INTRODUCTION

On the 26th of April 1995, Dusko Tadic, former President of the Local Board of the Serb Democratic Party (SDS) in Kozarac stood in the dock in a courtroom at The Hague. He pleaded not guilty to the charges against him. This was no ordinary national court; it was the dock of the International Criminal Tribunal for the Former Yugoslavia (ICTY) established by the United Nations Security Council Resolution 817 (1993) pursuant to Chapter VII of the United Nations Charter in response to the mass atrocities in the Former Yugoslavia. The plea was taken before international judges selected by the United Nations; the charges were not violations of national law but were crimes against humanity and grave breaches of the laws and customs of war. This was a trial before an international court for international crimes created by international law.

The event and the process that followed it were not without precedent; but the last time the international community embarked upon anything similar was on 21st November 1945 when 22 accused persons, leaders of the defeated Nazi regime were arraigned before the International Military Tribunal (IMT) in Nuremberg and pleaded not guilty to charges of conspiracy to wage aggressive war, waging aggressive war, crimes against the peace, war crimes and crimes against humanity. They too had pleaded not guilty. An interval of half a century
however passed before the international community ventured again into international criminal prosecutions.

The Tadic trial was a momentous occasion, one of great historical significance not on its facts or the law but for the fact that it set in motion a process of international criminal justice from which there appears to be no turning back.

Since the adoption of U.N. Security Council Resolution 827 establishing the ICTY, the Security Council has exercised its Chapter VII powers to establish the International Criminal Tribunal for Rwanda (ICTR) by Resolution 955 (1994) of 8th November 1994 to prosecute those persons responsible for serious violations of international humanitarian law committed in Rwanda between 1st January and 31st December 1994 and by Rwandan nationals in the neighbouring countries during the same period. This was the United Nations response to the genocide of over a million Tutsis and the killing of several others, mostly moderate Hutus during that year. The ICTY and the ICTR constitute the purely international ad hoc tribunals for the administration of international criminal justice. A new model of hybrid tribunals followed suit with the establishment of the Special Court for Sierra Leone (SCSL) in 2002, the ECCC for Cambodia in 2006 and the Special Tribunal for Lebanon in 2007.

In between, there has been progress from ad hoc systems to a truly permanent international system with the adoption of the Rome Statute of the International Criminal Court in 2002. The process of international criminal justice has remained uninterrupted since 1993.
But international criminal justice today stands at an important crossroads. The two ad hoc tribunals are now operating under their respective completion strategies approved by the UN Security Council in Resolution 1503 (2003) requiring them to wind up their activities. It is anticipated that within the next three years both tribunals would have wound up leaving only a few residual functions to be carried on by a residual mechanism. In October this year the Special Court for Sierra Leone delivered its last appellate judgment, the trials having been concluded with the exception of the ongoing trial of Charles Taylor, the former President of Liberia.

A few years hence, barring the creation of any new ad hoc international or hybrid tribunals by the UN Security Council, the International Criminal Court (ICC) will be the only remaining international criminal tribunal. It is thus an appropriate time to take stock of the legacy of the ad hoc and hybrid tribunals and their contribution to combating impunity, to explore how the gains from the past can best be secured for the future and to assess some of the challenges that lie ahead in the administration of international criminal justice.

**CONTRIBUTION OF THE AD HOC AND HYBRID TRIBUNALS TO COMBATING IMPUNITY**

It would be fair to sum up the legacy of the ad hoc and hybrid tribunals as the primary major instruments so far for combating impunity by bringing to account before courts of law several high ranking personalities who in the past might have evaded the long arm of the law and justice through their power and influence; by expanding the frontiers of international law through the progressive
development of international criminal law in its substantive, procedural, evidentiary and practice aspects; by the development of experience and techniques in the various intricate aspects of management of international tribunals as well as the investigation and prosecution of international crimes; by influencing national legal systems to become partners in the fight against impunity through the domestic enforcement of international criminal law; by contributing to reconciliation and restoration of the rule of law in the various communities where conflict had led to the intervention of international justice; above all by demonstrating that the enforcement of international criminal justice is feasible, desirable and necessary, thus encouraging the international community to adopt the Rome Statute for a permanent International Criminal Court (ICC).

Since Tadic’s initial appearance and plea at the ICTY and the relatively short period of 14 years which followed, close to 300 high ranking personalities have been indicted by the international tribunals. And it is not merely a matter of numbers too. These are largely high level personalities who hitherto wielded great power and influence. They include Heads of State – Slobodan Milosevic of Yugoslavia, Charles Taylor of Liberia, Hassan Al Bachir of Sudan, Radovan Karadzic of the Serbian Republic of Bosnia Herzegovina; former Heads of government – Jean Kambandsa Prime Minister of Rwanda; Khieu Samphan Head of State of Democratic Kampuchea and Iang Sari, former Deputy Prime Minister and Minister of Foreign Affairs in Democratic Kampuchea; former senior military officers, Chiefs of Staff, senior politicians, administrators, media people, clergy, etc...
That the tribunals have been able to indict and bring to account all but a handful of these people who planned, organised, ordered or were otherwise instrumental in the great mass tragedies of Yugoslavia, Rwanda, Sierra Leone, Liberia, Cambodia, etc... has been a major contribution to combating impunity and promoting accountability and the rule of law worldwide. Whether or not this exercise has had an impact on the prevention of mass atrocity is of course besides the point. Admittedly mass crime continues to be committed even as perpetrators are being held to account in courts of law. The DRC is a tragic example of this situation. But we need to be clear about the objective of combating impunity: it is to bring to account the leading perpetrators of these egregious violations of human rights. Whilst preventive strategies such as promoting an environment of good governance in each society must continue to be given priority, when such strategies fail, the intervention of the legal justice strategy will remain necessary.

Until the establishment of the Tribunals little of the substantive international criminal law was based on judicial decisions. Much of it was treaty based and had received scant judicial interpretation. The principal treaties include the Convention on the Prevention and Punishment of the Crime of Genocide (1948), the Convention Against Torture (1984), the Convention on the Suppression and Punishment of the Crime of Apartheid (1973) the four Geneva conventions of 1949 and the two additional Protocols of 1977.

While Nuremberg constitutes a watershed in the evolution of international law with its establishment of the fundamental principle of individual criminal responsibility under international law it has not left much else by way of precedent for the subsequent international criminal tribunals. In the daily routine
of the current international tribunals, there is little reference to Nuremburg beyond this principle. Nonetheless the past decade and a half has seen an expansive development of international criminal law by the tribunals beyond this basic principle established by Nuremberg. Notable among these jurisprudential landmarks have been the following:

(i) the elaboration of the elements of the crime of genocide as detailed in the 1948 Genocide Convention, free speech versus direct and public incitement to genocide, rape as genocide (ICTR Kambanda judgment 1998, Media Judgment, Akayesu Judgment 1998); judicial notice of the Rwandan genocide (ICTR Karamera et al case 2006); the responsibility of civilians for war crimes (Akayesu 1998); judicial expansion of the concept of “aiding and abetting” to include “tacit encouragement” and thus creating a mechanism to impose criminal responsibility on persons in positions of leadership who turn a blind eye to criminal conduct by persons over whom they have influence (Akayesu 1998);

(ii) the judicial recognition of the concept of joint criminal enterprise (JCE) in all its three forms by which the ICTY came to the conclusion that “international criminal responsibility embraces actions perpetrated by a collectivity of persons in furtherance of a common design” (ICTY Tadic judgment 1999);

(iii) the elaboration of the statutory provisions for criminal responsibility of superiors for subordinates’ actions (ICTY/ICTR);
(iv) the landmark decision of the SCSL Appeals Chamber in 2004 rejecting arguments for immunity from prosecution in respect of President Charles Taylor as an incumbent Head of State thus strengthening the principle that no one should be above the law (SCSL);

(v) that national arrangements for amnesties in respect of international crimes are no bar to prosecution for such crimes at an international tribunal (SCSL);

(vi) prosecution for the first time of individuals for recruitment of child soldiers and for forced marriages (SCSL).

Similarly several ground breaking judicial decisions have been rendered in respect of practice, procedure and evidence; fair trial rights, etc..

In the fifteen years of its existence, the ICTR has indicted 93 leading personalities for the crimes of genocide, crimes against humanity and war crimes. It has arrested and brought to trial all of those indictees save 11 who continue to challenge justice by evading arrest. But they cannot run forever; there are no time limits for the prosecution of the crimes with which they are charged. Sooner, rather later, even after the closure of the ICTR, the law will surely catch up with them. So far, 49 of the accused have had their cases completed, with 8 acquittals and the rest being convictions. 17 accused are currently awaiting judgement following the conclusion of the evidentiary phase of their trials. 9 of the cases completed have been the result of guilty pleas. Two cases have been referred for trial to France under Rule 11bis of the ICTR Rules of Procedure and Evidence.
There are currently 10 accused on trial and 10 on appeal all of whose cases we expect to conclude by the end of 2010. There are now only two detainees whose cases are pending trial as they were arrested only recently. The implementation of the Completion Strategy of the ICTR approved by the U.N. Security Council is thus being vigorously pursued and barring any new arrests we expect all trials, save the recent two arrestees, to conclude at the end of 2010 and the appeals to conclude by the end of 2012 or early 2013. Impending closure also has focused our attention, as with the other ad hoc tribunals, on legacy and residual issues including the location and management of our vast sensitive archives, the disposition of the cases of new arrestees as well as the management of legal issues which may require judicial attention after closure.

The tribunals have also had a positive impact on the societies where international conflict had necessitated the intervention of international criminal justice. In the case of the ICTR for instance, the strategy for the referral of cases to Rwanda has encouraged that country to abolish the death penalty and to embark on a process of law reform that has improved conditions for fair trial. The ICTR has also engaged in capacity building measures – particularly training of key operators of the legal system, investigators, lawyers, judges, managers – in order to improve the machinery of justice. The employment of Rwandan nationals by the OTP-ICTR – as investigators, trial appellate attorneys as well as support staff has not only assisted the tribunal but also contributed to capacity building for the Rwandan legal sector. I believe the very fact of the establishment of the ICTR and, its subsequent judicial processes may have contributed in reinforcing the rule of law and the role of the law in managing the post-genocide situation in Rwanda. The outreach programme of the ICTR has also assisted significantly in bridging
the information gap on the tribunal in Rwanda in various ways, the latest of which has been the recent establishment by the ICTR of 10 information centres in Rwanda to enable all Rwandans access information not only on the ICTR but on combating impunity.

It has not however been an exclusive role for international tribunals in combating impunity. An effective partnership has been forged and is developing with national legal systems – courts, bar associations and law enforcement agencies in this respect. Courts in several countries now exercise jurisdiction over some international crimes. Canada, France, Belgium, Holland, Norway, Finland, Senegal, the United Kingdom are among them. The list is likely to grow. In October 2009 Canadian Courts convicted and sentenced to life imprisonment Desiree Munyaneza for genocide, war crimes and crimes against humanity in relation to the events in Rwanda. Safe havens for perpetrators of such crimes are becoming relatively few compared to a decade and a half ago. National law enforcement agencies are increasingly being supported by the tribunals with information, evidence and expertise in the investigation and prosecution of international crimes. In the past year alone, the OTP-ICTR has received and serviced for instance requests for information from the law enforcement authorities of about 30 countries which are involved in domestic investigation and/or prosecution of international crimes committed outside their territorial limits.

I do not mean to plead the case that it has all been a success story only. There have been and continue to be challenges along the way. Many perpetrators evade justice because of the limited numbers that the tribunals can prosecute; we
can prosecute only those who play a leading role in such crimes; there is room for more effective prosecution of sexual violence crimes than all the tribunals have been able so far to undertake successfully; the tribunals have been criticised for being slow and expensive although it should be recognised that along the way with rule changes and improved courtroom and trial management techniques, the timeline for trials has been progressively reduced; international cooperation, the lynchpin of the international tribunal system, whilst generally good as evidenced by the rate of arrests and transfers of fugitives, has in some critical instances fallen below the desirable standard. A number of top level fugitives, including 11 in respect of the ICTR, continue to evade justice, thus presenting a serious challenge to the proper completion of the respective mandates. Jurisdictional and capacity weaknesses in national systems have created gaps in the struggle against impunity through which suspected perpetrators are walking freely. Nonetheless the venture of the past decade and a half to combat impunity through legal accountability has been one of the most remarkable developments of this century. Nothing symbolises the confidence of the international community in its effectiveness more than the decision to progress from ad hoc judicial arrangements to a permanent International Criminal Court (ICC). But the future too has its share of challenges and concerns.

BEST PRACTICES

One of the great challenges is how best to ensure that the gains of the past in the administration of international criminal justice are effectively secured and made available for future practitioners. The area of substantive jurisprudence offers little, if any, difficulty in this respect. Judgments of the Tribunals are
readily available and thus usable by practitioners – judges, prosecutors, defence counsel and others. There are however numerous rulings on practice and procedure which need to be assembled, digested and published to make them accessible to those who need them. The internal regulatory framework of the tribunals, their internal practices and procedures reflect good practices in the area of case and trial management, investigations, prosecutions, witness management, etc. developed from practical experiences. These best practices need to be harnessed – to be identified, compiled and made accessible as well to the practitioners of international criminal justice. It is only in this way that the lessons of the past – successes as well as failures and challenges – can be harnessed to good use for the future.

Clearly the constituency for such a compendium of best practices will be essentially, the ICC and its operators. In my view, the Rome Court should therefore take the lead role in this process which would help us avoid repeating the mistakes of the past – reinventing new wheels and enable us put to good use the lessons of the past..

**EXPANDING THE FRONTIERS OF INTERNATIONAL LAW**

While custom is still a major source of international law a substantial part of international criminal law is today governed by treaty. We have already referred to the major international instruments. The statutes of all the Tribunals define the crimes over which they can exercise jurisdiction. The Rome Statute of the ICC also defines the crimes of genocide, crimes against humanity and war crimes comprising its jurisdiction. The Statute goes further to provide a chapter on
Elements of Crimes to assist in the interpretation and application of these provisions.

There nonetheless remain two areas in which there are strong pressures for further codification and progressive development: crimes against humanity and war crimes.

Apart from the instruments establishing the various tribunals there is no international instrument or treaty on crimes against humanity. Many argue that a Convention on Crimes Against Humanity is needed to fill in the gaps in the Genocide Convention in relation to the characterisation of the groups to be protected, perhaps by adding others; to go beyond the individual criminal liability for such cases as provided in current instruments to address the issue of state responsibility for such crimes in the same way that the Genocide Convention addresses both issues; to provide for interstate cooperation in the prevention and punishment of crimes against humanity and generally reinforce the doctrine of the responsibility to protect. Some do argue that the parameters of such a convention should be expanded to include economic and environmental crimes which they claim pose equally destructive threats to whole communities. Some point to the fact that today a large proportion of civilian casualties is due to political reasons and not on the grounds set up in the 1948 convention.

On the other hand some see the increased violence against civilians in times of conflict as a serious challenge both to the adequacy and effectiveness of international humanitarian law. According to research conducted by the International Institute of Higher Criminal Sciences (ISISC) between 1948 and
2008 some 311 conflicts occurred worldwide with a victims total of up to 170 million, most of them civilians caught in internal conflicts.

The killing of civilians has continued on a massive scale in both international and non-international armed conflicts since the end of the Second World War and the adoption of the Geneva Conventions and Protocols thereto. Some of it has unfortunately often been dismissed as collateral damage with little effort to ensure the legal accountability of the perpetrators. Collateral damage is the killing of civilian persons who do not threaten combatants in the process of killing those who do. Some argue that the laws of war do not sufficiently address the legal character of collateral damage despite its increased prominence in conflict and that needs to be brought within a legal framework, properly defined and individual criminal responsibility brought to bear on its perpetrators.

On the other hand much of the violence against civilians in conflict situations – with the women and children bearing the brunt of it - arises from the activities of armed groups whose strategy appears to be the deliberate targeting of civilians or their use as human shields. These activities of armed groups have resulted in massive internal, as well as external displacement of populations entailing much suffering to civilians. The foundations of the laws of war – regulating the means of warfare and protecting civilians in times of conflict – seem increasingly to be at risk. It is vital that the international community insists that conflicting parties respect the obligation to protect civilians, that violators of the obligation are brought to account and that the legal regime for ensuring such accountability should be reviewed and strengthened.
Much as some of the international crimes are already the subject of international legislation and have been the subject of judicial interpretation and expansion, there is room for further progressive development or elaboration of the law in the foregoing and other areas. The business of law reform is a continuous process and the field of international criminal law is no exception.

**THE CHALLENGE OF STATE COOPERATION**

All systems of justice rely on state structures for their effective operation. The international system is no exception. A fundamental difference is that this international system depends almost entirely on the political structure and goodwill of states. The national court will issue its subpoena for witnesses, its warrant of arrest, its order of commitment to prison fully confident in the knowledge that the law enforcement structures of the state will normally execute these orders and ensure the arrest of the accused or suspect, the appearance of the witness in court and the conveyance of the accused to a lawful place of detention or imprisonment. The international court is bereft of this assurance. Much as its orders and decisions may be legally binding on states, the court lacks a police force which will readily enforce its orders for the arrest of persons, production of witnesses and evidence, detention or imprisonment of persons, etc. All these actions – crucial as they are to the effectiveness of any system of justice – will be carried out by national agencies only on the authorisation of the political organs of the state whose cooperation is being sought by the international tribunal concerned. Essentially the choice of state cooperation with international courts, although a binding legal obligation, is dictated by the concerns of the political arms of the state.
Admittedly in the vast majority of matters, states have made the right choice to support the mandates of the tribunals and to give effect to their requests and orders. Nonetheless issues of cooperation remain in respect of the arrest of top level fugitives, the transfer of convicts for imprisonment, relocation of acquitted persons, relocation of witnesses under risk, etc. etc. Thus whilst dependence on state cooperation remains indispensable and will continue, it is perhaps opportune to explore ways of making the machinery of international justice more autonomous and less dependant on state cooperation. State cooperation is as much a strength as the Achilles heel of the system. Some starting points have been suggested: create an international police force with powers of entry into and enforcement of tribunal orders within member states territory; establish an international prison for the detention of persons and imprisonment of convicts. Too futuristic? Perhaps. But who would have predicted two decades ago the creation and effective operation of international tribunals to administer international criminal justice?

RESTRUCTURING THE ARCHITECTURE

Whilst the machinery of international criminal justice has been proven to be effective and necessary it must be acknowledged that it has its limitations. The principal limitation is that it can prosecute only a relatively small number of the perpetrators of mass crimes and atrocities. Its authority needs to be reserved for those who play a leading role in mass crimes.
Over the past decade and a half of operation the ICTY has indicted 161 persons and as of now concluded the cases of about 120 of them; the ICTR indicted 93 accused and has concluded to judgment as of today the cases of 49 of them. The cases of 17 accused are now pending judgement only.

This limitation has compelled the ad hoc tribunals to shift from a *de jure* status of concurrent jurisdiction over the crimes with member states but with *primacy* of the tribunals to a *de facto* relationship of concurrence and partnership. Hence the tribunals have had to develop and prioritise strategies for the referral of cases to national jurisdictions in the case of the ICTR under Rule 11bis of its ROPE as part of the process of an effective and proper completion of their respective mandates. The transition in legal strategy from concurrence and primacy in the ad hos to one of concurrence and complementarity under the ICC Statute (Art 17) is an acknowledgement of the limitation of the process of international justice.

Whilst one hopes that the ICC record and rate of disposal of cases would be an improvement on that of the ad hoc tribunals, it has to be borne in mind that the ICC is potentially a multi situation jurisdiction, unlike the ad hoc courts. This in itself can pose quite a challenge if the ICC were to have to simultaneously deal with several situations. National legal systems need to be recognised as and effectively made indispensable partners in combating impunity.

It seems that two matters may be of significance in this respect:-

(i) Complementarity must be made effective in order given the limitations of the international system to ensure success in combating
impunity. Complementarity however requires a sustained international effort to empower national legal systems – through *inter alia* a process of law reform and capacity building – play their roles in the prosecution of international crimes. It also requires building the necessary political will in all member states to ensure that no safe havens exist for perpetrators of crimes. The experience of the ICTR and the ICTY in respect of their referral strategies could be useful to the ICC in the implementation of its complementarity programme.

(ii) The architecture of the machinery of international justice needs to be reviewed and possibly restructured to enable regional courts, not only national courts, to play an effective role in this process of complementarity. With the conclusion of the mandates of the ad hoc tribunals a few years hence will the only remaining structures i.e. the ICC and national courts – barring the creation of any new ad hoc or hybrid courts – be able to cope effectively with all the situations which require the intervention of international law? Doing so will clearly be a challenge.

There has been considerable experience with regional judicial structures as part of the process of regional economic or political integration. The East African Community operates the East African Court of Justice; the European Union maintains the European Court of Human Rights; ECOWAS has its Court of Justice; the African Union has established the African Court of Justice and Human Rights; the Americas have the Inter-American Court of Human Rights. The expansion of the jurisdiction of such regional courts to include prosecution of
international crimes may greatly facilitate the struggle for accountability and make complementarity a living reality. Combating impunity and promoting accountability should be part of the process of regional integration particularly where there are regional judicial institutions in place. A pooling of regional resources within a regional court could assist the member states to address issues of impunity and accountability within their own region which may pose a challenge to them individually. There is the additional advantage which regional courts have in common with national courts of proximity to the locus of the crimes and the possibility therefore of a more effective outreach to the communities affected by such mass atrocities.

Indeed in March 2009, the Africa Regional Conference on Fighting Impunity and Promoting International Justice in recognition of the magnitude of the task before the ICC urged the international community to establish regional courts to complement the ICC and called on the Africa Region specifically in partnership with the rest of the international community to work towards the “establishment and operation of the Africa Regional Court”. Even more recently, the Mbeki Commission mandated by the Africa Union to advice on the way towards a resolution of all aspects of the Darfur situation has recommended inter alia the establishment of a hybrid court for Darfur within Sudan’s legal system but with an international component to address issues of legal accountability for the crimes committed in Darfur. The African Union has accepted the recommendation and is working towards its implementation. These are welcome initiatives in what should be a trend that would consolidate, rather than undermine, the mandate of the ICC and provide efficacy in the global fight against impunity.
The closure of the ad hoc and hybrid tribunals will leave a big gap in the architecture of international criminal justice. The creation of new ad hocs and hybrids is an uncertain prospect subject to the political appreciation of the major powers and the decision of the United Nations Security Council. Ultimately the system of international criminal justice may best be served by an architecture comprising a pyramid of judicial structures at the base of which lie the national legal systems with regional judicial institutions at the intermediate stage and at the apex an ICC exercising its jurisdiction on the basis of the complementarity principles of the Rome Statute.

In the absence of this intermediate stage comprising regional courts, there is a real concern that with the possibility of several national systems being unable or unwilling to play their complimentarity role, the ICC may not in reality become the ideal court of last resort. In that event, will it cope with the workload? Will it then meet the expectations of the countries worldwide which now look up to that court for justice?

**CHALLENGE OF UNIVERSAL APPLICATION OF THE LAW**

Equality of all before the law is a fundamental principle of justice. There is a reasonable expectation that like situations will be treated and treated alike. Equality before the law and equal application of the law. These principles hold true for the national legal order; but so should they for the international legal order as well. In the matter of prosecutions it is inconceivable that all crimes will be prosecuted; the exercise of prosecutorial discretion is absolutely necessary for the
proper functioning of any system of criminal justice. Decisions not to prosecute would however be based on clearly articulated, transparent and non-discriminatory grounds. Increasingly there is criticism that the international criminal justice system may not be meeting these standards by virtue of the fact that the Rome Statute regime does not embrace all states; that the rules of accountability are not being applied to all situations and that the concept of universal jurisdiction is being exercised in an arbitrary and discriminatory manner.

The adoption of the Rome Statute raised hopes for the emergence of a truly universal international criminal justice system embracing all member states. Whilst the majority of states now numbering 110 have become parties to the Rome Statute the reach of that jurisdiction remains short of the universal. Several member states remain outside its scope. The jurisdiction of the ICC will thus not reach the activities of all States. Article 13(b) of the Rome Statute provides an opportunity for Security Council referral of situations not ordinarily falling within the jurisdiction of the ICC. But will the international community find unanimity in acting under Chapter VII of the United Nations Charter and Article 13 (b) of the Rome Statute to refer situations of serious human rights violations involving states not party to the statute? It has done so in the case of the Sudan. Universal membership of states in the Rome scheme may make Article 13 referrals unnecessary. Until that universality is attained however the international community should be ready to act on the opportunity provided by Article 13 to ensure that all situations of mass crimes and serious violations of the law do not escape the long reach of justice.
The ICC too has not been without its critics, particularly from several African states which constitute a large portion of its membership. They argue that the ICC is concentrating overwhelmingly in its work on African situations and not on others. In support they point out that of the 8 cases pending at the ICC involving 13 accused all relate to four different situations, all of which are in Africa viz the Democratic Republic of Congo, the Central African Republic, Uganda and the situation in Darfur, Sudan. The reality of course is that the first three situations are self referrals i.e. the situations were referred to the ICC by the states concerned and not a suo moto assumption of jurisdiction by that court. The Sudan situation was a referral by the U.N. Security Council in accordance with Art 13(b) of the Rome Statute. There are also other situations outside of Africa which are at different stages of consideration within the Rome Statute system. This reality has not unfortunately dispelled the criticism of bias. We must continue to explain the reality and we must find ways too of dispelling the perception.

The exercise of universal jurisdiction by States is also coming under criticism, particularly by States in the southern hemisphere. This concept has emerged in the post second world war era enabling national courts by virtue of their national legislation or principles of customary international law to unilaterally exercise criminal jurisdiction over situations and persons outside their territorial limits. The concept of universal jurisdiction is not without controversy. Whilst some hail it as a panacea for impunity, others regard it as a threat to justice. Those who support the concept see it as a formidable tool which could, in a network of domestic tribunals applying it, ensure that no safe havens exist for the perpetrators of grave international crimes such as genocide, crimes against
humanity and war crimes. Still others argue that in modern times the concept has been used as a weapon of the strong and developed northern states against underdeveloped states of the south; that it is applied against peoples of the south and not in respect of the activities of the people of the north in the south; that where it is applied by the north against northerners, a rare occurrence, it is dictated by the political agendas of groups and movements in the north. It is further argued that the real test for the concept will come when an underdeveloped southern state seeks to exercise criminal jurisdiction pursuant to the concept against former or incumbent state officials of a developed northern state.

Perhaps the truth lies somewhere in between these positions. The concept of universal jurisdiction is potentially a formidable tool in the armoury of the struggle against impunity. However because it is exercised arbitrarily by a state there is undoubtedly potential for its abuse and discriminatory application. We do not however have to throw out the baby with the bath water! It may well be that it is the element of arbitrariness that needs some curtailment and that some international legislation to define the parameters within which universal jurisdiction can be exercised by a state might restore confidence in and encourage universal acceptance of the concept. Indeed an important element of the strategy to combat impunity is to ensure that all states give practical effect to the duty to prosecute or extradite suspected perpetrators of mass atrocity.

The prospects for a more effective machinery for the administration of international criminal justice could thus be considerably enhanced if all states were to come within the ambit of the Rome Statute as states parties; if we push for accountability in respect of all situations without exception; and if we were to
legislate to ensure that the concept of universal jurisdiction is exercised less arbitrarily and more in accordance with conditions and procedures agreed upon by the international community.

Ultimately, the challenge of equal application of the law is a political, rather than a legal one. But perceptions of unequal application of the law tend to undermine the considerable gains made in the struggle against impunity. The power and influence of politics must be applied constructively to bring all nations under the rule of law rather than create sacred cows which operate outside the realm of law and justice. That is a task not just for lawyers but particularly for policy makers and for civil society.

CONCLUSION

Despite many challenges the administration of international criminal justice has turned out to be one of the most remarkable developments in the international arena within the past century. The struggle against impunity has been significantly advanced by the work of the international criminal tribunals. Challenges of course remain particularly at this juncture when the architecture of the system may need to alter significantly in the next few years. Overcoming those challenges will require amongst other things harnessing effectively the lessons of the past decade and a half for the future, giving concrete reality to the concept of complimentarity by ensuring that national and regional courts, through effective law reform and capacity building become effective partners in this quest for global justice; by securing a commitment by all states to global membership of the Rome Statute and to equal and indiscriminate application of the law and justice to all situations.
We must remain committed and insist that all states remain committed to the goal of international criminal justice; for justice is essential to national and international peace; peace is essential for the progress and well being of mankind. When the ICTR Trial Chamber on 2\textsuperscript{nd} September 1998 delivered its landmark decision in \textit{Prosecutor vs Jean-Paul Akayesu}, being the first international tribunal judgement to adjudicate on genocide, the then United Nations Secretary General, Kofi Annan welcomed it in words which remain memorable for today and for the future as they were more than a decade ago. He said:

“This judgement is a testament to our collective determination to confront the heinous crime of genocide in a way we never have before. It is a defining example of the ability of the United Nations to establish an effective international legal order and the rule of law. Let us never again be accused of standing by while genocide and crimes against humanity are being committed. I am sure that I speak for the entire international community when I express the hope that this judgement will contribute to the long-term process of national reconciliation in Rwanda. For there can be no healing without peace; there can be no peace without justice, and there can be no justice without respect for human rights and the rule of law”.

I thank you for your attention.