



**UNITED NATIONS
OFFICE OF LEGAL AFFAIRS**

Regional workshop for Field Legal Officers

"Accountability for International Crimes in Africa"

Remarks

by

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Dear Colleagues,

I am delighted to address you here in Entebbe. First of all, I would like to thank the Legal Advisor of MONUSCO, Mr. Riccardo Maia, for organizing this workshop and for providing me with this rare opportunity to address you in the field, here in Entebbe. This is really a very nice initiative.

It has been an intense week of travelling around the Democratic Republic of Congo, but at the same time it has been very gratifying to witness - first-hand - the complex and invaluable work of colleagues at MONUSCO.

No doubt it can sometimes feel to you in the field that we at Headquarters are somewhat removed from your everyday realities. I think meetings such as these and the annual Field Legal Officers meeting in New York organized by my Office play a huge part in addressing that perception and providing us with the opportunity for meaningful exchanges.

It gives me great pleasure to address you all today on a topic that I believe, as legal officers working in peacekeeping missions in Africa, you will no doubt find pertinent. Accountability for international crimes in Africa is an issue in which I take a keen interest as United Nations Legal Counsel. My Office has worked closely with all the international and UN-assisted criminal tribunals, from their inception to their conclusion.

[International Criminal Tribunal for Rwanda/ Residual Mechanism]

Africa has been in the vanguard of the pursuit of individual accountability through international criminal justice processes. As is well-known, the Security Council established the International Criminal Tribunal for Rwanda (ICTR) in 1994, following the commission of genocide in that State. Indeed, the ICTR became the first international tribunal to deliver verdicts against persons responsible for genocide. Alongside the ICTY - established a year earlier - these two institutions triggered the contemporary era of international criminal justice. The ICTR - since its establishment - has indicted no fewer than 91 individuals. Of these, 61 have been sentenced, with 14 acquitted. A further 10 have been referred to national jurisdictions, and 3 fugitives have been referred to the Residual Mechanism.

The ICTR's jurisprudence has also been at the cutting edge, with the Court's recognition of rape as a method by which genocide can be committed being a particularly often-cited legal insight of the court [in its Akayesu case].

Today - after 20 years of operation and a broad array of cases - the ICTR is nearing delivery of its final appeals judgment later in 2015 and subsequent closure. Its jurisprudence over these last decades, as well as its contribution to national accountability processes, have been essential.

Even as the ICTR winds down, its seminal work will continue. The Security Council, in its resolution 1966 (2010), established the International Residual Mechanism for Criminal Tribunals – or Mechanism – for this very purpose. The Mechanism's Branch in Arusha is assuming the ICTR's ongoing rights, obligations and residual functions. In so doing, it is cementing the ICTR's legacy for the long-term. In the next months, a new courthouse for the Mechanism is set to begin construction outside Arusha, providing a state-of-the-art justice facility available for future needs in this regard.

The Mechanism will also be a valuable tool to engage with national and regional judiciaries, and to facilitate exchanges of best practice and advanced judicial education in this field.

[The Special Court for Sierra Leone]

For its part, the Special Court for Sierra Leone (SCSL) presented an opportunity for an expansion of the ICTR's exclusively UN character. Further to the conclusion of an agreement between the Government of Sierra Leone and the UN, the SCSL became the first of the so-called "hybrid" courts, synthesizing national and international components in a stand-alone court. Under this model, international judges, alongside a minority of national judges, successfully adjudicated a series of very serious crimes committed by those considered to have borne the greatest responsibility for the conflict - including the former Head of State of Liberia.

With the advantage of its location in the country concerned, the SCSL was able to engage dynamically with Sierra Leone's population, making the institution accessible to victims in a way that previous, remotely-located, courts had not been able to do. At the same time, the SCSL recognized the security risks in the case of the high-profile trial of Charles Taylor, the former President of Liberia, and chose to hold his trial in The Hague.

At the end of 2013, the SCSL completed its judicial mandate and became the first of the tribunals of the modern era to close its doors. Its successor, the Residual Special Court for Sierra Leone, is split between Freetown and The Hague and continues important legacy functions, notably the ongoing protection of witnesses in Sierra Leone.

[The International Criminal Court]

Turning to the International Criminal Court, I believe that it needs little introduction.

There are nine ongoing investigations before the Court.

Five of these situations under investigation were referred to the Court by the States themselves: the Democratic Republic of Congo (DRC), Mali, Uganda and the Central African Republic, which has now referred two situations to the Prosecutor.

With regard to the situation in Cote d'Ivoire, the Prosecutor initiated investigations after that State, which was not a party to the Rome Statute at the time, accepted the Court's jurisdiction by lodging a declaration pursuant to Article 12(3) of the Rome Statute, and encouraged the Prosecutor to open investigations.

The Prosecutor also initiated investigations into the situation in Kenya, further to a mediation process initiated by the African Union and led by former UN Secretary-General Kofi Annan.

The remaining two situations — Darfur and Libya — were referred to the Prosecutor by the UN Security Council.

With all nine investigations taking place in Africa, it is easy to see why the Prosecutor often faces the charge of focusing exclusively on the continent. Her response has always been that she focuses on justice for victims of serious crimes of concern to the international community – regardless of their nationality. Nonetheless, the perception that there is some form of anti-African bias at the Court remains widespread, and has led to efforts by some in the African Union to frustrate her work. Indeed, many have seen this as the central motive behind the adoption by the African Union last year of the Protocol on the Amendment of the Statute of the African Court of Justice and Human Rights. The Protocol which will enter into force after ratification by 15 AU member states, grants serving AU Heads of State and Government and other senior officials, whose rank the Protocol does not specify, immunity from prosecution.

It is not surprising, then, that many are talking about a crisis in relations between Africa and the Court. Personally, I think that this talk of crisis is somewhat overblown.

It is worth reiterating that the majority of the situations under investigation by the ICC Prosecutor were referred to her by African Governments. Moreover, this is a trend that has continued in recent years, with the Governments of Mali and then the Central African Republic referring situations in those countries to the Court.

Furthermore, the Prosecutor has benefitted from unimpeded cooperation by African Governments in most of the countries in which she is conducting investigations, demonstrating their commitment to the fight against impunity. This commitment was also evident in the recent transfer of LRA suspect, Dominic Ongwen from the Central African

Republic to The Hague, in which the Governments of Uganda and the Central African Republic, as well as the African Union, played a central role.

It is also noteworthy that, despite talk of some form of mass “walkout”, 33 African States remain party to the Rome Statute, of which a number can be said to be among the Court’s main supporters.

This is not to say that the Court does not face challenges in Africa – it has in the past and will no doubt continue to do so in future. However, there is a role for the ICC in Africa; and, until the infrastructures and judicial institutions in post-conflict societies in Africa are rebuilt and strengthened, the continent will continue to need the International Criminal Court if it wants to end impunity for serious crimes.

Let me now turn to the Organization’s relationship with the International Criminal Court: my Office acts as focal point for the United Nations on matters of cooperation with the Court. To that end, we work closely with colleagues throughout the Organization, including its various offices, funds and programmes, in order to ensure the effective implementation of the Relationship Agreement between the United Nations and the Court.

Your positions as Legal Officers in peacekeeping operations - particularly in situations countries that are being investigated by the ICC Prosecutor - are absolutely essential in this regard. You are no doubt aware that we have concluded several memoranda of understanding for cooperation between the Court and some of our field operations and offices in Africa. Our most recent agreement was finalized last July for cooperation between the Court and the Multidimensional Integrated Stabilization Mission in Mali (MINUSMA). The ICC has since expressed an interest in concluding an MOU for cooperation with the Stabilization Mission in the Central African Republic (CAR).

Under these various MOUs, the Organization receives almost every week requests for assistance from the Court, in particular requests to share evidence, to allow personnel to be interviewed and, occasionally, to let them testify. We value the speedy assistance that you provide to your mission leaderships and, through them, to DPKO and the Organization more generally, in handling these requests. And we would value your suggestions on how we, in the Office of Legal Affairs, might be able to help you in handling them even better.

[Special Criminal Court in the CAR]

Now I would like to turn to the UN’s efforts to promote accountability and to fight impunity for international crimes committed in the Central African Republic.

Recognizing the deeply troubling situation in CAR, the Security Council decided by its resolution 2149 (2014), that MINUSCA’s mandate shall initially focus on certain priority tasks including the protection of civilians and support for national and international justice and the rule of law. The Council also decided that MINUSCA may, “within the limits of its capacities and areas of deployment, ... in areas where national security forces are not present or operational, adopt urgent temporary measures..., [...] maintain basic law and order and fight impunity”.

Such urgent temporary measures or UTMs have given rise to new and interesting challenges both from the perspective of UN peacekeeping as well as from the point of view of criminal justice.

In light of the lack of sufficient capacity of national counterparts in the areas of police, justice and corrections and the Transitional Authorities, it was essential for the Organization to support the creation of a credible and effective national judicial mechanism to charge and hold over for trial, those accused of serious crimes, including in particular serious violations of international human rights and humanitarian law.

In August 2014, a Memorandum of Intent (MOI) was signed by MINUSCA and the CAR Authorities to elaborate the UTMs requested by the CAR Authorities, and adopted by MINUSCA, primarily MINUSCA's powers of arrest and detention. In this context, the CAR Authorities decided to establish a Special Criminal Court (SCC) under national laws and jurisdiction to try those accused of serious crimes. MINUSCA agreed to assist the Government in its establishment as well as to support the SCC once established. Let me be clear, the SCC is not itself a UTM: it is not a measure to be taken by MINUSCA. The SCC is a national court to be established by the CAR authorities themselves under their national laws. As such, while its chambers will include internationally-recruited magistrates who will be appointed by the CAR Authorities, the SCC is not an international or hybrid court.

To that end, the CAR Government tasked a national working group, assisted by MINUSCA and others, to draft the necessary national legislation to establish the SCC. The text prepared by the working group was submitted in February 2015 for consideration by the National Transitional Council (NTC). The draft law currently under consideration by the NTC does not, in the UN's view, fully conform to the MOI, as internationally-recruited magistrates do not have a majority in all the stages.

Nevertheless, to the extent that it does not cross the UN's "redlines", namely the death penalty and amnesty, the UN has concluded that there is nothing in the draft law, in its current form, to preclude the UN or MINUSCA from providing support to the SCC.

It is also interesting to note that the establishment of the SCC will be in stages, starting with the establishment of the Office of the Special Prosecutor, the *Chambre d'Instruction* and the *Chambre d'Accusation Spéciale* (which hears appeals from of decisions from the *Chambre d'Instruction*). Thereafter, the Trial Chamber (*Chambre d'assises*) and the Appeals Chamber (*Chambre d'appel*) will be established.

The United Nations welcomes the fact that the draft law upholds the fundamental principle that the law applies equally to all. Although we find it regrettable that the *Chambre d'assises* does not have a majority of internationally-recruited magistrates, we welcome the fact that the *Chambre d'Accusation Spéciale* and the *Chambre d'appel* will both have a majority of internationally-recruited magistrates.

Throughout the process, it was essential to ensure MINUSCA's exclusively international character and, at the same time, preserve the national ownership of the Special Criminal Court and the independence of its personnel. Furthermore, the draft law specifically provides that the jurisdiction of the Special Criminal Court is without prejudice to the competence of the International Criminal Court and/or the International Commission of Inquiry.

[South Sudan]

Moving to another area of concern for the United Nations, as you will no doubt have read or seen, there has been a resurgence of the conflict in South Sudan since December 2013, leading to the killing of thousands and the displacement of tens of thousands civilians. It goes without saying that crimes on such a scale demand accountability.

This call for accountability has been repeatedly emphasised by the members of the Security Council, and has been echoed by civil society both in South Sudan and internationally.

The African Union's appointment last year of a Commission of Inquiry to examine the situation and to recommend accountability options was a very important step. Regrettably, the report was not taken up for consideration at the AU's Summit in late January and its recommendations remain unknown to the Organization. President Obasanjo, chairing the Commission, has stressed the importance and the centrality of the report's recommendations on accountability. These would be an essential component of the debate going forward.

In an agreement of 1 February 2015, leaders of the two major parties to the conflict agreed to the creation of an "independent hybrid judicial body" to prosecute those with greatest responsibility for violations of international humanitarian law and South Sudanese law, since December 2013. Other than noting that South Sudanese and eminent African jurists should participate, no further detail has been articulated.

Nonetheless, this threshold agreement, identifying the need for a formal accountability mechanism, is a very important political foundation upon which to build.

The United Nations, for its part, has been examining options in this regard, drawing on experience gained elsewhere.

As a matter of policy, the ICC remains a preferred option for the United Nations. At the same time, it must be noted that, even if seized through a Security Council resolution or through acceptance by South Sudan of the Court's jurisdiction, the ICC could only address a very limited number of actors.

In terms of hybrid tribunals, key considerations include whether the political and security situation within the country would permit the location of such a tribunal there, or whether third States would need to be considered as hosts.

The degree to which South Sudanese investigative, prosecutorial and judicial capacities are sufficient to form part of a hybrid mechanism is difficult to assess. It may be that adaptations of existing mechanisms are preferable to creating entirely new architectures. Lastly but fundamentally, assuring a sustainable funding basis for such a project is an essential consideration.

My Office, in conjunction with other departments, is currently considering this range of issues in order to ensure well-informed engagement by the Organization as this important issue moves forward.

[Senegal]

In Senegal, an alternative model of international criminal justice is making important progress in respect of accountability for the crimes committed in Chad between 1982 and 1990. In this instance, it has been the African Union which has provided the international dimension to the structure in question.

In a model with considerable similarities to the UN's assistance to the Khmer Rouge Tribunal in Cambodia, Senegal concluded a treaty with the African Union, agreeing to set up the Extraordinary African Chambers in the courts of Senegal to try the persons most responsible for the crimes in question. As in Cambodia, the Senegalese Chambers are staffed primarily with national judges, but with internationally-nominated judges bringing broader experience and diversity of legal perspectives to the proceedings.

This institution has clearly shown that regional accountability options represent a fully viable option. Just in the last month, in a landmark step for the institution, the Chambers' investigating judges have issued an indictment sending Hissène Habré to trial. This follows a complex investigation, in which thousands of victims and witnesses were interviewed, thousands of documents analysed and forensic examinations undertaken.

The Chambers' Prosecutor has additionally sought indictment of a further five former officials of the Habré regime.

It will be essential that the international community continue to support this important new model in the area of international criminal justice. Such support is indispensable if the Extraordinary African Chambers are to succeed.

[Conclusion]

Colleagues, I sincerely hope that I have been able to pique your interest in this rather broad topic of accountability for international crimes in Africa. I am encouraged by the fact that many of you play a vital role in some of these issues and would like to take this opportunity to commend you for the incredible work you do.

You are at the heart of a very tough mission – to replace the arbitrary rule of man with the rule of law. You are working to strengthen justice and security institutions in some of the world's most difficult environments. And you are delivering on some of our most challenging mandates.

Societies traumatized by years of fighting and gross violations of human rights yearn for the establishment of the rule of law ... for accountability, transparency, security and justice.

So to conclude, let me stress again that it is critical that you get the best support possible from Headquarters which must increasingly become the repository of comparative experiences in the rule of law and best practices. We in OLA will work very hard with you and with other Departments inside and outside of the Secretariat to ensure this.

I look forward to seeing many if not all of you in a few months' time at the Field Legal Officer's Meeting and wish you a productive and fruitful workshop.

Thank you.