

Keynote Presentation—Genocide and Human Rights:  
Accountability and Reconciliation in Africa and the World

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## **I. Introduction**

I have a long and meaningful connection with Texas Southern University, having taught for many years at the Thurgood Marshall School of Law. I considered Mickey Leland to be a friend and I have so much admiration for his unrelenting work for civil and human rights and the eradication of poverty. His advocacy had no borders and Patrice Johnson, my law clerk when I was a federal judge, had joined his office and she was with him when they met their untimely death in a plane crash in Africa while on a mission to provide aid to refugees in Ethiopia in 1989. The memory of their passion and commitment is kept alive by this conference.

As many of you may know, two weeks ago the United Nations Security Council adopted resolution 1593 referring the atrocities in Darfur to the newly established International Criminal Court (ICC). Many of us reacted to this referral with a huge sigh of relief. We had heard reports that over two million Africans had been driven from their homes and perhaps 300,000 had been killed or died from intolerable conditions. Rape and other sexual violence and abduction of women have been widespread. However, in Darfur the mass atrocities are still being committed. Although this carnage is not going to be stopped by the mere referral to the ICC, I believe

that the ICC has the potential to make a difference. Today, I want to talk about the role the Court can play as an instrument of peace and some of the challenges it faces.

## **II. The Role of the ICC**

Courts are used to address breaches of peace---they help to maintain order. Certainly, no one would question the need for national courts. When the types of crimes we see in Darfur are committed they threaten international peace and security---the effect of these crimes extends beyond the borders of the Sudan and other States may be drawn into the conflict. When the State is unwilling or unable to prosecute these crimes, then an international court is needed. The ICC is a permanent, treaty-based court established to promote the rule of law and ensure that the gravest international crimes do not go unpunished. Although it is an independent international organization and not a part of the United Nations, when the Security Council finds that a situation constitutes a threat to international peace and security, it may refer it to the Prosecutor of the Court for investigation and possible prosecution. The Security Council made this referral by Resolution 1593 on March 31, 2005.

The International Criminal Courts for the former Yugoslavia and Rwanda, established by the Security Council, rather than by a treaty, in 1993 and 1994 respectively, were precursors to the ICC. The Council considered that the prosecution of persons responsible for the ongoing serious violations of international law in these countries would contribute to ensuring that these violations were halted and effectively redressed and thereby contribute to the restoration and maintenance of international peace and security. The Nuremberg and Tokyo Tribunals, set up by a group of victorious countries after World War II, also had some precedential value for the ICC. And the Genocide Convention of 1948, finally ratified by the United States in 1988, provided for the creation of an “international penal institution,” although the Cold War gridlock made that impossible. Therefore, while the notion that courts outside the border of a country could and should prosecute persons responsible for international crimes is not a new one, it was the experience of the Yugoslav and Rwandan Tribunals that actually demonstrated that international criminal justice in the post-Cold War era was a practical possibility

The Yugoslav and Rwanda Tribunals were the first genuine challenge to the culture of impunity for the commission of mass crimes that had evolved after World War II. The promise of “never again” after the Holocaust in reality became “ever again” -- we witnessed millions losing their lives in conflicts around the world. And, what is chilling is that civilians had become the very targets, rather than accidental casualties. Even though treaties like the Genocide Convention proscribe criminal behavior, for so long there was no enforcement mechanism. And, without accountability, these instruments were no more than “paper tigers.” The system of international criminal justice has now developed into practical reality and, as one commentator has put it, the “rules of legitimacy in international relations are changing.... It is no longer chic to be a genocidal killer, and it was for many years commendable to be a strongman in the vicious political matrix of the Cold War.” (Payam Akhavan, *International War Crimes Trials; Making a Difference*, p. 103). Thus, it is not surprising that the U.N. International Commission of Inquiry recommended that the Security Council refer the situation in Darfur to the ICC, recognizing that “the ICC is the only credible way of bringing alleged perpetrators to justice.” (p.146)

### **III. What Is This International Criminal Court?**

On July 17, 1998, 120 states voted in favor of the Statute establishing the International Criminal Court. Only 7 states voted against it, including Iran, Iraq, China, Israel, Libya, Sudan and the United States. The Court did not come into force, however, until July 2002, after the requisite 60 countries had ratified it. And, the 18 judges were not elected until March 2003 and the Prosecutor in June of the same year. Thus, the Court has really been in operation for only 2 years.

The ICC has jurisdiction over the crimes of genocide, crimes against humanity and war crimes committed after the Court came into force (July 1, 2002). The Court's jurisdiction is triggered by three methods: first, a State that is a party to the Statute may refer a matter; second, the Security Council may refer a situation; and third, the Prosecutor may initiate an investigation. Except in the case of a referral by the Security Council, an ICC exercise of jurisdiction is proper only when the State in which the alleged crimes occurred or the State whose nationals are accused of the commission of crimes is a party to the Statute. (Article 12. 2.) Finally, the Court has

jurisdiction only over individuals and not States—it tries persons, not countries, for the crimes.

Although not an original signatory to the treaty in Rome, the U.S. subsequently signed the treaty on the last day of the Clinton administration. Then in May 2002, the U.S. sent a letter to Kofi Annan advising that it did not intend to ratify the treaty and did not consider itself bound by its terms. The U.S. objects on a number of grounds, but especially because the ICC can try Americans for crimes even though the U.S. is not a party to the Statute and because it fears politically motivated prosecutions, initiated by an unchecked prosecutor. In the balance, I believe that the U.S. objections are unfounded and it would better demonstrate its long-standing commitment to international justice by joining the Court.

Because of its opposition to the Court, however, the U.S. threatened to veto several resolutions referring the Darfur matter to the Security Council. While the U.S. has taken the lead in denouncing the ongoing atrocities in Darfur as genocide, providing humanitarian assistance, supporting the implementation of the peace agreement between the North and the South in Sudan and supporting the establishment of an U.N. Commission of Inquiry

on Darfur, it opposed several of the drafts of resolutions that were being circulated. This delayed agreement to the final resolution. In the words of Samantha Power (a 2003 Pulitzer Prize winner for *A Problem From Hell: America and the Age of Genocide*), “the Bush administration can’t decide what it dislikes more: genocide or the International Criminal Court, which aims to punish it.”

The referral resolution, unfortunately gives effect to the U.S. opposition to the ICC, for it purports to exempt nationals or personnel from a State outside Sudan that is not a party to the Statute from the Court’s jurisdiction. Sudan has supported its refusal to cooperate by claims of that the resolution inequitably binds it, a non-party to the ICC, while exempting the U.S. Some have suggested that this is an impermissible rewriting of the Statute. Thus, although the referral has been welcomed in most circles, the limiting language may be a detrimental precedent.

#### **IV. Institutional Challenges**

Although the ICC may be the most effective judicial mechanism, it is not without its own institutional challenges. These challenges include: state cooperation and financial and staff resources.

## **A. State Cooperation**

The ICC has no independent way to enforce its decisions---unlike national courts, it has no police force. The ICC Statute provides that arrest warrants are to be executed by the States Parties. (Art 59) It is assumed that if a State has ratified the Statute it will honor its commitment and meet its obligations under that Statute. But as I have mentioned, Sudan is not a party to the ICC. Nevertheless, Sudan does have an obligation to cooperate with the ICC that flows from the UN Charter, to which it is a signatory. The UN Charter imposes the obligation on all Members of the United Nations to “accept and carry out the decisions of the Security Council.” (Art. 25) The Security Council resolution provides that “the government of Sudan and all other parties to the conflict in Darfur shall cooperate fully with and provide any necessary assistance to the Court and Prosecutor...” Despite this obligation however, Sudan’s President Omar Hassan Bashir has said that Sudan will not allow any national to be tried in courts outside the country; that the Sudanese justice system is good enough to try any Sudanese for crimes and that trials had already started in Darfur. The head of the pro-government Lawyers Union has said that “...it will resist it [the resolution] by all means.” There is other opposition within the region that may affect

cooperation. Even before the referral, Nigeria proposed a justice and reconciliation tribunal to deal with crimes in Darfur that it considers is more suited to the African culture than the Western “prosecutorial approach.” Egypt has spoken out against the “internationalization” of the Darfur conflict and has called a summit of African leaders that was to begin yesterday (April 18-19) to give the African Union a chance to deal with the crisis.

Thus, how can the U.N. bring about compliance should Sudan stand by its refusal to cooperate? The Security Council has already imposed sanctions, albeit relatively weak ones, calling for a travel ban and asset freeze on persons who commit atrocities or break cease-fire agreements. Douglass Cassel, Director of the Center for International Human Rights in Northwestern University’s School of Law has reported that the “U.S. has proposed “targeted sanctions...but Russia (which sells arms to Sudan) and China (which buys Sudanese oil) have balked...”

My experience leads me to believe that cooperation will not be brought about by such feeble measures. When I was president of the Yugoslav Tribunal, I made six reports to the Security Council of non-compliance by States and entities in the former Yugoslavia and even

addressed the Council twice. Yet the Security Council failed to bring about compliance. This is despite the fact that this Tribunal had the benefit of international peacekeeping forces, first from the U.N. and later from NATO, on the ground in the region that could, if the political will existed, support the work of the Tribunal. While the ICC Statute does not explicitly provide for this type of enforcement scheme, the referring resolution notes that the Council is acting under [Chapter VII] the same authority it used to establish the Yugoslav and Rwanda Tribunals. Further, the resolution calls upon the Prosecutor to periodically address the Security Council on actions taken pursuant to the resolution. Therefore, I submit the U.N. can and should utilize all the tools at its disposal to ensure cooperation with its mandates, including, but not limited to strong sanctions and the deployment of peacekeeping forces sufficient to keep the sides apart and thus stop the killing and to allow humanitarian relief to reach those who are suffering and dying every day.

Unfortunately, I fear that this may not happen because much of the world is too focused elsewhere now and Africa and Africans are often not very high on the list of priorities. Just as almost one million Rwandans were sacrificed as attention was directed at Bosnia, the people of Sudan are being

sacrificed for another conflict. As Lt. Gen. Romeo Dellaire, former Force Commander of the U.N.'s mission for Rwanda (UNAMIR) has said "We're not going to Darfur (because) we're so involved in Iraq. There are no lessons learned in stopping the violence and rape and decimation of an ethnic group. Racism and disinterest are part of both conflicts. Black Africans don't count unless there's something there for us." It is the African Union that has deployed persons to Darfur, but these 2,200 observers, have a mandate to do only that—observe. In March, the Security Council passed a resolution establishing a 10,715-member force, yet its primary purpose is to shore up a peace agreement between the North and South that ended 20 years of violent conflict.

Thus, the ICC will encounter difficulties if there is an absence of cooperation in Sudan and the region. Because of this and the situation on the ground, the assistance of the U.N., and the international community as a whole will be critical if it is to effectively carry out its investigations and, ultimately, prosecutions.

## **B. Lack of resources**

The ICC has a budget of just under 70 million U.S. dollars and is supported by the States that are party to the Statute. Moreover, as I have

said, the referral resolution seems to preclude financial support from the U.N. On the brighter side, Canada has just contributed \$500,000 to be earmarked for the Darfur investigation. Other financial expressions of political will are going to be necessary in order for the ICC to fulfill its Security Council-ordered mandate in Darfur. The Court is currently conducting investigations in Uganda, the Central African Republic, the Democratic Republic of Congo and the Ivory Coast. This limited budget and wide responsibility is to be compared with a budget of \$271,854,600 for the Yugoslav Tribunal that has jurisdiction for only one conflict and the Rwanda Tribunal with a current budget of \$231,506,500.

In addition to financial constraints, the human resources of the ICC are limited. The Prosecutor's office has only two investigative teams comprised of 13 to 15 people each, of which only six are investigators. The Darfur region is the size of France, larger than the state of California, and the staff is already stretched with the investigative teams at work in the DRC and Uganda. I have heard that a third investigation team is being mobilized and the Court has made an urgent request for an additional 10 investigators. In the short term perhaps staff from the DRC and Uganda teams may be reassigned to the Darfur investigation. The size of the area and large number

of alleged violations would seem to indicate that the human resources of ICC would be taxed even if Darfur was the only situation before the Court.

Yet, I hear that the mood at the Court is one of eager anticipation, for this referral is seen as an opportunity to handle a matter that has the concrete approval of the international community, which is evidenced by the UN Security Council's referral resolution. A few days ago, the Secretary-General delivered to the ICC Prosecutor's office 9 boxes containing thousands of documents which had been gathered by the UN Commission of Inquiry and a sealed envelope containing the names of 51 persons the Commission considered to be suspected of committing atrocities.

## **V. Conclusion**

I visited a genocide site in Rwanda in 1999, where rooms of a what was formerly a school, were filled with row after row of skeletons, grim reminders of the mayhem carried out in a three-month period against Tutsis and moderate Hutus that left almost one million dead. Believe me, the images of that horror are forever etched in my memory. Philip Gourevitch has written "the dead of Rwanda accumulated at nearly three times the rate of the Jewish dead during the Holocaust." Now, once again, we see a

horrific tragedy unfolding, this time, in Darfur---referred to by some as the “Slow Motion Rwanda.” At one point it was estimated that some 10,000 persons were dying each month in Darfur as a result of the conflict. The U.S. has called this genocide. The Commission of Inquiry did not find sufficient evidence that genocide had been committed because of insufficient proof of a genocidal intent “at least as far as the central Government authorities are concerned.” (p. 160) This finding has been challenged by some (See Prof. Paul Williams’ comments). The Commission did find, however, that war crimes and crimes against humanity had been committed on a massive scale and recommended referral of this situation to the ICC.

The ICC can be an effective instrument of peace. Through its investigations and prosecutions, it removes the “criminal element” so that a degree of community stability can be achieved. By holding persons, rather than entire ethnic groups, accountable for their crimes, it helps to break the cycle of revenge that perpetuates discord and violence. The goal of deterrence comes closer to reality only if would-be tyrants know that they, in fact, will be held accountable.

Yet “complete justice” that lays the foundation for reconciliation requires more. The Commission’s Report makes a valuable contribution by proposing additional mechanisms that help with this process. I will speak

about these mechanisms in the panel discussion that follows. For example, it recommends strengthening the Sudanese judicial system and making changes in its laws. The ICC Statute also encourages States to bring their laws into conformity with international norms. The ICC has a Victims Trust Fund to compensate victims. Yet, its current resources are limited---only \$500,000. One organization, the Women's Initiatives for Gender Justice, believes that laws that prevent women from benefiting from the Fund---laws that preclude women from owning, purchasing or inheriting land should be changed. Thus, the complex process of achieving a lasting peace in Darfur and, hopefully reconciliation, requires wider input and involvement than the judicial response offers. Each of us must find a way to contribute to this broader process.