When I was asked to speak at the Brussels Meeting of the Section of International Law of the American Bar Association on the topic "Justice and the Rule of Law," I began to think about the import of this title, and it struck me, in juxtaposing these two topics, how the two concepts interact. What role does justice play in establishing the Rule of Law, and more specifically, drawing on my most recent task in the field of justice as the Prosecutor for the International Criminal Tribunal for Rwanda (ICTR), what role does transitional justice have in restoring and maintaining the Rule of Law in conflict and post-conflict societies.

I first discuss generally the contribution that international criminal trials make to the establishment of the Rule of Law and will then focus specifically on the context of the work of the ICTR and discuss its contributions to date.

The "Rule of Law" is generally understood to refer to a principle of governance in which all persons, institutions, and entities, including the State itself, are accountable to laws consistent with international human rights norms and standards. "Transitional justice" comprises the full range of processes and mechanisms associated with a society’s attempts to come to terms with a legacy of large-scale past abuses in order to ensure accountability, serve justice, achieve reconciliation, and possibly deter recurrence.

† This speech was prepared by Justice Jallow for delivery at the American Bar Association (ABA) Meeting in September 2008 in Brussels. Unfortunately Justice Jallow was unable to attend the Brussels Meeting although his paper has been distributed. He has now kindly updated it for publication in The International Lawyer.

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The global experience in the past few decades, from the Democratic Republic of Congo to Sierra Leone to Rwanda to Cambodia, to just name a few, demonstrates that the promotion of the Rule of Law is a necessary precondition for successful reconciliation in a society struggling with gross violations of human rights. Establishing respect for and adherence to the Rule of Law is a means of promoting peace in a society torn by armed conflict. History has repeatedly shown that justice and peace are inextricably linked, that one cannot exist without the other in a way that is sustainable.

The challenges of post-conflict environments necessitate an approach that balances a variety of goals, including the pursuit of accountability, truth, and reparation; the preservation of peace; and the building of democracy and the Rule of Law.

In the past few decades, there have been many approaches taken to doing justice and restoring community after civil conflict. From the International Criminal Court to the three International Criminal tribunals (the former Yugoslavia, Rwanda, and Sierra Leone) to national trials, variations on truth commissions, and panels of inquiry, what is clear is that seeking justice through institutions of the law is one of the best means of determining responsibility for acts of genocide, war crimes, crimes against humanity, and other gross violations of human rights.

Criminal trials play an important role in transitional contexts. They express public denunciation of criminal behavior, provide a direct form of accountability for perpetrators, and ensure a measure of justice for victims either through reparations or the satisfaction of seeing the perpetrators being held to account.

The criminal trial process is particularly an important means of promoting peace and reconciliation. Trials help to establish an official historical record, individualize criminal responsibility rather than ascribing group guilt, officially acknowledge the victims’ suffering, and potentially incapacitate extremist elements. Holding perpetrators accountable and punishing them for their criminal conduct has a possible deterrent effect and contributes to replacing a culture of impunity with one of accountability.

Domestic justice systems should be the first resort in pursuit of accountability, but where domestic authorities are unwilling or unable to prosecute violators at home, the role of the international community becomes crucial. The establishment by the Security Council of the ad hoc Tribunals to punish the perpetrators of grave crimes has, as in the case of the International Criminal Tribunal for the former Yugoslavia (ICTY) and the ICTR, proved effective in this regard.

The ICTR and the ICTY provide examples that it is possible to deliver justice and conduct trials effectively at the international level in the wake of the breakdown of national judicial systems. They reflect a shift in the international community away from a tolerance for impunity and amnesty and towards the creation of an international Rule of Law.

The International Criminal Tribunals also serve as models of legal norms and standards and thereby lay the foundation for the restoration of the Rule of Law in a post-conflict society. International standards help establish the Rule of Law by entrenching certain fundamental principles in the judicial context, such as the independence and impartiality of judges, and certain guarantees of a fair trial, such as the right to be informed promptly and in detail in a language which the accused understands of the nature and cause of the charge against him or her, to have adequate time and facilities for the preparation of his or
her defense and to communicate with counsel of his or her own choosing, and to be tried in public and without undue delay.

The Tribunals have managed to establish the responsibility of the accused individuals, leaving a legacy of the truth and a weapon against denial. The work of the Criminal Tribunals establishes that no one is above the law and that no one will escape punishment for such horrendous crimes.

Where possible in the aftermath of conflict, national trials ought to play a large role in determining accountability and restoring the state. National trials often can deal with a greater number of perpetrators, and having trials in states where the atrocities occurred helps to reestablish the state, helps to rebuild the judiciary, helps to restore peace and helps to introduce the Rule of Law. National trials make a significant contribution to the search for justice and in restoring peace, as individuals are able to participate in re-establishing the Rule of Law in their own societies.

It is unreasonable, however, to assume that national systems will always be capable of bringing or willing to bring justice for atrocities in all cases. This is particularly true in post-conflict situations where justice systems have been either partially or completely destroyed. As a result, international justice will remain a crucial option.

For example, in the absence of the ad hoc Tribunals, there would have been a massive justice deficit in the countries they serve. Rwanda had been devastated by war and the parallel genocide and was without the means or the institutional capacity to bring the perpetrators to justice without external intervention. The establishment of the ICTR was in recognition that justice plays a role in the restoration of the Rule of Law in post-conflict Rwanda. The consolidation and maintenance of peace could not be achieved without judicially addressing the grievances arising from the genocide.

The United Nations Security Council recognized that serious violations of international humanitarian law had been committed in Rwanda and established the ICTR to prosecute persons responsible for genocide and other serious violations of international humanitarian law that occurred in Rwanda in 1994.

In Resolution 955, the Security Council expressed its determination to “put an end to such crimes,” convinced that such prosecutions would serve the ends of justice and “contribute to the process of national reconciliation and to the restoration and maintenance of peace.”

In the Rwandan context, a hybrid exists to seek redress for crimes stemming from the genocide and comprises:

i) international prosecutions at the ICTR;
ii) national prosecutions before domestic courts;
iii) prosecutions before community courts known as gacaca, derived in part from traditional Rwandan conflict resolution mechanisms; and,
iv) education and coordination of unity programs through a National Unity and Reconciliation Commission.

In the Rwandan context, national and international trials, together with the gacaca system, have worked simultaneously to complement each other’s work and to bring accountability to the devastatingly high number of perpetrators of the genocide.

In Rwanda, since 1959, past abuses were committed with impunity. Thus, when orders to eliminate Tutsi were propagated down the rungs of hierarchy in the early 1990s, those who joined in the carnage acted without fear that their crimes would result in punishment. Expectations of impunity were challenged, however, when the U.N. Security Council established the tribunal to prosecute the leading perpetrators.

Given the number of potential perpetrators, the ICTR focused on targeting the leadership without whose evil architecture and encouragement these egregious crimes would probably never have been committed. In many cases, these individuals had found safe haven abroad and were comfortably beyond the reach of Rwandan judicial authorities.

Prosecuting senior officials for serious human rights crimes where there are a large number of victims is a complex and expensive process regardless of whether the cases are tried before national or international courts. These prosecutions tend to involve massive amounts of evidence that must be analyzed and classified. Such cases require a sophisticated prosecution strategy. Trials must comply with international human rights standards to ensure their legitimacy and credibility. Ensuring the fairness of these trials, including their compliance with human rights standards, often results in a slow process. The ICTR, however, has managed to prosecute a significant number of Rwanda’s former leadership.

An analysis of the indicted accused indicates a spread across various levels of leadership: the central government, the military, local government, businesses, the clergy, the media, the intelligentsia, corporate executives, and political party operatives. The cases completed so far involve one prime minister, five Ministers, three Prefets, seven bourgmestres, and several others holding leadership positions in 1994. The trials in progress involve nineteen accused, six ministers, one Parliamentarian, three Prefets, three Bourgmestres, eight military officers, and others holding leadership positions.

To date, the ICTR has completed the trials of forty-six high-level accused (five have been acquitted), securing thirty-two convictions for genocide, crimes against humanity, and war crimes. Currently, nine accused of the forty-six completed trials are awaiting judgment from trial, including the four accused of what we call the “Military I” trial involving four senior military officers. The trials of nineteen others are currently in progress. Eight accused are in custody awaiting trial, many of whose cases are subject to applications pursuant to Rule 11 bis for transfer, while thirteen accused are on the run from the law. One accused has recently been arrested and is awaiting transfer to the UN ICTR detention facility. Two cases have been transferred to national jurisdictions pursuant to Rule 11 bis, both of these to France.

In addition to adopting this thematic approach targeting the former leadership, the ICTR has sought to prosecute suspects according to the location of their alleged crimes, ensuring that key perpetrators in all the regions were brought to account. This geographic spread was particularly necessary because the crimes were committed throughout Rwanda, rendering it imperative, in the interests of justice, to reach all the communities involved in equal measure.

The contribution of the ICTR to international justice is, however, reflected not only in the numbers and quality of its accused on trial and the outcome of these trials but in its contribution as well to the Rule of Law both at the global level and at the national level in Rwanda.
The jurisprudence of the ICTR, and of the other tribunals, has greatly enriched international law in its elucidation of the substantive criminal law, criminal procedure, evidence, and fair trial standards. The tribunal's interaction with Rwanda has contributed to legislature reforms in that jurisdiction, amongst them the abolition of the death penalty, the adoption of the ICTR statute standards of fair trial, and the capacity building of the Rwanda legal system through training and resource support. The ICTR has provided direct support to the Rwanda legal system—and hence the country's Rule of Law structure—through the training of its investigators, magistrates, judges, and other judicial staff. In addition the ICTR has employed several Rwandans and provided opportunities for attachment for practical training.

Effective as the international criminal justice system in all its forms may be in restoring the Rule of Law to societies that have undergone conflict, we must acknowledge that the more effective approach would be a preventive strategy that seeks to render unnecessary the intervention of the international system.

The principal cause of the mass atrocities that require such intervention is essentially disregard for the Rule of Law within the states concerned. The possibility of mass atrocity in a state where the Rule of Law prevails in all its manifestations is a remote one. We must therefore together strive to nurture and sustain an environment in each state that favors respect for the Rule of Law—with laws that comply with the standards and norms of human rights and good governance; with effective and independent national judicial and other oversight mechanisms; with government based on the popular mandate delivering social and economic policies aimed at eradicating poverty, disease, illiteracy and the other conditions which pose such a challenge to the Rule of Law and good governance in the developing world. The most effective bulwark against conflict and egregious violations of human rights lies in respect for good governance and the Rule of Law.

The World Rule of Law Initiative forged by the American Bar Association in collaboration with a truly global coalition of civil society provides us with a unique opportunity to encourage and to support states to walk the path of the Rule of Law; it provides us too with a standard to which states can be held to account.

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