168 in the record of the situation.

And, I will find you few others. For example, also in the context of some of the admissibility decisions, ruling on the interpretation of Article 17, the Appeals Chamber also made reference to the Preamble: it was also Article 1; Article 17, when referring to complementarity; and again, in other decisions, such as in the judgment of admissibility in *Katanga*, the Appeals Chamber had recourse to the Preamble, in paragraph 5 of the Preamble, in relation to the reference to the end of the impunity, as one of the purposes of the Statute.

In the admissibility decision in the *Gaddafi* case, the reference to the Preamble was, to that Preamble reference, of course, number 10, linked to the complementary relationship of the Court and then linked to [articles] 1 and 17. You see this also in a number of other decisions. So, if you look into the case law of the Court, the general point is that you see references to the Preamble as a guide to interpretation.

Now, perhaps, this maybe the last point in terms of the drafting history. Apart from the ILC’s initial citation of four paragraphs, there is not much further discussion on the Preamble in the intervening period during the negotiation of Statute, during the *Ad Hoc* Committee or during the Preparatory Committee phase. So, you only really see a substantive discussion in general on the Preamble in Rome, where it is tasked to Samoa to convene the consultations on it. And, through a series of different proposals by Andorra and others, we have the text as it stands today.

Now, if we can just turn quickly to each of the paragraphs.

So, the first paragraph refers to this idea that “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”. This came, initially, from a proposal by Andorra in fact. There Andorra had used a notion of a tapestry (that may be rent and torn at any time). And, there were some objections from some States that felt that the notion of a tapestry was unfamiliar in their cultural context and therefore the idea of a mosaic was preferred. But, anyway, the point is that this paragraph reflects this notion of a common shared heritage, common bonds of humanity - and, in some ways, they represent this lofty aspiration toward these fundamental principles that tie us all together. So, in some ways, you can say that these principles are related all to this notion of the oneness of humanity; all peoples are united; unity, if you like, in common bonds, and the cultures are pieced together so there is that diversity of pieces that go into a mosaic, to make the beauty of the shape. So, there is also this the notion of diversity is recognized there. And, of course, as you know, a mosaic is not just a singular, normally not a singular colour, all in white or black. It is a combination of colours. So, hopefully we are not getting overly prosaic here, but it is this idea that there is this unity in diversity represented in a notion of a mosaic and the fundamental oneness of humanity, which is encapsulated by this phrase.

Paragraph 2 recalls that millions of victims of unimaginable atrocities have suffered during the last century. And, of course, it is a well-known concept that modern warfare has increased the civilian casualties to a completely different level to conflicts that may have occurred in previous centuries, which were between tightly organized military units on defined territories, engaged in

warfare at a particular point of confrontation; and civilian casualties were relatively limited in numbers. It was, mainly, arm-to-arm combat or otherwise similar types of formations, contrasting that with modern warfare, where civilian casualties are the norm and in fact often exceed military casualties, both civilian victims, persons and civilian objects. A figure that is often given is that, in modern warfare, perhaps, up to 90% of the victims of modern warfare are actually civilians. I mean, this is a general phrase that is given, it is not necessarily empirically established. I mean, for example, there is an interesting article by Adam Roberts, the distinguished professor in IHL who actually has critiqued this figure and noted that it is true that, in some conflicts, civilian casualties have been as high 90% - one thinks of the DRC perhaps, Rwanda or Northern Uganda and so on - but in other conflicts, such as in the former Yugoslavia or elsewhere, the numbers have actually been about the same, just as civilian casualties or military casualties. And also, there have been advances in the efforts of international organizations, national militaries and others to reduce civilian harm through precision-guided weapons and other means of that sort. The figure is not necessarily stable, but the point is that indeed modern warfare has seen preponderance of casualties in the form of civilians. So that reference there recalls that general notion.

Paragraph 3 sets out a number of protected values, in terms of the thrust of the treaty. The notion of peace and security is quite a common one, you see in other UN documents. For example, the ILC, during its work on the Draft Statute for the ICC, was also working in parallel from many years on a Draft Code of Crimes Against the Peace and Security of Mankind, for offences against the peace and security of mankind, a Code of Crimes, sorry. And you see references to the peace and security of mankind or humanity in other places. And in some contexts it is noted that, in some ways, the Rome Statute goes beyond that and advances it, by adding in the notion of the well-being, not just the peace and security, but also the well-being of the world: so, impacting in terms of the general distribution and basic conditions of well-being and living guarantee for human existence and so on.

And, I am looking in this context to the commentary in the Triffterer/Ambos, Third Edition, that gives a nice overview of the Preamble. And, in that context, also noting that the reference within that paragraph is to the peace, security, well-being of the world, not of humanity, suggesting a broader perspective, in relation to the effect of these crimes on the natural environment and on the planet more generally. Some food for thought there, to see whether or not that may trigger some reflections on the object and purpose of the treaty and how some of the crimes may be interpreted in the light of that, some of the crimes that go to protect the natural environment and so on.

Paragraph 4: affirming that particular aims of the treaty are to be achieved. So, these aims are that “the most serious crimes of concern to the international community must not go unpunished and that their effective prosecution must be ensured by taking measures of the national level by enhancing to international cooperation”. In some ways this paragraph is not really directed towards the ICC itself, but more an affirmation of the international community who is adopting this treaty, an affirmation that these crimes must be addressed by States primarily. And, the notion of ensuring effective prosecution, by both measures domestically, but also through the system of mutual legal assistance to ensure the effectiveness of those prosecutions, is reiterated in that context. So that feels like it relates to the more general, pre-existing framework that already applies before the Statute comes into being, through the obligations to try or extradite and search out the perpetrators of grave breach violations, for example, under the Geneva Conventions, under the Torture Convention, the *aut dedere aut judicare* obligations that you see in many such treaties, the

Genocide Convention and so on. So, in some ways, that affirmation is recalling those general duties and the need to maintain them.

Paragraph 5 focuses on the contribution of the Court both to the suppression of these crimes and thus to their prevention. The idea that by prosecuting these crimes it may have some type of, perhaps, specific deterrence towards the perpetrator concerned; or may have some kind of general deterrence in the context of society at large, whether in that particular situation perhaps or more generally. And, there is some anecdotal evidence from different courts and tribunals, whether it is the former Yugoslavia or Rwanda tribunal or the ICC, that the fact that these trials have been constituted and some of the most senior individuals involved in those aspects of criminality have faced justice, has changed the calculation of high level actors in their planning of military campaigns or in considering whether or not to conduct certain activity. So, there is research on that, it is not very, obviously, it is difficult to have empirical data on proving a negative, but nonetheless, it is the same as at the national level. There is some basis to believe that tackling impunity is likely to prevent occurrence of crime. And, certainly, we know the contrary, that a failure to hold persons to account is likely to embolden perpetrators because of the risk, the calculation that there is no risk for being apprehended for the commission of crimes. So, if we look at that statement, which I think is perhaps self-evident, I think we can deduce that it is likely that ending impunity for the perpetration of these crimes is likely to at least contribute to the prevention of crimes, even if we cannot guarantee that prevention.

Number 6, I think, is quite an important provision, recalling: “it is the duty of every State to exercise its criminal jurisdiction over those responsible for international crimes”. Now, again, this provision is not directed towards the ICC, but towards States themselves and, as in paragraph 4, it recalls this pre-existing obligation to investigate and prosecute such crimes, as derived from previous treaty norms. The duty that is mentioned here, I do not believe this is a duty that is established by the Statute. The Statute does not establish any obligation on States to investigate or prosecute these crimes. It must be recalled, the Statute is really, of course, a code of crimes and a procedural instrument for the Court itself. And, even provisions like Article 17 do not impose any obligation on States. They maybe provide rights that States may invoke to have cases heard at the national level, as opposed to, the ICC, in certain circumstances where they themselves are acting in relation to a particular case and are doing so genuinely. But, what the Preamble here recalls, is that this pre-existing duty remains. And, of course, as we see later on, when the Court, there is reference to the Court being established to complement this pre-existing system, it is necessary to first establish that there is this general system of enforcement that already exists. So, the Court comes as an additional element to this system. And, of course, that duty is not in any way interrupted or impeded by the establishment of the Court; and the Court does not seek to supplant national jurisdictions in that sense. So, the reference there, is very important also in a broader sense, or perhaps in terms of advocacy or otherwise to emphasize this, the recognition in the drafting of the Rome Statute and its adoption, that States retain this primary duty to exercise the criminal jurisdiction in relation to international crimes. And “international crimes” here, of course, is broader than the ICC crimes, so there is also some intentional phrasing of that word there, because it could relate to other crimes under international law, whether transnational crimes or other aspects of organized crime and so on.

Paragraph 7: the recalling of “the Purposes and Principles of the Charter”. It is perhaps in the context of recalling the common aims of the two instruments and, of course, you will recall that the Rome Statute itself was negotiated under the auspices of the UN. The ILC, the body within the UN system recommending that this be submitted to a conference of plenipotentiaries, the four-

year period negotiated under the auspices of the UN, and vote, voting taking place there, and the Secretary General remains depository of the treaty and so on. So, there is a very close affiliation and association with the UN and as recognized in Article 2 of the Statute, the second article of the Statute, that the Court is to be brought into relationship with the United Nations, so it is natural that there is a reaffirmation, as there are in many international treaties, of the purposes and principles of the UN Charter.

The reference to States refraining from threat or use of force against the territorial integrity or political independence of any State is also similar to the reference in Article 8, that nothing in the Statute should be taken as authorizing any State Party to intervene in an armed conflict or the internal affairs of any other State. You might be wondering why it is necessary to say that, because this instrument is not dealing with State responsibility; it is dealing with individual criminal responsibility, and the enforcement of it devolves back to States that have the authority to act. So, one cannot imagine States, one State, forcibly and without international authorization, let us say, intervene on the territory of another State to, for example, apprehend a suspect or to collect evidence. But, also, I think what this paragraph helps emphasize is that nothing in the Statute in and of itself can be construed as constituting interference in the affairs of a State.

So, for example, when the Court rules on issues of admissibility, that might rule that, for example, a particular case is to be heard at the ICC level and not on the national level, because of the issues related to genuineness; or the Court orders the surrender of a suspect; or the Court orders for certain investigative measures to be undertaken and then makes a request for assistance and so on. Those rulings cannot be construed in and of themselves as interference in the internal affairs of a State, nor can a State say that by dint of the Court investigating its nationals, somehow these are internal affairs. I mean, first of all these crimes are crimes of international concern as a whole, so it is well-established in case law, reference to custom international law, that these crimes offend all humanity. So, they are not the sole prerogative of a particular State, they do not correspond to exclusive sovereign spheres of influence. And, secondly, as I say, the Court, exercising its jurisdiction in that sense, cannot be so construed as interference in internal affairs of a State. So, that may be a creative reading of the provision, but I think it is one that is plausible.

And paragraph 9 relates to, again, the relationship with the UN which is reflecting in Article 2. And it is interesting that you have eight provisions that precede the almost end point, where reference is made to establishing an ICC in relationship to the UN system. So, all of the earlier paragraphs, if you like, refer both to the overall aims and goals of the international community, but also are - some of them dart back at States, as we discussed - and, then, what is the determination able to create an ICC, with jurisdiction over the most serious crimes of concern to the international community as a whole. So, the Court is also designed to have a limited scope. And this can be seen as also a basis for international criminal law itself. It is grounded in its desire to focus on the crimes, most serious crimes of concern to the international community as a whole, and, as we discussed earlier, these crimes are and have been held at Nuremberg and elsewhere, to be held to constitute crimes against humanity as a whole.

Then, paragraph 10 recalls the complementary nature of the Court. It is interesting that already in ILC - draft commentary, the commentary on Draft Statute, the ILC mentions that some members of the ILC had considered that the provisions of the preamble would actually better suite being included into the operative part of the treaty. And, you see a demonstration of that in the fact that paragraph 10 of the Preamble is then replicated in near identical terms in Article 1 of the Statute. And, the complementary principle has often been held as one of the foundational aspects of the Rome Statute. I think that is evident here, because of the fact that the first provision of the

Preamble, after a reference to the desire to establish this Court, is to emphasize that the Court will be complementary to the national criminal jurisdictions. And, then, also the very first provision of the operative part of the treaty, again, refers to the complementing nature of the Court. So, clearly that was of high priority and emphasis at the out-set for State Parties or States negotiating the Statute.

And the other thing to note here, in terms of its guidance to the interpretation of Article 17, is that the provision emphasizes that the Court's complementary relationship is in relation to national criminal jurisdictions. The same reference is made in Article 1. This is useful because Article 17 does not actually specify this. Article 17 just refers to the State which has jurisdiction, without referring to what type of jurisdiction the State may be exercising. So, often, there is discussion in the commentaries and in academic literature, at the policy level, and advocacy, whether or not Court would be able to accommodate non-criminal accountability mechanisms, truth and reconciliation commissions and others. Well, while that discussion is still valid, I mean, nothing has been litigated or case law yet established on that issue. I think, relevant to guide a discussion is the fact that, as I say, the Preamble makes it quite clear that the Court is to complement national criminal jurisdictions. And, then, lastly, the commitment of States, resolving to guarantee lasting respect for and enforcement of international justice. We can presume that also refers to international justice as meted out by the ICC and that when they commit to guaranteeing lasting respect for international justice (fumble) as practiced before the ICC, that relates to their respecting the authority of the Court, the authority of the Statute itself, the guiding instruments, and also any decisions issued by the Court. - And to guarantee also the enforcement of international justice and that is obviously most visible in the undertaking of States in Part 9 to enforce co-operation requests of the Court, which may be co-operation requests in relation to arrest and surrender or in relation to other forms of judicial assistance.

Great, I hope that has been useful and not overly simplistic. Thank you very much.