High-level Roundtable Discussion
on promoting accountability for international crimes

Konrad Adenauer Stiftung

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ARUSHA

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I. OPENING SESSION

A. Welcome remarks by Justice Hassan Bubabar Jallow: Prosecutor of the ICTR and MICT

1. Justice Jallow welcomed all participants to the Roundtable discussions on promoting accountability at the national level for serious violations of international law.

2. He commended national jurisdictions for their commitment and continuous efforts to promote accountability at the national level for those persons responsible for serious violations of international humanitarian law. He recalled the 5 November 2014 Resolution of the 7th Colloquium of International Prosecutors in which the importance of accountability for these crimes was emphasized.

3. Justice Jallow stated that these workshops provide a valuable forum for international and national authorities to build on existing relationships, share lessons learned, and develop best practices that will benefit all actors in the fight against impunity. He recalled that much of the International Criminal Tribunal for Rwanda (ICTR)'s success over the past twenty one years has been due to effective partnerships between international and local justice mechanisms, as well as the international community. He reiterated that these partnerships are a testament to the success that collaboration among national and international actors can achieve.

4. Justice Jallow also expressed hope that notwithstanding the ICTR's closure, the international community will continue to play an important role in ensuring accountability for serious violations of international humanitarian law.

5. Lastly, Justice Jallow expressed his gratitude to Deutsche Gesellschaft für Internationale Zusammenarbeit (GIZ) and Konrad Adenaur Stiftung (KAS) for their great support in hosting this important event.

B. Opening remarks by Miguel de Serpa Soares: United Nations Under-Secretary-General and Legal Counsel

6. The United Nations Under-Secretary-General, Mr. Miguel de Serpa Soares, explained the importance of addressing accountability for international crimes in the domestic arena. He also explained the vital role that national courts play in ensuring that there is no accountability gap for international crimes.

7. Mr. Serpa Soares raised the fundamental question of how national actors can balance increased calls for national accountability with the challenge of acquiring sufficient resources. He stressed the importance of national actors securing adequate financing and building sustainable partnerships in order to conduct fair and effective international crimes prosecutions.

8. Mr. Serpa Soares concluded that the legitimacy of a trial rests on the capacity and accountability of the process and that national systems must rise to these challenges.

C. Opening remarks by Judge Theodor Meron: President of the MICT

9. Judge Meron thanked Justice Jallow for inviting him to the Roundtable. He recalled that he has taken part in the dawn of a new era in international law, an era focused on ensuring accountability for the worst of crimes and on strengthening the rule of law, an era often referred to as the era of international justice. He recalled that his era began to take shape with the establishment of the ICTR and the International Criminal Tribunal for the former Yugoslavia (ICTY), amongst other Tribunals.

10. Judge Meron emphasized that international justice is still, in many ways, at a very early stage of its development, and that much more remains to be done to ensure that commitment to accountability and respect for the rule of law are established and entrenched the world over. He observed that international justice

is, in many ways, entering a new and critical stage in its development, and that much of the responsibility for how the future of international justice will unfold rests with all the Roundtable discussions' participants.

11. Judge Meron also emphasized that it is only with the true engagement of States and their commitment to ensuring accountability, both at the national and international levels, that it will be possible to look back at the horrific atrocities and terrible crimes that humanity has wrought in our lifetimes and for centuries before, and say: never again. Judge Meron encouraged the participants to keep in mind all that international courts, like the ICTR, can offer. He noted that a significant resource offered by international courts is a generation of young lawyers and other professionals who have worked with and trained at the ICTR and other international criminal courts, and who are very much a part of those courts' living legacy.

II. SESSION ONE

Moderators: ICTY Prosecutor, Dr. Serge Brammertz, and the Director of Public Prosecutions of Uganda, Hon. Mike Chibita

How do national authorities develop the political will necessary to promote accountability? Issues to be considered are how to foster a political climate receptive to holding all persons responsible for crimes and instituting necessary legal reform to bring national prosecutions in line with international standards, particularly with respect to questions of amnesty, immunity, and the death penalty

A. Political will

12. The first session commenced with a discussion on the political climate necessary for states to prosecute international crimes and the ways in which this political climate can be fostered.

13. Rwanda, Kenya and Uganda are examples of countries which have demonstrated the political will to undertake the necessary legal and institutional reforms to conduct international crimes prosecutions. The political will to institute these reforms emanated from a combination of forces, including pressure from the international community and civil society, and the need to bring accountability.

14. Uganda set up the international crimes division as part of its High Court. The conflict with the LRA was what prompted the Ugandan government to implement this institutional reform. The international crimes division provided Uganda with a local solution to a local problem.

15. Kenya has ratified the ICC Statute and has implemented the International Crimes Act. It is also at the tail-end of establishing the international crimes division of the High Court. The DPP's office has also set up an international crimes division with dedicated staff to conduct international crimes prosecutions.

16. In Rwanda, domestic prosecutions of international crimes are preferable because they bring legitimacy. Rwanda currently has five active international crimes prosecutions–two from the ICTR and three from other states. To prosecute international crimes, Rwanda established the international crimes unit and recruited specialized prosecutors and judges to handle these cases.

17. The discussion also focused on how public awareness is an important way to develop political will, particularly where access to justice is weak. In this regard, national human rights commissions can play an important role in investigating and documenting international crimes and are often mandated to promote awareness of international crimes.

18. In addition, States should avoid passing laws that restrict NGO's activities and concentrate on adopting laws that address, rather than suppress, accountability for international crimes.

B. Amnesties

19. The moderators noted that several international treaties, such as the 1948 Convention on the Prevention and Punishment of the Crime of Genocide, the four Geneva Conventions of 1949 and Additional Protocol I of 1977, and the 1984 Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, prevent states parties from passing amnesties for international crimes. These treaties do so by placing states parties under an obligation to investigate and prosecute those responsible for committing international crimes. States should, therefore, be reminded of their treaty obligations to investigate and prosecute international crimes.

20. Currently, most of the countries that have adopted amnesty legislation ensure that such legislation excludes the application of the amnesty to international crimes. Countries that adopt national amnesties should also avoid granting blanket amnesties which only dilute the objectives of international criminal and human rights law. Even when states deviate from principal accountability for practical reasons–such as ending conflict, as was the case in Columbia–they must be reminded that they still have a legal obligation to pursue justice because they have ratified international treaties.

21. Like the international treaties mentioned above, international criminal courts and tribunals do not recognize amnesties for international crimes. The Special Court for Sierra Leone (SCSL) was created because of whether or not a local amnesty applied where there had been serious violations of international laws. Whilst civil society in Sierra Leone opposed the idea of an amnesty, the government thought that it was a necessary measure to end the war. This prompted the government to request the United Nations to establish the SCSL. However, the Appeals Chamber of the SCSL found that Sierra Leone's national amnesty did not cover international crimes, over which states may exercise universal jurisdiction.

C. Immunities

22. States' national legislation may include legal impediments–including domestic immunity provisions–which protect their state officials, for example members of parliament, from prosecution in their domestic courts. Whilst immunity may be permissible for certain domestic offences, the same international law that prevents amnesties also prevents states from granting domestic immunities to their state officials for international crimes prosecutions. States should, therefore, ensure that any domestic immunity provisions either explicitly exclude international crimes prosecutions or require that a competent body, for example parliament, will waive any immunities for such prosecutions.

23. As discussed in respect of amnesties, many states are under binding treaty obligations to investigate and prosecute those responsible for committing international crimes as well as to provide victims with remedies and reparations. None of the treaties listed above allow states to make exceptions for state officials. States should, therefore, ensure that domestic immunity provisions exclude prosecution for international crimes.

D. Death Penalty

24. Several countries on the African continent have taken great strides to abolish the death penalty or declare a moratorium on its use. Rwanda's elimination of the death penalty in 2007 was triggered by Rule 11 *bis* of the ICTR's Rules of Procedure and Evidence which precludes cases being transferred to countries that would apply the death penalty. To satisfy this requirement, Rwanda undertook substantive and procedural reforms to ensure its national laws and practices complied with international fair trial standards, most notably by abolishing the death penalty.

25. In light of the growing abolitionist trend in human rights and the international criminal tribunals' practice, when states institute legal reforms to

allow for the prosecution of international crimes, they should also ensure that the corresponding penalties do not include the death penalty.

III. SESSION TWO

Moderators: Chief Justice of Tanzania, Hon. Mohamed Chande Othman, and former UN High Commissioner for Human Rights, and former ICTR President, Hon. Navanethem Pillay

How do national authorities ensure adequate capacity—both in terms of human and physical infrastructures—to effectively deliver justice and promote accountability? Issues to be considered are effective means of ensuring access to justice, providing adequate conditions of detention, and ensuring witness safety

26. The second session commenced with observations that international crimes are complex and therefore require expertise, experience, and resources. National jurisdictions may supply less than what is required because they are lack capacity and resources. Capacity building was identified as the central theme in this discussion.

27. It was noted that capacity building in national jurisdictions needs to factor in the existing legal infrastructure/framework, (including the domestication of international crimes). It also needs to build judicial capacity as well as the capacity of law enforcement officials (e.g investigators and prosecutors).

A. Human capacity

28. The adequacy of criminal courts to handle international crimes needs to be carefully assessed. Different areas that require capacity building should first be identified in order for proper strategies to be devised. Capacity building has been conducted through training programs in many jurisdictions. In Kenya, for example, training programs for prosecutors are conducted according to different specialized groups/crimes. The office of the Director of Public Prosecutions (DPP)

has established a number of divisions which deal with judicial review, domestic violence, and sexual violence offences. Officers trained in these fields are dedicated to prosecute these specific cases.

29. During the discussions, questions were posed to the participants about, for example, who bears the responsibility for carrying out investigations. In Tanzania, an act was passed in 2008, which gives prosecutors the responsibility of investigating international crimes. However, investigations for lesser offences remain the responsibility of the police. In Sudan the responsibility lies with both the police and the investigators, who work together. However, a decision on dismissing an investigation, can only be made by a prosecutor.

30. National jurisdictions need to take advantage of existing resources and technical assistance offered by regional and international bodies. Justice Rapid Response (JRR) provides resources for short, technical assignments. For example, JRR has recently conducted training in Dakar on technical issues such as handwriting analysis. During the discussion, participants observed that technical training should be combined with mentoring to make it more targeted, effective and comprehensive.

31. Rwanda has had to work very closely with the ICTR and has thus benefitted from the ICTR in terms of capacity building. For example, as the ICTR downsized, a lot of the witness protection duties were passed on to the Rwandan government. The ICTR also assisted Rwanda to set up a robust witness protection system by providing training, workshops and exchanging ideas.

B. Physical infrastructures

32. The genocide/war crimes courts are very well staffed in Rwanda. Courtrooms were constructed to specifically hear international crimes cases and Rwanda's Mpanga prison was certified to meet international standards. The prison is also monitored by the ICRC to ensure that it maintains international standards.

33. In Kenya, conditions of detention have been improved although a lot still needs to be done. To avoid overcrowding in prisons, Kenya has introduced mechanisms to deal with petty offenders.

C. Witness protection

34. Kenya has a witness protection agency that is independent of the government. A number of witnesses have been put under protection through this agency, including by relocation. However, there is a challenge of limited resources involved in the operations of this agency. There is no certainty on how long the agency can sustain the lives of the relocated witnesses outside the country.

IV. SESSION THREE

Moderators: Under-Secretary-General and Special Adviser of the Secretary-General on the Prevention of Genocide, Mr. Adama Dieng, and Director of Operations at Justice Rapid Response, Ms. Carole Frampton-de Tscharner

How to build effective partnerships to support national efforts to promote accountability? Issues to be considered include continued engagement with civil society and the international community to provide financial support and expertise to support national actors in the investigation and prosecution of international crimes, including ensuring adequate protection for victims

35. For national efforts to prosecute international crimes to be effective and fair it is incumbent upon all national and international actors in the fight against impunity to work together to build effective partnerships. The discussion focused on effective partnerships that can assist national actors to promote accountability for international crimes. Often a lack of capacity at the national level to conduct international crimes prosecutions increases the need for effective partnerships to build the capacity and will to handle such crimes.

A. Partnering entities

36. Continued engagement with partnering entities–such as civil society organisations, international and regional courts, UN agencies, the media, police, and NGOs–should provide national actors with the capacity, expertise and financial support necessary to investigate and prosecute international crimes, whilst also ensuring adequate protection of victims and witnesses.

37. When identifying potential partners, national actors should consider whether partnering organisations may have competing interests or raise neutrality and confidentiality concerns. For organisations such as the International Committee of the Red Cross (ICRC), it is critical that confidentiality is maintained. This enables the ICRC to remain close to conflicts without compromising the judicial process that may follow such conflicts. To avoid jeopardizing either partners' objectives, where possible, protocols should be established to ensure that the necessary level of confidentiality and neutrality is maintained even after cooperation ends.

B. What makes an effective partnership

38. Effective partnerships are sustainable, diverse and reciprocal, and require devoted partners and defined parameters. Some partnerships may be established through official agreement, such as mutual legal assistance agreements or memoranda of understanding, whilst others may only require an agreement on the protocols, programmes and safeguards regulating the partnership. Identifying needs and then working on initiatives to build capacity is paramount for building successful partnerships.

39. National authorities must be able to trust their partnering entities. To build this trust, a memorandum of understanding could be adopted between the partners in order to govern issues such as the retention of information and other modalities of the partnership. This is particularly the case where national authorities will need to share confidential information with partnering agencies. For example, when Justice Rapid Response assisted a country to investigate

international crimes, it entered into a memorandum of association which specifically provided that all information collated belonged to the national authorities, who retained ultimate control over its dissemination.

40. It is also important that partnering entities lend credibility to national actors' investigation and prosecution of international crimes. In this regard, partnering entities must be–and must be seen to be–politically and culturally acceptable and appropriate.

C. Partnerships to build capacity

41. Once states decide that they will prosecute international crimes, one of the first steps to building this capacity is to ensure they are parties to the relevant international treaties criminalizing international crimes. The ICRC, for example, has provided advisory services on international humanitarian law by engaging national actors to ratify and accede to the Geneva conventions.

42. Forging partnerships with international partners, such as international tribunals and education institutions and the ICRC, is a key way of providing national actors with the requisite training to conduct international crimes prosecutions. It is important, however, to ensure that the training provided meets the requirements on the ground and that a needs assessment is conducted. Effective examples of these partnerships include the assistance provided by the ICTR, International Criminal Tribunal for the former Yugoslavia (ICTY) and the ICRC to national actors in the form of training, mentoring and technical assistance. Employing national prosecutors and lawyers in international tribunals and running internship programs has also been an effective way to train national actors.

43. Law schools can also assist national actors to promote accountability for international crimes. An example of such a partnership is Georgetown University

which has a program that assists people to go back to their communities with the necessary skills.

44. Engaging and developing partnerships with the media can be an effective way to promote public awareness of international crimes prosecutions. However, local and national media may often require capacity building before they can responsibly and accurately report on this legal development. National actors could, therefore, partner with civil society organisations who could finance and conduct this training. Once the media understand how a reformed justice system can bring accountability for international crimes, their reporting can both educate and raise awareness in the local community.

D. Partnerships to assist with witness protection

45. Before, during and after proceedings, victims and witnesses of international crimes will require protection, security, and psychological support. Where such capacity or expertise is lacking, national actors could partner with international experts, international criminal tribunals, civil society organisations, and medical institutions to ensure that they have the expertise and infrastructure to provide the necessary support to witnesses and victims at each stage of the trial.

46. International criminal tribunals could provide training on the laws, protocols and procedures required for national actors to run effective witness protection programmes. The ICTR, for example, partnered with Rwanda's national witness and victim support unit in the Prosecutor General's office and conducted training programmes on implementing protective measures in Rwanda. In Rwanda, witness support is provided on a 24-hour basis through hotlines, which have been a particularly effective way to engage with victims of sexual violence. Support is also provided to ex-convicts to help them re-integrate as productive members of society.

V. SESSION FOUR

Moderators: Registrar of the African Court on Human and Peoples' Rights, Dr. Robert Eno, and Executive Director of the Rwanda Bar Association, Mr. Victor Mugabe

How do national authorities ensure an adequate and effective defence? Issues to be considered are provisions for legal aid for indigent accused through pro bono *or government funded programs, as well as effective measures to ensure an independent defence*

47. The discussion focused on three main issues: (i) the importance of legal aid and how it is administered; (ii) challenges in providing legal aid (internationally/nationally in African countries); and (iii) effective measures that can ensure an independent defence.

A. Rwanda's experience

48. The Rwanda Bar Association's experiences of developing a legal aid system in Rwanda were discussed. Rwanda has an extensive legal aid program which includes legal aid for persons accused of serious violations of international law. The Rwanda Bar Association was created in 1997 after the genocide, and has achieved a lot in terms of organizing the legal aid system for indigent persons accused of crimes committed during the genocide.

49. The Rwanda Bar Association has developed a system of legal aid for cases transferred from the ICTR and other jurisdictions. Legal aid representation is provided for cases transferred from the ICTR from a selected pool of about 70 lawyers who are highly experienced in criminal matters. Although these lawyers are considered to be highly experienced, there are still challenges on, for example, their knowledge of fair trial principles. The Rwanda Bar Association encourages training and requires its members to attend continuous legal training. Lawyers obtain "legal education credits" each year if they undergo specialized legal training workshops.

50. The Rwandan government has set aside a budget of $450,000 per year for legal aid. Since the establishment of the legal aid system in 1997, there was a huge increase in the budget from 2012, intended to cater for cases transferred from the ICTR. However, Rwanda faces the challenge of how to quantify an "effective" defence in monetary terms. Every accused has the right to an effective defence, therefore, the challenge is: how much does an "effective" defence cost?

51. The Rwandan Bar Association and the Ministry of Justice had to determine whether lawyers should be paid on an hourly or lump sum basis. Rwanda followed the ICTR's lead and agreed on fixed rate/lump sum payment scheme. There were also challenges regarding indigent accused persons who wanted to choose their own pro bono lawyers who in some cases happened not to be on the list provided by the Bar Association.

B. A way forward for Africa

52. Legal aid is recognized as a fundamental right. The Dakar Resolution of 1999 and other treaties that African countries have signed require that these countries establish legal aid systems. While countries are aware of their obligations to establish legal aid systems, this awareness seems to be more of a theory than a reality because there is no implementation and the theory has not been put into practice. For the "need for legal aid systems" theory to be realized it is important that "fair trial" procedures are put into place. The question is whether there is commitment to fair trial standards and if not, the challenges need to be examined.

53. In Uganda, for example, civil society and lawyers asked the government to take the responsibility for providing a legal aid budget. Some governments, however, may be reluctant to provide a legal aid budget. They may not view legal aid as a priority area and may consider that public funds should not be used to support "criminals", especially people charged with capital offenses.

54. The African Court for Human and Peoples' Rights (the African Court/the Court) has also learned some lessons from the ICTR and ICTY on the management of legal aid for indigent applicants. It was only from 2012 that the African Court was faced with a number of cases where the applicants were indigent and needed assistance. The Court then developed a legal aid policy based on a lump sum (not hourly rate) for each stage in the proceedings. The Court also circulated applications to the Bar associations throughout Africa inviting lawyers, who were willing, to be placed on a *pro bono* roster. However, the *pro bono* program is yet to be launched. The Court has also looked into the possibility of working with law schools in order to attract more willing lawyers for the *pro bono* roster. It is thus still in the process of developing a holistic legal aid program.

55. There is also a need to provide training on international law and its application, especially to young lawyers. An understanding of the fair trial principles in international law will go a long way towards attracting young lawyers to enlist in *pro bono* programs.

56. Another indication of lack of commitment to ensuring fair trial rights can be seen from the reluctance of judicial authorities to inform indigent accused persons of their right to legal aid. In most cases in national jurisdictions, indigent accused persons do not request legal aid because they do not know that it is their right to do so, even though it is provided for in legislation.

57. In Kenya, the constitution now provides for legal aid as a fundamental right for persons charged with serious offences. Although Kenya has been providing legal aid and *pro bono* lawyers for a while, it is only recently that the right to a fair trial is recognized as including the right to be provided with a lawyer free of charge where an accused is facing a serious charge. Kenya now has a "Legal Aid Bill" in parliament, which will hopefully come into effect soon.

58. At the conclusion of the session, suggestions were made on how to improve legal aid systems in Africa. It was noted that putting systems in place will work as

long as there is a real commitment to fair trial rights. It was further noted and suggested that perhaps the rights of the accused persons should be placed within the responsibility of independent offices, not under the authority of governments. It was also suggested that there should be a strategy to collect funds at a national or continental level, with every lawyer, for example, contributing $1 per month. These funds can be administered by a national/continental or an international public defender's office. It is time that judicial bodies recognize legal aid as a fundamental right, like any other right.

VI. CLOSING REMARKS

A. Vote of thanks

59. National prosecutors Mr. Mutangana and Mr. Bah presented closing remarks and a vote of thank at the conclusion of the Roundtable discussions. They thanked Prosecutor Hassan Bubacar Jallow for hosting the event. They also expressed their appreciation to the moderators and all participants, for engaging in discussions that guide national jurisdictions on the way forward in the prosecution of international crimes, after the closure of the ICTR and the ICTY.

60. Both Mr. Mutangana and Mr. Bah expressed a continued commitment to the fight against impunity at the national level for serious violations of international law.

B. Closing address

61. Justice Hassan Bubacar Jallow once again thanked all the participants for honoring his invitation to attend the Roundtable discussions. He commended everyone for greatly contributing to the important discussions on issues of accountability for serious violations of international law.

62. Justice Jallow reiterated his confidence that, having worked together in the last 21 years, national and international prosecuting authorities have forged

strong relationships by exchanging lessons learned and best practices. He also expressed hope that the lessons learned and best practices will provide further guidance to national jurisdictions as they continue efforts to fight against impunity for grave breaches of international law.

63. Justice Jallow concluded by reiterating his gratitude to GIZ and KAS whose financial support enabled his office to orgainse and host these important and informative Roundtable discussions on promoting accountability for international crimes.