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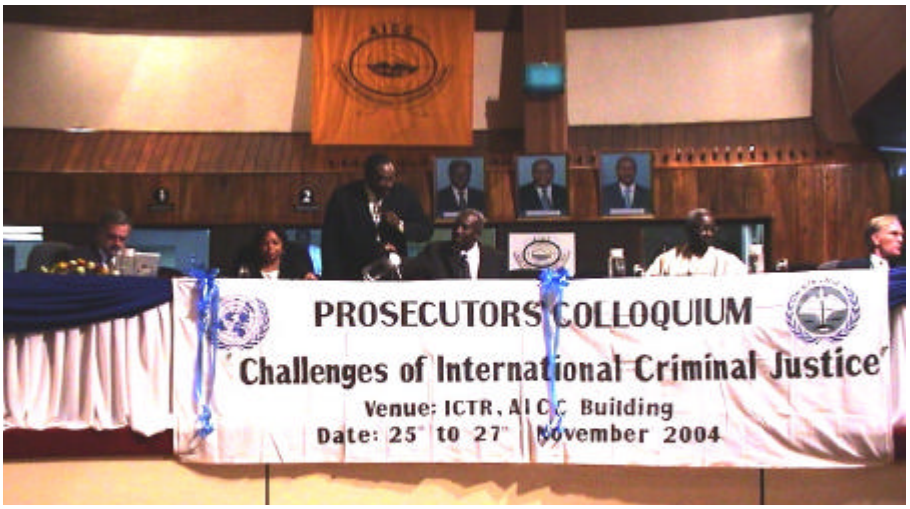

International Criminal Tribunal Prosecutors Conclude Conference in Arusha

In This Issue:

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On 27 November, 2004, the Prosecutors from the International Criminal Tribunal for Rwanda (ICTR), the International Criminal Tribunal for the former Yugoslavia (ICTY), the Special Court for Sierra Leone (SCSL) and from the International Criminal Court (ICC) concluded three days of discussions about how to better prepare themselves for meeting the challenges of delivering international criminal justice. The prosecutors issued a joint statement from Arusha, Tanzania, the headquarters of the International Criminal Tribunal for Rwanda (ICTR) where the conference was held.

The statement was signed by prosecutors Hassan Bubacar Jallow, of the ICTR, Carla Del Ponte, of the International Criminal Tribunal for the former Yugoslavia (ICTY), Luis Moreno Ocampo of the ICC and David Crane of the Special Court for Sierra Leone.

The prosecutors reaffirmed their commitment to ending impunity, deterring crimes against humanity, instituting a culture of accountability and bringing about peace and reconciliation in post-conflict societies. Their statement also calls upon national and international authorities to assist the tribunals by arresting and transferring indicted fugitives such as Radovan Karadzic, Ratko Mladic, Ante Gotovina, Félicien Kabuga and Charles Taylor for trial.

During the three days of meetings in Arusha, the prosecutors discussed a wide range of issues they face in bringing to justice those most responsible for genocide, war crimes and crimes against humanity in the conflict regions of the world.

The prosecutors exchanged views on successful strategies for conducting investigations, protecting witnesses and enforcing sentences against convicts of the international tribunals. They also assessed how best to administer tribunals and to complete their work in the time limits prescribed by the United Nations.

The prosecutors have formed a task force to gather and exchange strategies and best practices for the prosecution of international crimes. They agreed to meet again in six months in Sierra Leone.

Other presenters at the conference included: Adama Dieng, ICTR Registrar; Navanethem Pillay, Appeals Judge at the ICC and former President of the ICTR; Lovemore Munlo, Deputy Registrar at ICTR, Gavin Ruxton, Chief of prosecutions at the ICTY; Martin Ngoga, Deputy Prosecutor General of Rwanda; Bernard Muna, former Deputy Prosecutor of the ICTR; Michael Bohlander from the University of Durham and Binaifer Nowrojee of Human Rights Watch and Harvard Law School.

The colloquium was funded by grants to the ICTR from the Ford Foundation and the Open Society Institute.

Joint Statement of the Prosecutors

As international prosecutors, we have been entrusted with the responsibility of bringing to justice individuals accused of genocide, crimes against humanity and war crimes.

We represent all the regions of the world. Our institutions were variously founded by treaty, by the United Nations Security Council, or by agreement between the United Nations and national governments.

Having reviewed the challenges of international criminal justice, we have concluded that the ideal behind the establishment of each of our institutions is the same: to end impunity for the most serious crimes that plague humankind, and to contribute to peace and the prevention of future crimes.

These tribunals have made great progress. Heads of state or government have been brought to justice. Other major perpetrators have been indicted, arrested and tried; many have been convicted; trials are ongoing. These institutions have recognized that genocide can be committed through acts of sexual violence; they have found that the use of child soldiers is a crime against humanity, they have brought the weight of law to bear on the evils of ethnic cleansing. But because many people continue to suffer from these crimes throughout the world, we affirm that only a sustained commitment to accountability will deter these atrocities.

The ultimate success of these tribunals depends on the continued political support of the international community. Resources, cooperation, and assistance are essential to enforce the principle of accountability and the rule of law.

The resolve of the international community will also be measured by its willingness to deliver indictees for trial, even if politically difficult. International criminal justice must apply to indicted fugitives such as Radovan Karadzic, Ratko Mladic, Ante Gotovina, Félicien Kabuga, and Charles Taylor. To permit individuals accused of the gravest of crimes to evade justice would reinforce the culture of impunity that fuels conflict and atrocities.

National legal systems have a vital role in the prosecution of these grave crimes. International institutions need step in only when national systems lack the strength or impartiality to hold the most serious offenders to account. Combined national and international efforts will be a guarantee of impartial justice.
We reaffirm our commitment to the task that has been entrusted to us. We call upon all national and international authorities to strengthen their dedication to justice.

We believe that the people of the world are entitled to a system that will deter grave international crimes and hold to account those who bear the greatest responsibility. Only when a culture of accountability has replaced the culture of impunity can the diverse people of the world live and prosper together in peace.
Signed on this 27th day of November 2004.

Signed by:

Luis Moreno Ocampo
Prosecutor of the International Criminal Court

Carla Del Ponte
Prosecutor of the International Criminal Tribunal for the former Yugoslavia

Hassan Bubacar Jallow
Prosecutor of the International Criminal Tribunal for Rwanda

David Crane
Prosecutor of the Special Court for Sierra Leone

Welcome Address by Prosecutor Jallow to the Colloquium of Prosecutors of the International Criminal Tribunals

Your Honour Mr. President of the ICTR,
Honourable Judges,
Mr. Registrar,
Distinguished Guests,
Members of staff,

Prosecutor Jallow addresses the Prosecutors' Colloquium

It is my singular honour and pleasure to welcome you all to this Colloquium of the Prosecutors of the international criminal tribunals. A special welcome is extended to my honourable colleagues, Louis Moreno O'Campo, the Prosecutor of the International Criminal Court (ICC), as well as the two Deputy Prosecutors of the ICC, Mr. David Crane, the Prosecutor of the Special Court for

Sierra Leone (SCSL), Mr. Longuino Monteiro, the Prosecutor General of East Timor, Mr. Martin Ngoga, Deputy Prosecutor General of Rwanda, the Representative of the government of Mali, together with their delegations, the Chief of Prosecutions at the OTP-ICTY who is deputising for the Prosecutor, as well as the distinguished independent experts who have been invited to participate. I also recognize the presence of Judge Navanethem Pillay, former President of the ICTR and now a Judge of the Appeals Chamber of the ICC and Dr. Bernard Muna, former Deputy Prosecutor of the ICTR.

This colloquium, which for the first time brings together the Prosecutors of the Tribunals, has been for long in the pipeline. A combination of factors seemed to conspire to postpone it on several occasions. But I am glad – and I believe so is everybody here - that we have overcome those obstacles and are finally gathered in Arusha. Indeed, auspiciously on the 10th anniversary, to the month, of the passing of the UN Security Council Resolution 955(1994) on the 8th of November 1994 to establish the International Criminal Tribunal for Rwanda (ICTR).

Our pleasure is the least because we all convinced of the necessity of this meeting. We hope that it will also be the beginning of a process of regular consultation between the Prosecutors and their officers. We have a common mandate: to contribute to consolidating and enhancing international justice and the rule of law by bringing to account in an international forum those who are responsible for the most egregious violations of human rights. Such persons, we are well aware, often are beyond the reach of an 'unwilling or unable' national system of justice. Hence the need to share our separate experiences in this common cause for justice with a view to finding ways to improve the effectiveness of the international criminal justice system. For the next two days, we shall under the general theme of "Challenges of International Criminal Justice" be exchanging views on various aspects of that process: the conduct of investigations generally and specifically on sexual violence offences; the challenges of trial; lessons learnt from the enforcement of sentences; the experience of hosting international criminal offenders; the challenge of administration of an international criminal tribunal; the challenge of proper completion and winding up of the work of the Ad Hoc tribunals, amongst other topics.

We are looking for and expecting practical results from the deliberations of the Colloquium. We hope that as a result we would be able to identify the constraints and challenges which we face in these various processes; where we have not so far succeeded in overcoming them we should explore possible solutions. In this way I believe we should be able to establish "best practices" and "standards" in the international prosecution of crime.

The system of international criminal justice is today at a turning point. We meet against the backdrop of the Completion Strategy of the ICTR and the ICTY. As the ad hoc tribunals prepare to wind up, the mantle of leadership for the cause of international justice will fall on the shoulders of the ICC. Looking back over the decade since the establishment of the tribunals it is fair to conclude that, measured against their objectives and the expectations of the founders, these institutions have had a reasonable level of success: despite many considerable constraints –novelty, of resources, of logistics and of a jurisprudential clean slate on the most important issues they were required to resolve.

In the decade of their existence, the Ad Hoc tribunals have made a significant contribution in filling in the jurisprudential vacuum by developing and enriching the jurisprudence of international criminal law and in elaborating upon the rules of practice, procedure and evidence as well as setting out international standards of fair trial. Substantial experience and expertise has now been acquired in the conduct of international criminal investigations, in the selection of cases for prosecution and in facing the enormous logistical challenges of mounting and pursuing an international criminal prosecution.

The experience of the past decade, I believe, provides us with several lessons. And the colloquium should provide us with a good opportunity to explore these lessons of the past and the present as well as the challenges of the future. However, I believe that the most important lesson is that it has been demonstrated conclusively that the system of international criminal justice is, despite all its constraints, challenges and shortcomings, a viable and feasible option.

The international prosecution of crime is 'do-able'. But it is not a perfect system. And this colloquium should not be merely an exercise in self-congratulation. We must be bold and courageous to identify our shortcomings and continue to strive for greater efficiency and expedition in the delivery of justice in conformity with the standards of due process and fair trial. Whatever deficiencies exist do not however detract from the good case for the maintenance of the system. We must remember that no national legal system can claim to be perfect. After centuries of existence many national legal systems, or indeed whole legal traditions, continue to grapple with and seek solutions to some of the most basic yet fundamental issues of justice.

International criminal justice is, however, not only feasible; it is necessary if peace and justice are to be maintained. Can we legitimately implore victims and survivors to be patient and exercise restraint if we are unable or unwilling to deliver justice to assuage their wounds? This link between peace and justice, between individual self restraint and justice, has on a number of occasions, been driven home to many of us by ordinary Rwandan survivors. In the face of tremendous and hitherto unimaginable personal tragedy, they are ready to be patient and to restrain their indignation so long as there is the prospect of the law and justice catching up with the perpetrators. We must not let them and other victims or survivors down. We should now accept that large scale brutal violations of human rights such as occurred on the level the world witnessed in Rwanda and the former Yugoslavia cannot be effectively dealt with through national systems or other quasi-criminal international procedures. The international penal sanction and

option must be retained. It must be applied to hold to account those bearing the greatest responsibility. As the ICTR, the ICTY and the SCSL have done in the case of former Heads of State, Heads of Government, Cabinet Ministers, heads of local government, leaders of the military, etc, etc.

But no such system can succeed without the fullest international support and cooperation in various matters: Resources; Investigations; Apprehension and transfer of fugitives; Witness protection and relocation; Prosecution of cases within the national jurisdiction. The current level of international support in respect of these matters poses a serious challenge to the work of the ad hoc Tribunals. I hope that on the occasion of the colloquium we shall collectively address this issue and offer a possible way forward.

On behalf of the staff of the OTP and the entire ICTR, I once more welcome you all to this colloquium. I thank you.

25 November 2004

RAPPORTEURS' REPORTS PRESENTED AT THE PROSECUTORS' COLLOQUIUM

Chief Rapporteur: Dr Alex Obote-Odora, Special Assistant to Prosecutor
Assisted by: Ms Adebayejo Adesola, Trial Attorney

Challenges of International Criminal Justice
International Prosecution

26 November 2004

Moderator: Mr. Luis Moreno Ocampo, Prosecutor, ICC

Panelists: Ms. Melanie Werrett; Ms. Carla Del Ponte, Prosecutor, ICTY; Mr. David Crane, Prosecutor, Special Court for Sierra Leone; Mr. Hassan B. Jallow, Prosecutor, ICTR

Mr. Gavin Ruxton's Presentation

Fact Finding Exercise
I am from a system of police fact finding and then handed to prosecutors. Here prosecutors do not get a neat package. There is one chance to fact find and then scrambling at trial. Cases here evolve factually, so we perhaps should do more of a dossier. Moving that way with tools such as case map. One problem is knowledge is in the minds and they leave!

Disclosure
Moving to an Electronic Disclosure Suite, and out open book approach. "Within our actual knowledge" should be defined internally.

Judicial Intervention
This is on the increase.

Pre-trial judges resolving issues, but some problems:
- Control of level of indictees
- Determining which charges should be subject to evidence.
- Number of witnesses
- Deadlines for length of cases.

Trial
The balance between written and oral evidence not yet struck. Some impatience from judges with too much crime based oral evidence. Written statements create pressure on staff and judges to prepare and read respectively. In Milosevic many witnesses have their statements tendered and only cross-examined. But there is discontent from e.g. the press.

We spend too much time on crime-based issues e.g. was there a genocide in Rwanda.

Recent Developments
Use of contempt powers for e.g. the intimidation of witnesses in trial of Albanian accused. The rights of an accused to defend self. Guilty pleas – some 15 now. Problems with proving a joint criminal enterprise between a General and Corporal.

Transfer of cases
Mr. Moreno Ocampo to Mr. Crane:
How did you determine the targets?

Mr. David Crane:
- Study facts and law and make an assessment
- Ask the clients, the victims
- Consult all of the staff

Mr. Hassan Jallow (in the course of his presentation) choosing indictees:
- Status of person
- Role played by person
- Geographic spread in that did not want to exclude in a discriminatory way any area
- Full consultation with STA's
- No need for the Bureau to make this selection. They do not have the database that Prosecutor has.

Ms. Frederik De Vlaming to Mr. David Crane:
Please elaborate on criteria for selection of indictees.

Mr. David Crane:
- Look at diplomatic and cultural aspects of indictee. It could be destabilizing of a whole region
- Must reach out to the civil society, NGO's
- Base selection on theory of case adjusted with new information
- Have discussions on "greatest responsibility e.g. local crime? Children?

Mr. Muna:
Kambanda plea caused difficulties. Some thought that he needed to be given benefit of pleading guilty. But he was one of the major perpetrators. Now there is room for plea bargaining to ensure Kambanda impact does not interfere.

Professor Osinbajo of Mr. Crane:
Is Office of Defence only for offenders?

Ms. Monasabian:
Office is only for accused and not for victims. But this may be amended in the Statute.

Professor Osinbajo of Mr. Jallow:
What was rationale of confirming indictments and then look for evidence?

Mr. Muna:
International pressure required us to arrest suspects walking at large, so holding indictments prepared. But we had enough evidence to have indictment confirmed.

Mr. Ngoga:
- ·Rwanda has a confession programme which attractions reduction in sentence.
- ·An additional factor in selecting accused has been the place in society e.g. musicians
- ·A need to have a legacy programme in ICTR
- ·Inconsistent international approach e.g. spending money in Arusha, but not in Congo on same issue
- ·Delays contributed by method of paying defence for hours spent.

Mr. Ruxton:
- ·In ICTR now a lump sum payment based upon a grading of case.
- ·Confirmation of indictment based upon a prima facie case. There was material to satisfy judges of that. Investigations continued and facts added. That was not unethical.

Ms. Monasebian:
Special Court agrees with defence on a programme in advance. But there must be flexibility including for quality and for pleas.

Mr. Munlo:
Cases can be affected e.g. by late amendments to indictments.

Mr. Moreno Ocampo:
Were there strategies to start with? Why were leaders targeted in ICTR and not ICTY?

Mr. Muna:
There was a clear strategy aimed at leaders. If a lesser offender identified but committed enormous crime, then target him. Hampered by view that responsibility was individual.

Mr. Coté:
There was little strategy. We identified a number of targets to get the ball rolling and it grew from there.

PANEL

Ms. Melanie Werrett:
- ·ICTR/ICTY are round pegs in square UN holes.
- ·Lack of proper resources, not just luck.
- ·Dehumanizing attitudes – e.g. resources/ person, witness/individuals

Mr. Luc Coté:
- ·Desirable that in the country where crime committed, but naïve to think that can always be the case. Apart from continuing conflict, the country may be unwilling to give up enough sovereignty.
- ·Problem of decreasing the number of witnesses includes attachment by prosecutors to witnesses.
- ·Limited resources means we must be particularly focused. But S.L. is a special case as well, because has the support of the government.
- ·Must take political reality into account and the charging criteria should be made public. E.g. ICTR and ICC policy is written
- ·Transparency is essential

Ms. Fatou Bensouda:
- ·We have the history of not being troubled by completion strategy.
- ·But we have our own issues
- ·Investigations are often in dangerous circumstances, governments may not be co-operative, and peace negotiations may be going on.
- ·We must be guided by the Statute. Prosecutors are involved in the investigations and prosecutors are team leaders.
- ·We have duty to investigate inculpatory and exculpatory matters, not just later disclose exculpatory material.
- ·We must respect the integrity of victims, and we have staff and protocols directed to the handling of different categories of witnesses and potential accused.
- ·Prosecutor has duty to present evidence of "unique investigating opportunity" to pre trial chamber who will give directions which will preserve the opportunity.
- ·The joint prosecution/investigation approach is very important

Mr. Gavin Ruxton:
- ·ICTY had constant media images in Europe and that gave some information, but we had to get out and find our own witnesses such as refugees.
- ·All we were doing early was experimental
- ·We were building up the picture of structures of military, militia etc.
- ·We had concentrated on regional and national level, and focus was always on leaders. If lower level perpetrators fitted into the picture then we would indict.

·We could not trust much of the information coming to us out of Balkans.
·Jurisdiction is ongoing and we have looked at issues e.g. NATO bombarding, as they arose.
·Very vulnerable to criticism if there are gaps in court activity, but cannot always control that. May be we need to be creative and fill court with pre trial issues which will speed up process and use courts effectively.

Ms. Frederiek De Vlaming to ICTY:
ICTY has not had a strategy on paper. Would it have been possible to create it at the beginning?

Mr. Gavin Ruxton:
It would have been difficult. Even if we had done it as events unfolded we would have been diverted.

Mr. Samuel Akorimo to ICC:
Please comment on ICC provision on compensation, are giving effect to it?

Mr. Moreno Ocampo:
There will be a Trust Fund for compensation with an independent international panel of Directors. The judges have final say on who and what amount. How do you make decision? Numbers kidnapped but 1.6m displaced. We need a community approach (e.g. hospitals, schools)

Mr. Ciré Ali Ba:
Could you speak more on JCE?

Mr. Gavin Ruxton:
Lifted from civil criminal law. Not quite same as American conspiracy law. Judges adopted it, but subject to development. Can be difficult to establish a link.

Mr. Ngoga:
There is a Genocide Survivors Assistance Fund which has 5% of government budget each year, and 2% of monthly income of income earners. This is a workable model.

Mr. Paul Ng'arua:
On frivolous action by Defence Counsel we object and have been successful in denying fees.

SUMMING UP
Mr. Moreno Ocampo:
Independence.
We must learn from each other but be independent and learn from others e.g. the innovative prosecutions in Argentina and creative other approaches like investigations in Chile via children. Look at alternatives e.g. Gachacha.

Interdependence
We must be proactive. We are a complementary court. We have a few cases, but we must be proactive and you must help us.

Rapporteurs:
1. Ken Fleming, QC Former Senior Trial Attorney
2. Mulvaney Barbara Senior Trial Attorney

Challenges of Conducting Investigations of International Crimes

Afternoon session, 25 November 2004

This session addressed some of the common challenges that arise during the investigation of crimes by international courts and tribunals. Participants had the opportunity to exchange experiences and suggestions for improving the crucial work that they carry out in the international justice system. The session consisted of three presentations on topics relevant to the topic, followed by the remarks of four individuals intimately involved in the investigative work of their courts.

"The Early Challenges of Conducting Investigations and Prosecutions Before International Criminal Tribunals" Bernard Muna.

Moderator: Mr. Hassan Bubacar Jallow, Prosecutor, ICTR

Panelists: Mr. Richard Renaud, Chief of Investigations, ICTR; Mr. Gavin Ruxton, Chief of Prosecutions, ICTY; Mr. Serge Brammertz, Deputy Proseccutor (Investigations), ICC; Dr. Alan White, Chief of Investigations, Special Court for Sierra Leone

Muna made the following central points in his presentation:

Ad-hoc tribunals were political creations and, as such, raised expectations in the international community that were not always realistic. Speedy results were expected but investigations encountered many obstacles that do not exist in domestic jurisdictions. Most of those suspected of mass crimes had fled Rwanda and it was not a simple task to track them down. The ICTR does not have a police force and thus had to depend upon the cooperation of national police forces and enforcement systems. While some states cooperated in the ICTR's investigatory work, some others did not. In contract, the ICTY had an advantage in that it had the assistance of NATO forces in locating and arresting suspects. Muna expressed the hope that the ICC will receive more cooperation from states and national systems in their investigation of criminals.

The ICTR was created in the image of the UN General Assembly. That is, staff was recruited from around the world. While such geographic representation seemed like a good idea, this diversity brought with it a number of challenges in the creation of an investigation team, including those related to language, professional training and background, and culture. In contrast, the ICC has the opportunity to draw upon a more experienced pool of staff as many professionals have already worked with the ad-hoc tribunals.

The coming together of different legal systems has also created some difficulties for the ICTR. Practitioners trained in different systems may have markedly different perspectives on issues such as

statements by the accused, which may ultimately influence decisions and sentences.

Muna believes that the accusatorial legal system is not as well suited as the inquisitorial system for examining "the collective responsibility of a government that becomes a predator on its people." The accusatorial approach also may lead to lengthy proceedings that result take up time and resources.

Muna stressed that the international justice system must promote a consciousness of the importance of international courts, even among populations far removed from the kinds of conflicts examined by international criminal court. He remarked that "if it is not our turn today, it might be ours tomorrow."

It was pointed out that the ICTR has not yet resolved its credibility problem in the eyes of the Rwandan people. This is because the trials are taking place outside the territory in which the crimes were committed.

Muna suggested that cases that remain after the tribunal closes could be transferred to the new African Court for Human and Peoples' Rights as well as to national jurisdictions.

"**Jurisprudence on Sexual Violence in International Tribunals"**
Navanethem Pillay

Pillay started by pointing out that, as a judge, she cannot tell prosecutors how to advance their investigations. She stressed that Judges need to be balanced since they hear cases from the point of view of both prosecutors and defense.

She feels, however, that one area of criminal investigation that has not received sufficient attention is that of crimes of sexual violence.

Crimes of sexual violence require a particular approach since they are surrounded by feelings of shame and stigma on the part of victims.

In early ICTR cases, the charge of rape was sometimes added at a late stage of the prosecution in response to witness testimony. This was due in part to investigations that did not bring out evidence that supported a charge of crimes of sexual violence in the original indictment.

Investigators have also at times lacked awareness of the importance of investigating these crimes and sensitivity in collecting evidence about them.

Pillay pointed out that jurisprudence from the ad-hoc tribunals has influenced the definitions of rape and other sexual crimes and consequently the nature of evidence that has to be collected to prosecute these crimes.

She concluded by asserting that rape and other sexual crimes are as serious as other types of international crime. As such, they ought to be accorded the same attention.

"We Can do Better: Investigating and Prosecuting International Crimes of Sexual Violence"
Binaifer Nowrojee

The central issue raised in this presentation was that the prosecution of crimes of sexual violence has not been as consistent or thorough as it could be in international criminal courts. This could be corrected by a number of measures:

Political will on the part of the prosecutor
Designing a prosecution strategy for rape at the outset of the court's activities.
Training all staff so that they understand the complex issues surrounding sexual crimes and their investigation.

Dedicating a staff specialized in the investigation of sexual crimes
Care for the well-being, safety, and dignity of rape victims. This requires that sufficient information be provided to victims, that they have the agency to decide how they want to proceed vis-à-vis the judicial process, that they be properly prepared to testify, and that they receive appropriate support and protection services.

Creating an enabling courtroom environment for victims of sexual crimes
Nowrojee ended by pointing out that the evidence necessary to prosecute perpetrators of crimes of sexual violence exists. But prosecutors need to ask themselves how they can improve their methods of obtaining it.

Comments by Panelists

Gavin Ruxton, Chief of Prosecution, ICTY:
He commented on the difference between the nature of investigations immediately following the creation of the ICTY and those taking place as it approaches the end of its mandate. Investigations now support the work of prosecutors instead of leading to indictments. He reiterated some of the challenges laid by Bernard Muna in the ICTR, including the lack of cooperation of states in investigations. Another challenge facing investigators is lack familiarity with the context and facts. Evidence collected long after the events investigated is also a serious problem. It is also sometimes difficult for the OTP to know when to stop collecting evidence, or when a case is "trial-ready." Limited resources suggest that investigators need to move on to a new case within a reasonable amount of time. Finally, Ruxton described the need to "package" cases in such a way that they can be dealt with readily by other jurisdictions when transferred.

Alan White, Chief of Investigations, SCSL:
He shared the following best practices of his court:

- A court needs to have a well-defined mandate so that investigators can be properly focused.

- Gender crimes were included in the investigation plan from the outset.

- Investigators and prosecutors worked side by side.

- The SCSL identified as their client the people of Sierra Leone and reached out to them through town meetings so that they understood the court's mission.

- The right staff should be hired at the beginning of the court's work.

- Witnesses should be taken care of before, during, and after testimony. The SCSL created a witness management unit to this end.

- Donor fatigue will quickly ensue if there is not a "product." Focused work on investigations will help in countering such fatigue.

Serge Brammertz, Deputy Prosecutor (Investigations), ICC:
He recognized that the challenges cited by Muna still exist to a large degree today. The ICC has encountered similar difficulties in the management of expectations on the part of the international community (speedy justice). Victims' associations may have different expectations from the international community (full justice), and national governments yet different ones (local capacity building). Effective communication can help with expectation management.

Brammertz stressed the difficulty of investigating crimes. While the ad-hoc tribunals have recourse to UN Security Council Chapter 7 powers, the ICC does not. Supporting the creation of the ICC is not the same thing as supporting its work on a day-to-day basis. ICC investigations will also sometimes be carried out in dangerous environments, sometimes with continuing conflict.

In terms of crimes of sexual violence, the ICC has a specialized unit in the investigation division responsible for initiating policy, conducting training, and planning investigations on gender crimes.

Richard Renaud, Chief of Investigations, ICTR:
He stressed the importance of the frank comments offered during the session. Witnesses are a crucial resource in the international justice process and should be treated accordingly. The ICTR could also benefit from "insider witnesses." Plea bargaining as a method for expediting the judicial process should be explored further. Many of the challenges brought up by Muna are still relevant, he noted, in particular the need for cooperation by states in the investigation process. Renaud agreed that the treatment of gender crimes and women witnesses is of the utmost importance and agreed with the need for specialized staff.

Comments/Questions from participants

One participant compared the experiences of the ad-hoc tribunals and the SCSL in their approaches to investigation. The existence of Sierra Leonean staff at the SCSL has made an enormous contribution to the work of the prosecutor. The ICTR made the choice to not employ Rwandans in the OTP and has not had the comparable benefits. It was pointed out that local staff have the advantage of knowing the complete context of the crimes investigated, the language, and the culture. Sierra Leoneans have been particularly useful in getting direct testimony from sexual crime victims instead going through an interpreter.

Another participant pointed out the difficulty of protecting witnesses in Rwanda. It is not possible to have a watertight system of witness protection because identities of Rwandan witnesses often become known despite ICTR measures to ensure anonymity. The visibility of ICTR investigations in the localities where witnesses reside reveals their participation. The system of witness protection should be reconsidered; having witnesses known might be a better guarantee of their security than their anonymity. In the current system, the identity of anonymous witnesses is known to both the prosecution and defence teams, and the possibility for leaks of this information cannot be excluded. In several cases, witnesses have lost their lives.

It was also pointed out that the achievements of the ICTR are not widely known in Rwanda. This information should be made available to the Rwandan population so that they see progress being made and justice being provided. If the court proceedings were taking place where the crimes occurred, as they do in Sierra Leone, the successes the court would have a higher profile.

The ICC, another participant remarked, is based in The Hague but has worldwide jurisdiction. Thus, the judicial process will often be carried out far from the localities where the crimes occurred. The ICC will also face challenges of witness protection, especially as it may try criminals as conflict continues.

One participant pointed out that many international tribunals have no "coercive powers" – police force, right to subpoena witnesses, and other enforcement powers. The hybrid courts have the advantage of being able to rely on national enforcement systems. Why couldn't the ICC have incorporated a provision that states are required to assist the prosecutor in the investigation and prosecution process?

Finally, a member of the audience pointed out that when the ICTR Office of the Prosecutor was established, the conflict in Rwanda had just ended and it was unclear exactly what role the Rwandan nationals should play in the staffing of the ICTR. It may be easy in hindsight to criticize some of the decisions made by the ICTR, but the policies were made in good faith.

Several participants pointed that, even though the mandate of the ICTR is coming to an end, it is not too late to make changes in its procedures that would facilitate its work and its mission to serve the Rwandan people.

General Considerations on the Transfer of Cases and Legal Transplants

Professor Bohlander

The issue raises a fundamental question: Assuming that the transplants are necessary to instil respect for the rule of law, is the international community at present adopting the proper approach in coaxing states to implement them? Or, to put it provocatively, are we looking at an example of cultural condescension? Professor Bohlander addressed the issue on the basis of a few examples from Bosnia, Kosovo and Timor-Leste.

In the case of transferring trials from the ICTY to Bosnia, the international community had voiced concern in substantive and procedural areas of the law, amongst others with respect to the following issues (issues in italics):

Various rules implemented by the ICTY to facilitate receiving testimony in an efficient and effective way and to avoid the need to call multiple witnesses in some cases, or the same witnesses over and over again in cases against different accused should be adopted to the extent possible. - Apart from the fact that at least two former judges of the ICTY (Hunt and Wald) had publicly voiced their criticism of the procedural paradigm of efficiency under the umbrella of the Tribunals' completion strategies as a danger to the due process rights of the accused, many domestic systems adhere to the so-called "best evidence" rule. In fact, one may wonder whether it is not the use of the adversarial approach itself in such complex proceedings, which causes delays to a large extent. The case for the superiority of the law and practice of the ICTY is not made out.

Provisions should be enacted in Bosnia to allow shortened proceedings where the accused admits guilt and it is in the interest of justice to limit the amount of evidence taken. The OHR consultants thought that if the confession was clear and complete, and was corroborated by other evidence, further investigation should only be undertaken on the recommendation of the prosecutor. Confessions of guilt should be regarded as an additional piece of evidence, which together with a sufficient factual basis, establishing that the crime occurred and that the participation of the accused may in itself lead to a conviction. The principle of the material truth at present was said to put on the court an obligation to take part very actively in the collection of evidence in a way that might at least be seen as having an influence on its impartiality. With the creation of a relatively strong prosecutorial organisation, the validity of the principle was to be reassessed. - At this time, a procedure for guilty pleas does not exist in Serbia, Montenegro or in Republika Srpska. The previous Federation Criminal Procedure Code contained a regulation to the effect that the authority conducting the procedure has a duty to gather other evidence even though the accused has confessed. A similar regulation was in place in Republika Srpska. These regulations are an example of "the principle of the material truth", which to has deep roots in Bosnia and Herzegovina. Under this system, it is for the court, not the prosecutor, to decide whether it has heard enough evidence, and such a system leaves enough discretion to accept a confession as the basis for a judgement, but not as a plea with procedural consequences. It should make us wary that even previous communist jurisdictions like the former German Democratic Republic, who were bent on obtaining confessions, ended up by requiring additional evidence apart from a confession.

Any judge, who has worked in an inquisitorial system will know that not every pro-active judge is a biased one, just as every experienced counsel from an adversarial system will know that judges there are not always the impartial umpires they are said to be, for example as far as their summing up to the jury is concerned.

These points alone might tend to suggest that the international community may have no real intention in observing – let alone respecting – the legal traditions of the countries where the conflicts occurred and where the trials are now to be held. Some might even perceive a strong trend to introduce (mostly) common law concepts and attitudes. Another symptom of potential disregard for the domestic systems is the ease with which some international(ised) courts or administrations discount national reservations about the ways in which the supposedly universal international standards are implemented, not to say implanted, into the local law. Professor Bohlander mentioned a few brief examples, which were not strictly models of transfer from international to national jurisdictions, but which highlight the systemic problems nonetheless.

Kosovo

Under Yugoslav criminal law, there existed no offence of crimes against humanity. However, the District Court in Gjilan in the case against Momcilo Trajkovic tried to apply this class of offence by direct recourse to international customary law within the framework of Article 142 of the Yugoslav Federal Criminal Code. Under UNMIK law, however, the Yugoslav constitution was dispositive of the issue, and both the old socialist and the new Federal constitution required an act of parliament in order to create criminal liability.

Timor-Leste

Section 15 of UNTAET/REG/2000/15 – the regulation on the special panels for war crimes prosecutions – is copied from Article 27 of the ICC Statute and declares governmental office and diplomatic immunity as irrelevant for criminal prosecution. The special panels are, however, national, not international courts; thus there may be problems in reconciling the application of the ICC clause with international law vis-à-vis the Congo v. Belgium judgement of the International Court of Justice of 14 February 2002 insofar as protected citizens or officials of other states are concerned, because the ICJ majority held that the ICC exclusion clause and similar ones at the ICTY and ICTR applied only to international criminal courts, not to national jurisdictions of third countries. As far as Timorese protected officials are concerned, the domestic law

may, of course, provide for the prosecution of its own protected officials even during their term of office. Other national courts may, however, be excluded from doing so even after the person no longer holds the protected position, for crimes committed during his term of office, unless they were committed in a private capacity. Whether the domestic law of Timor-Leste previously provided for this, was unclear, because the courts were divided as to which law (Indonesian or Portuguese) was applicable before UNTAET and whether UNTAET law is applicable to crimes committed before 1999. This has been settled by an act of Parliament of 10 December 2003, which declares by way of authentic interpretation that the Indonesian law was "de facto" applicable. The Indonesian constitution of 1945 did not include any provision on immunities. The Penal Code of Indonesia as amended in 1999 did contain exemptions from criminal liability for acts done in the execution of a statute, or under lawful orders, but made provision for the enhancement of the sentence by one third if the offender used his official position to commit the crime. The new Timorese constitution does provide e.g. for domestic immunity for the President, subject to a waiver by a two-thirds majority of Parliament, for delegates to Parliament and to a certain extent for members of the executive. Under article 165 of the constitution, UNTAET regulations only remain in force insofar as they are not contrary to the new constitution.

Section 16 of UNTAET/REG/2000/15 applies the liability for superior responsibility which has been developed under international criminal law, and it does apply it also to acts of which the superior had no prior knowledge but omitted to punish when he learnt of them. What is often overlooked in the discussion is that the superior is punished as a murderer, génocidaire, rapist etc., and not for dereliction of duty. This means that the offence of the subordinate is attributed to the superior as if he had committed it himself, even if he did not know at the time of the commission of the offence and only failed to punish the offender after learning about it, which may be weeks or even months after the event. The Indonesian Penal Code did not provide for a similar liability. This means UNTAET introduced a totally new concept.

In German eyes, the retro-active facet of the principle of superior responsibility was a violation of the "Schuldprinzip" (principle of individual guilt). This legal construction has prevented the German legislature from copying Article 28 of the ICC Statute in its entirety into the German code of international criminal law (Völkerstrafgesetzbuch), and the government draft described the concept of superior's liability as a perpetrator of the subordinate's crime merely because of the omission to punish as clearly exaggerated and irreconcilable with German criminal law principles.

Professor Bohlander remarked in conclusion that Germany as a powerful state could quite easily defy the agenda of the international legal community, for example, as far as the wide application of superior responsibility is concerned. Bosnia, Kosovo and Timor-Leste as conflict-ridden post-war countries could not. If it is the aim of the international community and the transitional administrations to help countries and regions that have recently come out of internal turmoil to achieve political autonomy, then colonialist appearances must be avoided. Lawyers who wish to lend support to such states must familiarise themselves thoroughly with the ideas underlying a country's legal system before they can set about reforming it. Reforms should take place as much as possible within the existing framework and traditions. Wholesale replacement of legal traditions because of impatience and lack of proper planning, ignorance or unwillingness to understand them is a gross violation of the historical identity of a people. These countries and their citizens are also keenly aware of the issue of international double standards, both legal and political. Their respect for the alleged superiority of the rule of law based on Western democratic thinking will to a very large extent depend on their perception that the same rules apply to all. Recent history in that respect had been less than encouraging.

Challenges of International Criminal Justice

Service of Sentence for International Crimes

26 November 2004, 2:30-4:00 p.m.

Moderator: Mr. David Crane, Prosecutor, Special Court for Sierra Leone

Panelists: Dr. John Hocking, Deputy Registrar, ICTY; Mr. Lovemore Munlo, Deputy Registrar, ICTR.

Mr. David Crane introduced the topic of the Panel.

"Lessons learnt on Enforcement of Sentences: The ICTY Experience"
Dr. John Hocking

Dr. Hocking explained that he had been Deputy Registrar for ICTR for two months. He was previously Senior Legal Officer in the Appeals Chamber, dealing with both ICTR and ICTY appeals. He noted that we were commemorating a horrific episode in human history, this being the 10th year following the genocide in Rwanda.

He outlined important achievements accomplished.

It was just over 10 years since ICTY had been created. It had been the dream of international lawyers after Nurenberg and Tokyo to create an international criminal court, and it was realized with ICTY. As a consequence, there is ICTR, SCSL, East Timor, and, it was hoped, Cambodia, and now the ICC, the first permanent international criminal court.

By 1997, the ICTY had completed one trial, Tadic, and it was about to start the Celieici trial. It had 11 judges. Now it has 25 judges and runs six trials every day in three court rooms on a split shift. Thousands of victims have testified and nearly 40 accused have had their processes completed.

ICTY also had the first ever international court of

criminal appeal, there having been no appeals from the Nurenberg of Tokyo Tribunals. The Appeals Chamber handles cases from both ICTY and ICTR. Last year it delivered 350 written decisions on topics, such as, evidence, jurisdiction, procedure, and final appeal judgments from judgments of the Trial Chambers.

There has also been an evolution in other areas, such as, victim witness support, and interpretation and translation (overcoming the difficulties of translating legal concepts from English into BCS and French). An international criminal defence bar has also been established, as well as a well-established legal aid system.

All of these have involved a process of learning and struggle.

There are now state of the art court rooms.

There is a detention facility.

How did this all come about? In Dr. Hocking's opinion, it was due to the critical effort of key individuals, such as, the Prosecutor, the Registrar and the President, who just refused to give up. Within one of its establishment, ICTY had Rules of Procedure and Evidence, an arrest, its first trial (Tadic).

The Tadic trial played a critical role in the development of the Tribunal, since trials have a momentum, and it is important to get them going. They are still learning from trials at ICTY. It is not possible to foresee all the problems that will come up. It is important to get trials started with commitment, creativity, and flexibility.

ICTY and ICTR are criminal courts set up within the UN administrative structure. The UN had never operated a criminal court before. An example of one issue that had to be overcome was to deal effectively with protected witnesses.

State co-operation is important in many areas, such as investigations, arrests, prosecutions, and relocating witnesses. It is also important the reinforcement of sentences.

The ICTY detention unit is established as part of the normal Dutch prison in The Hague. It is a model prison, with education possibilities, facilities for exercise, and much else.

Article 27 of the ICTY Statute governs, in relation to the service of sentence. ICTY is entirely dependent on the co-operation of States to take its prisoners. The ICTY has entered into agreements, and it has not been an easy task. ICTY is asking States to take prisoners convicted of the most serious crimes, such as, genocide, crimes against humanity, and war crimes, with the only compensation being the honour of serving the international community.

There are 10 agreements in place, all with European countries: UK, Denmark, Germany, Spain, France, Sweden, Austria, Norway, Finland, and Italy.

Domestic regimes apply with respect to early release, which has to be authorized by the President of the ICTY after consultation with the judges.

Twenty four persons have gone to serve the sentences in States. Ten have completed their sentences. Fourteen are still in detention.

Pursuant to the completion strategy, all indictments at ICTY must be finalized by December 31 of this year. There are 20 fugitives still at large. There are about 60 accused in custody, although some are on provision release. It is estimated that each of the 10 States, which have agreements with ICTY, may be expected to take on five more prisoners.

It is not easy to take on these prisoners, who often do not speak the language of the State involved, and whose families are far away. ICRC organizes visits of family and friends to detained persons, but this is difficult.

ICTY will close in 2010 with the last appeals. There will have to be residual powers in some body that will have to take over. This will require an amendment of the Statute.

Part of the completion strategy is the use of Rule 11 bs, under which law and middle level offenders are handed back to courts in the former Yugoslavia. There is also an obligation to handover know-how. ICTY has developed great expertise. Dr. Hocking was of the view that they should all they could to handover know-how.

One failing of ICTY has been the failure to reach out to the local community. An Outreach Programme has been established with EU funding. Dr. Hocking shared an experience he had, in relation to the Outreach initiative. One of the criticisms of ICTY had been its failure to follow up with witnesses. Outreach and the Helsinki Committee started a programme called "Bridging the Gap", relating to the Celibici trial.

The camp that was at the centre of that trial is an hour or so from Sarajevo. Bosnian Serbs were held there as prisoners by Bosnian Muslim forces. It was a horrific place. There were murders, rapes, torture, and violent assaults on prisoners. Persons from ICTY, who had worked on a trial, went to the place. It was cold and snowing. The hall was packed. Most of the victims had come in from Republika Serpska. From 9 a.m. until 5:30 p.m., the ICTY people spoke about the trial, beginning with the lead investigator, who explained the investigation process and why four persons were indicted, and others not. They moved on to the trial itself, showing two hours of footage of the trial, interspersed with comments from those involved.

It was a moving experience. Dr. Hocking remembered particularly the reaction to the video shown of the camp. Three elderly men sitting at the front nodded agreement with everything that was said.

This was the first chance for the community to see the outcome of the trial and the appeal, and to know what the sentence was. Most people cannot get to The Hague to watch the trials, the way they can for a

domestic trial. After they testify, witnesses don't know what comes afterward. This experience was like closing the circle of that trial.

If ICTY may have failed to meet the needs of victims, witnesses and communities, the alternative, which was not to have a trial at all, was unacceptable, in Dr. Hocking's view.

Mr. David Crane introduced the next presentation.

"**The Enforcement of Sentences in the ICTR**"
Mr. Lovemore Munlo

Mr. Munlo opened by congratulating the Prosecutor for a well organized Colloquium and for inviting the Registry to participate.

Mr. Munlo had prepared a document on Enforcement of Sentences and said he would speak to it, not read it.

Enforcement of sentences at ICTR was a challenge. The powers of the Tribunal were restricted by the ICTR Statutes. ICTR had no police power, no sovereign authority, and no territory where it could take convicted persons. Under the host agreement in Tanzania, as soon as a person is convicted, he must leave Tanzania as soon as practical. Where to take them?

Article 26 of the ICTR Statute governs the service of sentence, and provides for the service of sentence in Rwanda or State willing to take the convicted person. This is a very big problem not so many countries were willing to take ICTR prisoners. The Registrar has taken the initiative to see if countries would take convicted persons.

ICTR has succeeded in getting only six countries to take prisoners: Mali, Benin, Swaziland, Italy, France, and Sweden. Negotiations are at an advance stage with Rwanda.

ICTR has a model agreement, which subject to modification, depending on the particular country. In order to maintain minimum international standards, the Tribunal may have to help a country to meet them.

Article 26 also speaks about the responsibilities the accepting State has and what is expected from ICTR. The governing law is that of the country. ICTR has a supervisory capacity. After the completion strategy successfully winds up in 2010, who will have the supervisory powers? This is an issue both Tribunals have to meet.

Article 27 deals with commutation of sentence or pardon. This matter is referred to the President, who must consult with the Trial Chamber that tried the case and others, and make a decision, which must always be in the interests of justice. After completion, who will do this? Mr. Munlo thinks there will have to be a body to carry on this work that is designated by ICTR.

Also with respect to enforcement of sentences, there is procedure to follow to get in touch with a country for a potential transfer. On 10 May 2000, the President put in place a Practice Direction, to govern the procedure. The initial contact is made by the Registrar, who provides all the information relating to the convicted person, so that the State can take and inform decision. If there is interest, then a comprehensive memorandum is done to the President, covering matters, such as international minimum standards, security, freedom to move within cells, exercise facilities, and so on. All the information on the prison, including the situation of his family, how much of his sentence has been served, and so on, is provided to the President, who consults with the Trial Chamber. Rwanda is also informed. The request is then forwarded to the State concerned. If there is agreement, then a certificate is signed by the Registrar and the transfers made. It is a long, complicated process.

One complication might relate, for example, to the health of the accused. Some countries say they cannot afford the care, or cannot offer a cell that conforms to the necessary standards, and ICTR has to assist.
Dr. Alex Obote-Odora announced that the delegate from Mali had fallen ill, and had not been able to attend the Colloquium. He explained that the delegate's paper on the administration of sentences in Mali, relating to persons convicted by ICTR, would not be read.

Mr. David Crane observed that SCSL was facing the same issues on sentence enforcement that were being faced by ICTY and ICTR. The SCSL legislation provided that a sentence could be served in Sierra Leone "or elsewhere", and they were putting much emphasis on "elsewhere", since they had to protect their prisoners. It would be too bad, if, much later, people broke into a detention facility either to release or kill the prisoners. The SCSL was trying to move prisoners elsewhere, and the Registrar was taking steps to do this.
Mr. David Crane then opened the floor to discussion.

Mr. Ciré Ali Ba (STA, ICTR) commented on two features: pardon and commutation of sentence, and review.

He was not too concerned about pardoning under Article 27, but felt the issue should be reserved for the legislative assembly of the country that had lived through the genocide.

There is going to be a jurisdictional void.

He was more concerned about review applications under Article 25, where the discovery of new facts could cause one to reconsider the decision. How would this be done after completion? This was an important feature of criminal justice. He felt reviews should be referred to the Appeals Chamber of the ICC, as the only convenient form.

Mr. David Crane echoed the question: What to do when all was done, especially in relation to administration? He said that part of the SCSL exist strategy related to what to do with records, convicted persons serving sentence, and other matters. They were thinking about a residual office, where records could go, and which could monitor indictees [convicted

persons]. He felt the UN should develop a "UN war crimes residual office", where individuals from the various Tribunals would work, with librarians, records, and other facilities. He felt these things had to be thought of now.

Mr. Lovemore Munlo observed that on this issue, the ICTR had already engaged the UN since two years past, to deal with transitional issues, and this was being taken care of.

Mr. David Crane disagreed. It was not being taken care of, if each office did something separately. He suggested that there was a need for a single office. This was a Registry function. In his opinion, the Tribunals ought to consolidate and work together.

He also thought it was wrong to give to refer reviews to the ICC. The ICC had other things to do. It had nothing to do with the issues of concern to the ad hoc Tribunals. It did not have their expertise.

Mr. Roland Amoussouga (Chief of External Relations and Strategic Planning Section, ICTR) supported what the Deputy Registrar, Mr. Munlo had said, with respect to engaging to the UN. The model agreement that the Office of Legal Affairs (OLA) had sent to ICTR had been amended, since most African States were unable to meet the required standards, and ICTR had to meet certain costs. ICTR had tried to get the General Assembly to accept this. The OLA agreed to the amendment, but refused the financial support. The General Assembly approved the ICTR request and made the money available, but the OLA opposed the expenditure of the money by ICTR, on the basis that ICTR was not competent to spend the money. ICTR was blocked for two years and has now only got authorization. At the same time, it has engaged the General Assembly in long term planning.

The long term financial obligation of the UN in sentence enforcement is a serious issue for African countries. The UN has agreed to give a thought to a body to replace ICTR, especially in respect to the monitoring of sentences.

Mr. David Crane observed that they had some young indictees, which could mean a commitment of 40 years, that is, life.

Ms. Binaifer Nowrojee (Lecturer, Harvard Law School and Senior Researcher, Human Rights Watch) asked Mr. Munlo how many of the detainees at ICTR were HIV positive and what the cost was of their care.

Mr. Lovemore Munlo refused to divulge this information, for reasons of confidentiality.

Mr. Samuel Akorimo (Commander, Investigation, ICTR) posed the question: What did we aim to achieve in the enforcement of sentences? He spoke about to criminological theories of punishment: (1) the consequentialist theory, under which punishment is to lead to reform of the convict and his reintegration in society; and (2) the retributive theory, under which, regardless of the result, punishment must occur. He said he subscribed to a third theory, which was a hybrid. Punishment should occur, but should also bring about reform and lead to reintegration.

Did the panellists agree that we needed the third category? This would be to ensure punishment, but also to reintegrate perpetrators into the community. What was in place in the international Tribunals?

Mr. Akorimo had been impressed by the Gacaca process in Rwanda. He was also hopeful about the Sierra Leone model, involving town hall forums.

What was in place to advance the third model?
Mr. David Crane invited comment from the floor, but Dr. John Hocking fielded the question first.

At ICTY, he said, all convicted persons serve their time in western European prisons, all of which had provisions for early release. The general rule was that release would occur after two thirds of the sentence was served. In some countries, there was a limit to the maximum period a person could in prison, so, for example, in Spain, where the maximum is 20 years, a convicted person could not go, if he had been sentenced to more than 20 years.

All prisoners came back to the President when they had the two thirds mark. It was pretty much of a case that they got out an early release.

What was the purpose of sentence? Most people sentenced are going to come back to the community, and it is in the community's interest that they should be able to function without causing further problems.

Respecting the matter of additional evidence coming up, they had provisions at ICTY relating to additional evidence, which apply to the end of the appeals process. ICTY also has a review procedure after the end of the appeals process. The Prosecution has only 12 months to provide new evidence. There is no time limit on the defence, and it can request a review at any time after. This is a question for the residual power.

Mr. Ciré Ali Ba opined that, if there was a residual authority, then ICTY and ICTR were no longer ad hoc Tribunals. Matters should be referred to the ICC.

Mr. Martin Ngoga (Deputy Prosecutor-General, Rwanda) asked where the minimum standards written down.

In Rwanda's negotiations with ICTR, which had been very successful, the Tribunal seemed to be setting its own standards. For example, where a dormitory was required, the Tribunal required cells. Where was the minimum? It was never the maximum. If the standards kept changing, could they ever be applied equally? He offered the example of the prisoner, who is required to have a television set, which he had never had before.

Mr. Ngoga raised the question of how the enforcement of sentences was advancing the goal of reconciliation, if the circumstances of an ICTR convicted person were to be different, not only from those of fellow prisoners in Rwanda, but from those of ordinary law abiding citizens.

He also raised the questions about standards for victims. Prisoners with HIV got care. Were their victims to be left to die? How did this advance reconciliation? Mr. Ngoga said that there was a big audience that viewed all these as window dressing, especially those who had survived atrocities.

Mr. Ngoga recognized that they could not provide similar conditions for victims, but should have a minimum policy for survivors. He put himself in the place of victims.

As a Prosecutor, was he below standard, he asked? He could only justify himself by speaking from the point of view of the victims.

Mr. David Crane said this was a challenge in Sierra Leone. People there were also concerned with what happened to convicted persons. Many thought they should be executed. This was not the international standard, but one had to be delicate and respectful, and try to explain the rule of law was more powerful than the rule of the gun.

Victim assistance and support is necessary for the whole process too. If pieces were missing from the process, victims would feel they were victims again. The SCSL accused were living quite well. For an ordinary person, it was good to get one meal a day. Detainees got four. This bothered people in Sierra Leone.

Mr. Roland Amoussouga described the issue raised by Mr. Ngoga as very touchy. ICTR was not a national court, but an international jurisdiction that was bound by international covenant to respect minimum standards to whole humanity agreed were necessary.

The International Community could only help Rwanda to improve standards, and progress was being made, although there was a way to go. He found, as a head of the ICTR delegation to Rwanda, that many of the minimum standards were being achieved, and he was proud of Rwanda's progress.

ICTR does not disclose information about the treatment of victims with HIV. ICTR was at the forefront of activism to bring the plight of victims in Rwanda to attention. The Registry had put forward a programme, which the UN had voted down as ultra vires of the Statute, but now ICTR helped witnesses with HIV. Some members of the Rwandan government did not know this. ICTR had taken a step forward, creating a team with a gynaecologist, a psychologist, and a nurse. ICTR tried to give equal assistance to victim witnesses, and the money spent on witnesses was far higher than on accused.

Mr. Martin Ngogo suggested that there would be breach of confidentiality, if the public could know how much ICTR spent on witnesses and victims. It would be to the advantage of the ICTR to clear its image. Nobody in the public knew what the amount was.

Mr. Lovemore Munlo attempted to clarify the original question from Ms. Binaifer Nowrojee, but reported that he did not have the figures with him. He stated that the amount was not static, but fluctuated.

Ms. Binaifer Nowrojee responded to Mr. Amoussouga, she said, in order to correct the impression he had left. The team comprised of the gynaecologist and others had just started up this year.

To general applause, Ms. Nowrojee said that there needed to be accountability in the Tribunal, and the public needed to know what was spent on the medical care of victims and detainees.

Mr. David Crane decided to move things on, inviting Mr. Bernard Muna to make a comment that he had been wishing to offer.

Mr. Bernard Muna (Former Deputy Prosecutor, ICTR) raised a concern about the policy of remission of sentence, which seemed to him to be almost automatic at ICTY. He suggest there should be an additional element, concerning the conduct and recognition by the prisoner - repentance - about the wrong done to society some prisoners could go back to their particular community as heroes, having spent time in prison in defence of their group. It would not help reconciliation to give one third remission of sentence, and then have the person go back as a hero. The prisoner had to accept of the reality what he did.

There was a need to assess the attitude of the prisoner, so that he did not aggravate the situation on his return to society.

Dr. John Hocking accepted Mr. Muna's point as a good one. He explained that there was not an automatic granting early release, although this might be so in practice. The procedure was complex. The President would ask information on prisoner from the country where he was detained and, he believed, from the OTP too. Behaviour in detention did count.

The issue of repentance, however, was not taken into account, to have the person to return to a local community to apologize. This was not the domain of the ICTY, but it was a good point.

Judge Navanethem Pillay (Appeals Judge, ICC) asked what happen to persons who were acquitted, and whether States would accept them. She also asked whether the place of service of sentence figured on plea bargaining.

Dr. John Hocking took these questions, noting that persons at ICTY had been acquitted by both the Trial Chambers and the Appeals Chamber. He did not know of problem at the State level, but acknowledged that there could be problems in the local community. He mentioned the case of Blaskic, whose sentence of 40 years was reduced to nine years on appeal, and he got early release almost immediately. Blaskic went back to visit the areas where the crimes had been committed, saying he wished to apologize, and it was with mixed fillings that the victims received him.

Plea bargaining was an issue between the Prosecution and the accused. The Trial Chamber was involved.

The Registry was not involved. The Registry was responsible for transferring prisoners to States, and would have no contact with the Prosecution on that issue. Therefore, place of service of sentence would not be part of plea discussion.

He also noted that in one case the Trial Chamber had imposed a higher sentence than the one recommended to it by both parties, following a plea agreement.

Mr. Roland Amoussouga, in response to Judge Pillay's first question, said that this was the key challenge and nightmare for ICTR, which had not been addressed in the Statute or by the international community.

Acquitted persons were usually refugees, with no documents. For example, there were two acquitted persons at ICTR now whom no country was willing to accept.

Convicted persons who have served their sentences became quasi stateless. Most did not want to go back to Rwanda.

What was to be done? Mr. Amoussouga noted the reinsertion effort mentioned by Mr. Akorimo. Right now, there was no answer. ICTR was paying dearly for the lack of provision on this issue in the Statute and Rules.

Mr. David Crane closed the session at 4:00 p.m. It had started at 2:30 p.m.

Rapporteur: James Stewart, Senior Appeals Counsel, OTP, ICTR

Challenges of the Administration of International Criminal Tribunals

Moderator: Mr. David Crane

Panelists: Ngoga Martin, Adama Dieng, Luis Moreno Ocampo and Erik Møse

"The Independence of the Judicial Organ of the Tribunal"
Hon. Judge Erik Møse, President ICTR

Independence of the judicial organ can be discerned from the 3 part structure of the tribunal
- bench
- prosecutor
- registry

This results from UNSC Resolution under chapter 7, and based on general principles recognized internationally. These are found in Human Rights conventions, some of which are:

Article 14: International Convention on Civil and Peoples Rights;

Article 13: Genocide Convention

In Prosecutor v. KANYABASHI, Appeals Chamber confirmed principle that the accused is entitled to be tried by an independent and im partial tribunal.

Strasbourg cases stress the importance of the link between independence and impartiality.

What is executive power in our context and does it exist in this tribunal?

Impartiality comprises the objective and subjective aspects, which are well known and need no elaborate explanation here

Above are the general conceptual issues, and now the specific challenges

No reference of judicial independence in statute and rules

Challenges for the Bench:
- The ad hoc nature of the tribunal.
- Perception of Impartiality.
- Non-appearance/cooperation of the accused in the courtroom.

Management: In an ad hoc tribunal with a lot of international players and other states required to cooperate, more problems both externally and internally. Judges have to be more proactive in problem-solving

Budget: Is it getting too close to the exec. Branch when the bench provides some input into this process?

Completion Strategy: Is deadline seen as a threat to independence of ad hoc tribunal? Such deadlines unduly constrain activities

Transfer: Does transfer of cases raise issues with regard to independence of judiciary?

"The Challenges of Administration of International Criminal Tribunals with Specific Reference to the ICTR"
Mr. Adama Dieng, Registrar, ICTR

The registry provides impartial, fair and transparent assistance and support to all parties and harnesses international political and financial support.

Role of Registry:
Logistical support, including office accommodation and human resources (this has been controversial). ICC won't have this problem because it is completely autonomous.

Servicing:
Not clearly defined. In national jurisdictions, the word is used to refer to administrative services. While in international setting, drafters mean something different.

Internal and external Communication: Internal: all communications from judges and parties are channelled through the registry. Registry also provides interpretation and translation of proceedings (don't

always find that in national jurisdictions). External: Keeps public records and documents.

Publicity of the work of the tribunal to the public: judicial archives, recording of public hearings. External relations section established – relations with member states, international organizations, and nongovernmental groups. Strengthening of cooperation with host country government.

Management of witnesses and victims: Bring witnesses and provide support (for defence and prosecution). Protective measures for victims and witnesses and provide relevant (physical and psychological support, including for rape victims) support and protection for life, family, or property.

Medical and Psychological Support: counselling, external medical care, providing in house medical care, psychologist, gynaecologist and nurse and provision of anti-retrovirals for HIV aids victim witnesses. How far can the registry go to provide physical and psychological care under Rule 34? Not an easy task since differing opinions about restititutive justice vs. retributive justice.

Rwanda: 10 years after the Genocide: Creating Conditions for Justice and Reconciliation
Mr. Martin Ngoga, Deputy Prosecutor General, Rwandan Government

Review of the past institutionalized impunity through amnesty laws prior to the genocide. International ratification of genocide convention by Rwanda was done with reservations regarding punishment. Before the genocide, 748 magistrates (90% had no legal training), 70 prosecutors, and 631 support staff. . In 1994, after the genocide, faced material and human constraints as well as the legacy of the past. Didn't even have a law to punish genocide.

Post-genocide: Government provided 6 month training to 244 magistrates. After the genocide, only 244 magistrates and 12 prosecutors had survived . Had to enact a law in 1996 to punish genocide crimes according to categories: Category I: Planners and positions of authority, notorious killers, and sexual torture crimes to Category 4: looters and other property crimes. Sentences vary accordingly.

This was an attempt to deal with the problem in a classical way. But there were 120,000 detainees, not all of whom evidence was compiled regarding their acts.

Had to find another way. Set up a confession program which allowed for a reduction of sentence. This effort successfully yielded testimonies that had not come out before. By the end of 2000, the government had prosecuted 60,000 cases and 60% of those had confessed. Many were done in joint trials, even as many as 60 in one trial. There are 12 specialized chambers in tribunal of first instance to deal with 120,000 detainees (others at large). The government also decided (in a controversial decision among the survivors) to provisionally release 40,000 elderly, sick, minors in prison, but retains the right to prosecute later since there is no statute of limitations.

The classical criminal law system could not address the situation so looked to the traditional system: Gacaca (grass in Kinyarwanda). Traditional dispute resolution mechanism. No lawyers part of the process. Trying to be practical. Drafted Gacaca law – categorization. Process to be handled by population: Training and confession programs. First Gacaca process took place in the prisons before the villages.

Started in phases: Phase I: June 2002, in twelve sectors (one sector in each province).

Training newly elected people. By next year Gacaca will be fully operational country wide. They will create a body to oversee sentencing regime for Gacaca. Debate still not resolved: prison term or community service work. If you don't give choice, could be accused of forced labour or is forced labour a lesser permissible sentence. Will forced labour be full-time or part-time? How will the person support themselves and their family? What will that community service entail? The prisoners will be reimbursed, but their remuneration will be put into the victim's fund to assist survivors. The larger community can also choose to willingly participate in the community service. Gacaca is not prosecution. National level: Have established a database (UNDP assistance) listing the victims and perpetrators. Punishment for those who do not speak up.

The Rwandan government is trying to institutionalize the rule of law and to create institutions and legal structures including, the new Constiution, the Commission of Unity and Reconciliation, Ngando: Solidarity camps, and the Human Rights Commission.

Current Issues and Development in International Criminal Justice
Luis Moreno Ocampo, Prosecutor ICC

What do we understand that we need to do:

Flexibility
Make a limited contribution, not a world supreme court. ICC is the global test to apply international criminal law. We are working in an environment that embraces state sovereignty.

Challenges for ICC:

1. Learn from others
2. Be Independent
3. Understand complementary as a benefit not as a restriction. Encourage hybrid or other initiatives that can provide a solution.
4. Try to cooperate with countries. Get national referrals from countries.
5. Have to build diplomatic alliances even while being an independent prosecutor, Have created a separate Jurisdiction Complementarity Cooperation division to undertake diplomacy.
6. Need to understand the local context for each case.
7. Understand that we need to stay small and

limited. Cannot replace national justice.
8. Focused litigation – just prosecute those who bear the greatest responsibility. Have to develop methods to do that.
9. Greater interchange, cooperation and exchange of information between international courts to create a global justice system together.

Discussion by Participants

David Crane: Have to stay focused or can be overwhelmed by the mass nature of the crimes.

Barbara Mulvaney: Takes a lot of time to get a witness to come to the stand – help comes from all quarters. But there is no system. Have to invent a system and convince people. Need court's cooperation even on logistics. Court must help the attorneys.

Bernard Muna: Cannot create global standards because we all come from different societies. Let's move towards global values to refer our societies to. Let each society adopt their own standards. Prosecution of the RPF has to be dealt with for credibility.

Luis Ocampo: Global values not enough, need global standards if we are operationalizing. We have to have agreements and pull from various traditions.

Martin Ngoga: Never denied that some RPF soldiers committed some abuses. Resisting philosophy of victor's justice. Are there victors in the context of genocide? Is RPF a winner? There is not moral equivalence. RPF did stop the genocide. Military justice system in Rwanda has taken some steps. Not punished all RPF members, but also no punished all ex-FAR. Compromises are made to stabilize the society.

Adama Dieng: If you limit your investigations at the outset, you preclude opening up to new information you may come up against.

Simone Monesabian: The need for a strong independent defence.

Martin Ngoga: Shifted rape from Category 4 to I in Rwanda's genocide law after looking at the tribunal and also the growing realization about its widespread nature. Pressure from NGOs. It was an error.

Luis Ocampo: Not "selling" the court, but need to work with states. Agreements for cooperation and referrals and for fact-finding. Have to assess ability and unwillingness. Won't interfere in peace processes. First duty to investigate and prosecute but protecting victims.

David Crane: Independent prosecutor, not US employee, with regard to the indict
ment of Charles Taylor.

The Colloquium Rapporteurs

Chief Rapporteur: Dr Alex Obote-Odora, Special Assistant to the Prosecutor
Assisted by: Ms Adebayejo Adesola, Trial Attorney

Prosecution Forum
Mr. Ken Fleming, QC, Barrister, Former Senior Trial Attorney, International Criminal Tribunal for Rwanda
Assisted by Ms Barbara Mulvaney, Senior Trial Attorney

Investigations Forum
Dr. Leigh Swigart, Associate Director, International Center for Ethics, Justice and Public Life, Brandeis University, USA
Assisted by: Samuel Akorimo, Commander, Investigations

Serving of Sentences Forum
James Stewart, Senior Appeals Counsel

Completion Strategy Forum
Mr. Bernard Muna
Assisted by: Richard Karyegesa , Senior Trial Attorney

Administering of Justice Panel
Ms Binaifer Nowrojee, Lecturere, Harvard Law School and Senior Researcher, Human Rights Watch
Mr William Egbe, Senior Trial Attorney

A Note of Thanks from the Chief of ERSPS on Behalf of the Registrar

To All ERSPS staff members, All Chief of Sections and Focal Points in the OTP and DASS,

I wish to express to each and every one of you my sincere congratulations for the overall organization of the Prosecutors' Colloquium as well as for the tireless efforts you made to make this first international gathering a resounding success for the ERSPS in general and the Tribunal in particular.

This experience, the first of its kind since the establishment of the Section, has proven the dedication and professionalism of all the staff of the Section despite some minor incidents which I am sure are part of the lessons learnt for future organization of such important events.

Once again, I thank you very much for your devotion and commitments to fulfill and achieve the objectives of the Section.

Kind Regards,
Roland Amoussouga
Senior Legal Adviser
Chief, ERSPS

ICTR gives special thanks to the Ford Foundation and the Open Society Institute, which fully funded the Prosecutors' Colloquium.

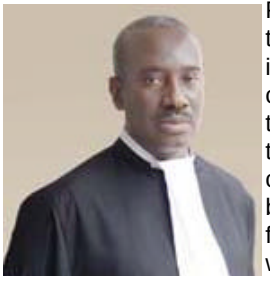
ICTR President and Prosecutor Update Security Council on Completion Strategy

President Erik Møse

On 23 November 2004, the President of the Tribunal, Judge Erik Møse, presented the ninth Annual Report of the ICTR to the United Nations Security Council. The report, which he also presented to the General Assembly the previous week, provides an overview of Tribunal activities from July 2003 to June 2004. The President and the Prosecutor, Mr Hassan B. Jallow, also gave their assessments of the implementation of the ICTR Completion Strategy, as required by Security Council Resolutions 1503 and 1534.

President Møse introduced the most up-dated version of the ICTR Completion Strategy, dated 19 November 2004. The ICTR is on schedule to complete all trials by 2008. Judgements have been rendered in respect of twenty-three persons. New trials involving seventeen accused started in 2003 and 2004. Currently, twenty-five persons are on trial. The Tribunal now has a total of completed and on-going cases involving forty-eight accused. It has reached its goal for adjudication of cases as promised in its last report on the Completion Strategy in April 2004. Three trials were completed in 2004. They confirm the Tribunal's capacity to complete single-accused cases in less than a year even though the judges sitting in these cases are also conducting multi-accused trials. Three trials involving six accused commenced in August and September 2004.

The President emphasized, as he did the previous week before the UN General Assembly, that the ICTR can only comply with the completion deadlines established by the Council if provided with sufficient resources. Some Member States have failed to pay their contributions to the two ad hoc Tribunals. As a consequence, the recruitment of new staff to the Tribunals has been frozen. So far, this has not had a significant effect on the ICTR Completion Strategy but the situation is becoming critical. More than 80 staff members have already left the Tribunal since the freeze was imposed. Many vacant posts are drectly linked to the judicial productivity of the ICTR.



Prosecutor Hassan B.Jallow

Prosecutor Jallow stated that the Prosecution has closed its case in three trials and is close to doing so in two other trials. He remains committed to the deadline for conclusion of investigations by the end of 2004 and the filing of any new indictments which may arise by the last quarter of 2005. The prosecution is now preparing for trial the cases of the remaining eighteen detainees.

The Prosecutor has initiated discussions with Rwanda and other States on the prospects for transfer of cases to those States. He said that several indicted persons are still at large. The bulk of fugitives continue to be based in the Democratic Republic of Congo. It is necessary for the Security Council to exhort Member States to live up to their legal obligations to arrest indicted fugitives in their territory and transfer them to the Tribunal.

The freeze of recruitment has hit the Office of the Prosecutor hard. For instance, there are many vacancies in the Appeals Unit, in the Prosecution Section, and in the Investigation Division. The Prosecutor stated that the filling of all vacant positions is absolutely necessary. It is important to lift the recruitment freeze in order not to put the Completion Strategy at risk.

Lieutenant Colonel Setako Transferred to Arusha to Face Charges and Pleads Not Guilty to Six Counts

Lieutenant Colonel Ephrem Setako

A former senior officer in the Rwanda Armed Forces, *Lieutenant Colonel Ephrem Setako* was transferred from The Netherlands to the Detention Facility of the United Nations International Criminal Tribunal for Rwanda in Arusha, Tanzania on 17 November, 2004 to face charges in connection with his alleged involvement in the 1994 genocide in Rwanda.

The accused was arrested on 25 February, 2004 in Amsterdam, The Netherlands at the request of the Tribunal. His arrest brings to 69 the number of accused people who have been arrested by the Tribunal.

On 22 November 2004, *Lieutenant Colonel Ephrem* Setako pleaded not guilty to six counts charging him of genocide, or alternatively complicity in genocide, crimes against humanity (murder and extermination), and violations of the Geneva Conventions. The plea was entered before Judge Dennis Byron (St Kitts & Nevis) when the accused made his initial appearance.

The prosecution alleges that *Lieutenant Colonel Setako* planned, instigated, ordered and participated in killing of Tutsi civilians in Ruhengeri and Kigali-ville prefectures. He is also alleged to have distributed arms to members of the Rwanda Armed Forces, the Presidential Guard, the Interahamwe, the Amahindure (Civil Defence Forces), and other soldiers engaged in the killings.

Setako is said to have committed the crimes in concert with others including *Colonel Theoneste Bagosora*, *Colonel Anatole Nsengiyumva*, *Joseph Nzirorera, Casmir Bizimungu*, *Colonel Augustin Bizimungu* and *Juvénal Kajelijeli*, who are also facing charges before the Tribunal in Arusha.

UN Family Fun Day

The UN Fun Day events of 27 November 2004, held at the General Tyre Grounds, were a great success.

Both children and adults joined in games such as the sack race, relay, soda-drinking competition, egg race, and three-legged race, as well as a tug-of-war.

The main attraction was the football match between ICTR staff members, where the men were pitched against the women. The referee, Beyan Harris of EDP, favoured the women, and even allowed them to use their hands. In the end, the women's team won with a score of 3-0. It was an unforgettable match and all staff and children had a great time.

The winners' prizes were awarded by Djiby Diop, Chief of Security, Elsie Effange Mbela, Chief of Gender Issues, and Saidou Guindo, Commanding Officer UNDF.

The coordinators of the event were Saida Kessy, Miss Tanzania 1997; Ms Teresa Adami, staff member UNICTR; Albert Dadson, staff member UNICTR, and Sulieman Mziray, the new Public Relations Officer for the UNICTR Staff Association.

The event's sponsors included:
Celtel, Kigongoni Lodge, Arusha Duty Free, Steers, Songota Falls Lodge, Nick's Pub, Mr Price, and La Fiesta.

UN Family Fun Day Pictures

Djiby Diop, Chief of Security Presents Awards

Elsie Effange Mbela, Chief of Gender Issues

The Sack Race

Tug–of-War

A Tribute to Judge Gunawardana by Judge Eric Møse, President of the ICTR

The Late Judge Asoka de Zoysa Gunawardana

It was with profound sadness that the Tribunal learned that former Judge Asoka de Gunawardana from Sri Lanka died on 26 November 2004.

During his five years at the ICTR (1999-2004), Judge Gunawardana contributed significantly to the development of international criminal justice. Both in the Trial Chambers and the Appeals Chamber, he was indispensable in ensuring the progress of the cases and the quality of judgments and decisions. His experience as a Supreme Court Justice in Sri Lanka made him particularly qualified for the complex and challenging tasks facing the judges in the two UN *ad hoc* tribunals. He was respected for his integrity and his consciousness of the principles to be observed by persons holding the highest judicial offices.

Judge Gunawardana was born in August 1942. He was enrolled as an advocate of the Supreme Court of Sri Lanka in June 1967, and became Barrister-at-Law of the High Court of Australia and the Supreme Court of New South Wales in November 1984.

He worked in Sri Lanka's Attorney General's department as Crown Counsel from 1972 until he was appointed Deputy Solicitor-General in 1986. In 1988, he was appointed a Judge of the Court of Appeal of Sri Lanka and became President of the Court of Appeal in 1996. In December 1996, he was elevated to the Supreme Court, the highest Court in Sri Lanka before joining the Tribunal in 1999.

Judge Gunawardana is survived by his wife Kanthie and children Onil and Chandima.