



Legal Representation at the ICC- A Training Session organised by Kenyans for Peace with Truth and Justice- 11 June 2010

Introduction and Opening Remarks

The meeting was convened by KPTJ as an opportunity for the legal community in Kenya to gain further insight into the operational mechanisms of the ICC, as well as an overview of the Court, the Kenya situation and relevant jurisprudence. A Senior Legal Advisor from the International Criminal Court was invited by KPTJ to explain the key intricacies of the ICC as well as what being a legal representative at the ICC essentially entails. The meeting commenced with a short feedback session from the participants with regards to the Review Conference of the Rome Statute in Kampala, Uganda.

Feedback from the Review Conference of the Rome Statute

The Review Conference was held in Kampala, Uganda from 31 May to 11 June 2010. The Conference presented the first opportunity for State Parties to the Rome Statute to propose and make amendments to the Statute. A large number of CSOs were present at the Conference, many of whom were from Kenya, and were able to assess and reflect on the progress of the Rome Statute and the International Criminal Court. Key on the agenda were proposals of amendments, including the definition of the crime of aggression and the transitional provision contained in article 124. Additionally, the Review Conference was also an occasion for a “stocktaking” of international justice.

Some of the key outcomes of the conference included the adoption of a resolution, whereby the Rome Statute would be amended in order to include a definition of the crime of aggression as well as the conditions by which the Court could exercise its jurisdiction in relation to the crime. The actual exercise of jurisdiction is subject to a decision to be taken after 1 January 2017 by the same majority of States Parties as is required for the adoption of an amendment to the Statute.

With regards to the stocktaking exercise, two resolutions were made, a declaration and summaries of discussions. The resolution on the impact of the Rome Statute system on victims and affected communities, inter alia, recognized, as essential components of justice, the right of victims to equal and effective access to justice, support and protection, adequate and prompt reparation for harm suffered and access to information concerning violations and redress mechanisms.

The Conference also adopted a resolution on the issue of complementarity, wherein it recognized the primary responsibility of States to investigate and prosecute the most serious crimes of international concern and the desirability for States to assist each other in strengthening domestic capacity to ensure that investigations and prosecutions of serious crimes of international concern can take place at the national level.

In the Declaration on Cooperation, the Conference emphasized that all States under an obligation to cooperate with the Court must do so. Particular reference was made to the crucial role that the execution of arrest warrants played in ensuring the effectiveness of the jurisdiction of the Court. The Conference further took note of the moderator's summary of the panel discussion held on the issue of "peace and justice". The panel highlighted the paradigm shift the Court had brought about; there was now a positive relation between peace and justice.

Presentation by Senior Legal Advisor, ICC

Explained was the fact that the Court was established through a treaty between State Parties¹. The court has 111 state parties within its jurisdiction at present.

Applicable Law

Described was the importance of Article 21 of the Rome Statute which pertains to the sources of applicable law. Essentially there is a hierarchy of rules that exists within the Statute. The content of the Statute takes precedence over the Rules of Procedure and Evidence which are subordinate to it. Subordinate to the Statute and Rules of

¹ Art. 1 of the Rome Statute provides that an International Criminal Court ("the Court") is established. It shall be a permanent institution and shall have the power to exercise its jurisdiction over persons for the most serious crimes of international concern, as referred to in this Statute, and shall be complementary to national criminal jurisdictions."

Procedure and Evidence are applicable treaties and international law. The judges of ICC have, in their decisions, applied jurisprudence from the American Court of Human Rights and the European Court on Human Rights in accordance with article 21, paragraph 3, of the Statute. Important to note was that in many cases, the ICC Judges have refused to use the jurisprudence of the ICTY or the ICTR as presenting precedentiary value. The speaker explained that this is an ongoing debate at the International Criminal Court, and one that was also highlighted in the decision of Pre-Trial Chamber II in relation to Kenya. It was deemed extremely difficult to apply the national law of a place where a crime/s was committed at the ICC, as well as this, it is also difficult for lawyers to refer to the general principles of law in their arguments, as this is a very subsidiary source of law before the ICC. In summary, the main sources of law are the Statute, the Rules of Procedure, and International law. Furthermore, according to Article 21 of the Statute, the Statute and rules have to be applied in accordance with international human rights law. Also important to note is that the Court is a hybrid of both civil law and common law systems, and as such, the rule of precedent is not applied at the ICC, and even a ruling from the Appeals Chamber may not be binding. However, stated was the fact that the ICC is a new body, debate on jurisprudence is on-going and therefore lawyers before the ICC will have the opportunity to present various arguments, thereby expanding the jurisprudence of the ICC.

Structure of the Court

According to Article 34 of the Rome Statute, the Court consists of four organs: the Presidency; Appeals Division, Trial Division and a Pre-Trial division; The Office of the Prosecutor and the Registry. There are three trial chambers which are constituted only after a confirmation of charges. The Judges, who were on the pre-trial chamber, will not sit in the Trial Chamber. Each judge in the Pre-Trial Chamber has a legal officer assisting him/her whose duties end at the confirmation of the charges stage. If there is a situation such that there is no confirmation of charges, a trial cannot take place; the case of Darfur rebel chief Bahr Idriss Abu Garda was cited as an example. The ICC declined to confirm charges against Sudanese rebel leader Bahar Idriss Abu Garda on 8 February, 2010, citing a lack of evidence. Abu Garda was accused of directing an attack that killed a dozen African Union peacekeepers in Sudan's strife-

torn Darfur region in 2007. The court's pre-trial chamber refused to move the case forward to trial, saying it "was not satisfied that there was sufficient evidence to establish substantial grounds to believe that Bahar Idriss Abu Garda could be held criminally responsible either as a direct or as an indirect co-perpetrator for the commission of the crimes."

The Pre-Trial Chambers receives situations and not cases, highlighted was the fact that there could be an enormous difference between the ambit of a situation and a case. The example of the Democratic Republic of Congo was given, where the Prosecutor of the ICC has charged Thomas Lubanga Dyilo with the war crime of conscripting children under the age of fifteen; and using children under the age of fifteen to participate actively in hostilities. Therefore, there is a high possibility that from a broad situation, the case finally brought by the Prosecutor may be extremely narrow. Another example that was given was that of the Katanga case, which is essentially concerned with one attack, on one particular day, with a mere 200 victims, as opposed to the millions who were actually victims of the situation. The trial against Congolese warlords Germain Katanga and Matthieu Ngudjolo Chui which opened on 24 November 2009 was the ICC's second trial. Katanga and Ngudjolo are accused of war crimes and crimes against humanity allegedly committed in the village of Bogoro in the Ituri district of eastern DRC from on 24 February 2003. The speaker noted that at present, it is impossible to ascertain the Prosecutor's area of focus for a potential case in Kenya.

Admissibility

Article 18 of the Statute lays out the admissibility requirements. With regards to the Kenya situation, the Kenyan Government can still bring up a question on admissibility, however, it is too late at this juncture for the Government to block any ICC investigations, as the thirty day period for a State to inform the Court, that it is investigating or has investigated its nationals or others within its jurisdiction with respect to criminal acts which may constitute crimes referred to in article 5 and which relate to the information provided in the notification to States, has lapsed (Article 18(2) of the Rome Statute).

Trigger mechanisms

The jurisdiction of the Court may be triggered by either one of three mechanisms: through the Security Council under Chapter VII of UN Charter: a State Party referral; or by the Prosecutor, acting *proprio motu*. It is important to note that there are conditions attached to each trigger mechanism, and political support may often play a role in what situation the Prosecutor may choose to investigate.

The Crimes

At present, the ICC cannot exercise jurisdiction for aggression, although there have been developments since the Review Conference in Kampala. There are three categories of crimes that are under the jurisdiction of the ICC: war crimes, crimes against humanity and genocide.

Genocide

According to the Statute, "genocide" means any of the following acts committed with intent to destroy, in whole or in part, a national, ethnical, racial or religious group, as such:

- (a) Killing members of the group;
- (b) Causing serious bodily or mental harm to members of the group;
- (c) Deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part;
- (d) Imposing measures intended to prevent births within the group;
- (e) Forcibly transferring children of the group to another group.

The crime of genocide is difficult to prove due to the requirement for specific intent. Also highlighted was the fact that there are different evidentiary standards at different stages of the proceedings before the Court. At stage of the warrant of arrest, this is not a very high threshold. Cited was the example of Sudan, where the Prosecutor appealed and won the request he presented before the Appeals Chamber

concerning the standard of proof for a warrant of arrest for genocide against President Omar Al-Bashir.

War Crimes

The Court has jurisdiction in respect of war crimes in particular when committed as a part of a plan or policy or as part of a largescale commission of such crimes. For the purpose of the Statute, "war crimes" means: grave breaches of the Geneva Conventions of 12 August 1949, namely, any of the following acts against persons or property protected under the provisions of the relevant Geneva Convention. With regards to war crimes, there are two categories of war crimes in the statute. For international armed conflicts, there exist on the one hand the Hague law, and, on the other hand, the Geneva conventions for those who are not fighting or not fighting anymore. According to Article 8(2) (a) (b), it is necessary to prove that there was an international armed conflict and furthermore, that there was a link between the crimes committed and the international armed conflict. With regards to internal armed conflict, there are certain requirements that have to be fulfilled. Firstly, there must some semblance of an organisation, with a hierarchy, and one which allows the group to conduct military operations. However control of a specific territory is not required by the Rome Statute. The argument was made that there could be some internal war crimes in some parts of Kenya. For example, the crimes in Mt. Elgon could be considered to be war crimes. However, the authorisation for the Prosecutor is only for crimes against humanity.

Crimes against Humanity

For the purpose of the Statute, a "crime against humanity" must be committed as part of a widespread or systematic attack directed against any civilian population, with knowledge of the attack. In the case of crimes against humanity it is not necessary, according to the definition contained in the Statute to prove specific intent as with genocide, nor is it necessary to prove the existence of a state of war. In fact, many States have refused to ratify the Rome Statute on the basis of this Article due to this wide definition. However, the main constraint to this wide definition is found in Article 7(2) (a), whereby a crime against humanity has to be part of a widespread or

systematic attack directed against any civilian population pursuant to or in furtherance of a State or organizational policy to commit such attack.

Thus, a crucial question for Kenya that was brought up by the speaker was the difficulty of distinguishing between crimes against humanity and ordinary crimes. For instance, if the threshold is too low, there could be a situation where crimes against humanity occur in almost every country. For example, the mafia, in Italy, or crimes linked to drug trafficking in Mexico. This was the main bone of contention within the decision of PTC II, and as such, the dissenting opinion of Judge Kaul alluded to the scenario where if the threshold for crimes against humanity is lowered, the ICC could be overwhelmed by cases.

The speaker also pointed to the fact that there is a need to prove a link between the crimes to establish a policy. The requirement is that there ought to be a state or organisational policy. Essentially, an organisation needs to reach a level of sufficient organisation, hierarchy and capacity to conduct military operations or large scale operations against the civilian population. In addition it is important to distinguish a deliberate policy of an organisation linking different crimes, from e.g. cases of organised violence. The Kenya situation was deemed as being one that would help to define the threshold for involvement of the ICC in situations of crimes against humanity. The presenter was of the view that, on the basis of the information publicly available, proving State policy could eventually be easier in relation to the actions by security forces as they were part of the State's organs.

Complementarity and Gravity

According to the speaker, admissibility of a case before the ICC has two components: complementarity and gravity. Article 18 of the Rome Statute sets out the provisions for preliminary rulings regarding admissibility. According to Article 18 (2) Kenya cannot challenge admissibility under this section, however, admissibility can be challenged under Article 19. Under this section, Kenya must prove that there is prosecution at the national level, and such a prosecution is against the same person, in relation to the same crimes as he/she is charged with at the ICC. The speaker highlighted that there are different layers in complementarity. It is not necessary to focus only on the unwillingness or inability of a country to prosecute, the inaction of a country may also be considered. Thus, if it is proven that there is inaction with

regards to the prosecution of a specific person for a specific crime (“same case scenario”); there is no need, according to the jurisprudence of the Court, to look into the unwillingness or inability of a country to prosecute. The ICC is entitled to verify whether this action was taken in good faith.

In addition there is a gravity element which has never been defined by the Court. In the Lubanga case, PTC I attempted to establish some criteria for gravity, and considered the criteria of whether: (i) the accused is a high level perpetrator and (ii) the level of the social harm caused by the crime. However, the Appeals Chamber did not concur with this argument, and argued that the ICC could also prosecute lower-level perpetrators. Thus, the chambers have applied very elastic criteria to an assessment of gravity, rendering the definition of gravity somewhat unclear.

Preliminary Phase

The first phase of any potential case is the preliminary examination stage. At this stage, the Prosecutor has a duty to verify any information that he has received. It is necessary to apply three criteria at this particular stage. Namely, the question of jurisdiction; the admissibility of the case, and interests of justice have to be considered. Jurisdiction: in order to determine if the case is within the sphere of the Court’s legal authority three conditions must be satisfied: first, did the alleged crime occur within the period set out in Article 11 of the Statute (*ratione temporis*)? Second, does the alleged crime fall within the category of crimes under Article 5 of the Statute? According to Article 7 of the Statute acts that would constitute crimes against humanity include murder, rape and other forms of sexual violence, deportation and forcible transfer of population and other inhumane acts. Third, was the crime committed on the territory of a State Party to the Statute (*ratione loci*) or did a national of any such State commit the crime (*ratione personae*)? The Prosecutor has to ascertain whether the investigations would not serve the interests of justice. An issue that was discussed was that in most cases, it is easier for the Prosecutor to postpone making decisions with regards to situations, than to argue interests of justice which may trigger a review of his decision by the Pre-Trial Chamber. According to the Statute, if the Prosecutor decides not to investigate a situation, he is under a duty to notify the Pre-Trial Chamber, and the decision can be reviewed by that Chamber.

The Investigation phase

An investigation is commenced on the basis of the entire situation, and covers all the facts in the situation. The duty of the Prosecutor under the Statute is to establish the truth, which is typical of civil law countries. However, at times, the Prosecutor acts in a very adversarial manner. During the investigation phase, the Judges at the Court have a very limited role as envisaged by the Rome Statute. However, Article 56 of the Statute allows the Prosecutor to make an application for the preservation of evidence to the Pre-Trial Chamber at this stage. It is also worth noting that the Chamber could apply this power *proprio motu*, to preserve evidence for the defence, although this has never happened at the Court. The Pre-Trial Chamber can also issue orders or warrants under the request of the Prosecutor, protection of evidence, victims, and national security. The use has not been very successful, but could be useful for victims who want to preserve evidence. In accordance with article 57(3) (d), the Pre-Trial Chamber can also authorise the Prosecutor to investigate in a State without the cooperation of that State. Logically, the Prosecutor should request the cooperation of the State, however it is possible for the Prosecutor to go directly on the ground and collect evidence if this does not imply any coercive measures. Thus, the Prosecutor can only collect statements which are given to him voluntarily. Furthermore, the Prosecutor has no powers in relation to search and seizure, and States are not always willing to give him the evidence he needs.

With regards to the rights of victims at the situation level; the decision of PTC 1, DRC, 17 Jan 2006, construed the notion of harm suffered by a victim to include direct harm as well as indirect harm, except where the victim is a legal person. The Pre-Trial Chamber further held that victims are only required to establish a link between the harm suffered and the crimes committed in the situation at stake. Thus, this ruling held that victims may participate at the situation level. However, the Appeals Chamber has taken a slightly different decision. According to the decision of the Appeals Chamber, victims cannot participate in the investigation conducted by the Prosecutor, although they can participate in judicial proceedings at the stage of the investigation in a situation before a case is presented by the Prosecutor. However,

victims are not barred from coming to the Chamber to be recognised as victims at the stage of the investigation in a situation.

An important issue that was raised was the scenario whereby the case that is brought by the Prosecutor is narrow, leaving a large majority of the victims of a situation unable to participate. However, also pointed out was the fact that the larger the amount of victims, the easier it would be for them to challenge the scope of a potential case. The simple act of challenging the scope publicly may have an effect. Any legal arguments to this effect would have to be very precise. At the situation level, as mentioned elsewhere, victims can apply in order to preserve evidence (s. 57(3) (c)).

Victim Participation

According to Rule 89, paragraph 1 of the Rules of Procedure and Evidence, it is necessary to prove that the victim is a human being or an institution; that the harm suffered was personal to the victim. The harm suffered can be either direct harm or indirect harm. However, the parameters as to what indirect harm encompasses is not completely clear.

An application to participate is complete if it includes: the identity of the applicant, date of crime, location of crime, description of the harm suffered, consent of victim, proof of kinship, signature or thumbprint. At the case level, it is necessary to prove the link between the harm suffered and the crime being prosecuted. The provision of identity documents in other situation countries has proven problematic. Accepted forms of identity include: either national ID, passport, birth certificate, will, driving licence, card from a humanitarian agency, voter's card, etc. Once completed, the application form is sent to the Registry, who then forwards it to the Chamber. The Chamber sends the application to the Prosecutor and to the Defence; however the relevant information as to the victim's identity on the application form may be redacted. It takes several months before victims are recognised as such due to this procedure.

Summons to Appear/ Warrant of Arrest

After investigations, the Prosecutor will bring a request to the Chamber for a summons to appear, or for a warrant of arrest. It is up to the Prosecutor to decide which charges (in Kenya all the charges will be limited to crimes against humanity), and how many, will be brought against the accused. An application can be presented under seal or publicly, unless the Chamber decides that the decision may be revealed to the public. A summons to appear is usually presented to the Judges where the Prosecutor is confident that the summoned person will appear voluntarily and there is no flight risk. However, it is ultimately up to the Judges to decide whether an arrest warrant or a summons will be issued, and whether it shall be under seal or not. The evidentiary standard at this stage of the proceedings is that of there being a “reasonable ground to believe”. This standard requires that the Prosecutor have more substantial evidence in contrast with the evidence provided at the preliminary stage. If the Chamber is of the opinion that the evidence is insufficient, they may request the Prosecutor to present more evidence. This has been done by the Judges on a number of occasions. Usually, this process can take up to 2-3 months on average, and maybe more in some cases. If the Judges decide not to issue a warrant of arrest or a summons to appear, this does not preclude the Prosecutor from presenting another request with more evidence. As soon as a warrant or summons is issued, the judges will decide on the enforcement procedure, and it is the Registrar who implements this. The warrant of arrest or summons to appear is served to the relevant person in person. If such a person does not appear through a summons, the judges may issue a warrant of arrest *proprio motu*. In the case of a warrant of arrest, the Court issues a request for arrest and surrender to the country where the accused is believed to be. It is important to note that this request can be sent to various countries, or all States Parties, as was done for Mr. Bemba.

This stage of the process is heavily dependent on cooperation from States as well as State Parties. As the ICC has no police force, its only option is to rely on States to cooperate in effecting the arrest of the relevant person. However, if there is no cooperation, the ICC can send a request to the Assembly of State Parties. If a country does not want to surrender a person, essentially the ICC is blocked, as there are no trials in absentia, but there can be a confirmation of charges in absentia. The warrant of arrest is valid as long as the person in question remains alive.

With regards to the freezing of an accused's assets, at the time of a summons or arrest, the ICC can request the freezing of all his/her assets. Again, in this case there is an onus on the relevant State/s to cooperate. But the ICC can effectively freeze foreign property or bank accounts. The Chamber can carry out the freezing of assets at the request of the Prosecutor, the representatives of victims, or *proprio motu*.

Process of disclosure

According to the rules of disclosure, the Prosecutor has to disclose to the defence the evidence that he has collected. However, it is possible for the Prosecutor to apply to the Chamber for redactions i.e. blocking out of certain information e.g. names and /or addresses that could lead to the disclosure of the identity of the Prosecutor's witnesses. This process can take a long time and during this time victims may participate in the confirmation process. However, this participation is limited to the victims of the case and not the victims of the situation. A confirmation hearing can take a few weeks, especially if the prosecutor or the defence want witnesses to be present at the hearing.

At this stage of the proceedings, the evidentiary threshold moves to the higher standard of "a substantial grounds to believe" (Article 61(7)) from a "reasonable grounds to believe". Once the confirmation hearing comes to an end, the Pre-Trial Chamber has two months to decide whether to confirm the charges or not. If the charges are not confirmed, that is the end of the matter. However, the Chamber may decide that there is not sufficient evidence, and may request the Prosecutor to gather more evidence and carry out further investigations. If the charges are confirmed, a new trial chamber is constituted. The Chamber may also disagree with the charges brought against a person. For example, in the *Bemba* case the Chamber was of the opinion that there was not the necessary criminal intent for that specific charge. Also important to bear in mind is that issues of admissibility may be brought up at this stage. In that, if a national prosecution is brought against the same person, for the same crime, the case may revert back to the national level. The speaker asserted the earliest a trial can commence for the Kenya situation is the second part of 2012 due to the complexities of the proceedings, including possible translation of voluminous documents that the process entails, numerous requests for redactions in relation to

the disclosure process and issues related to protection of witnesses. There is also the need to give adequate time and facilities to the defence to prepare.

Plenary Discussions

- One question put forward concerned the balance between peace and justice, and how the Court deals with this dilemma. The speaker explained that once the ICC issues a warrant of arrest it cannot withdraw the decision due to political problems at the national level.
- Another issue raised was whether the Prosecutor would target those who actually organised the violence, as opposed to those who would be easier to arrest? A related question was whether the Prosecutor is able to give judicial immunity; especially in regards to insider witnesses who may have participated in criminal activity.
- With regards to victims, it was clear that not all victims would be able to directly obtain justice, therefore many questions focused on what interim relief the Trust Fund for Victims would be able to provide. Again, the speaker drew the audience to the fact that compensation will only be disbursed by the accused, in case of conviction, to the victims of the case. The Trust Fund could however assist other victims. In addition, the Court could, in accordance with article 75(1) of the Statute, establish principles in relation to reparations, for victims other than victims of the case.

KPTJ, Nairobi, June 2010