ICC UPDATE: AMENDMENTS TO THE ROME STATUTE AND THE COURT'S FIRST TWO CONVICTIONS AND AN ACQUITTAL

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Speech to Plenary, International Society for the Reform of Criminal Law, Vancouver, BC, 22 June 2014

I was stunned to find that this is the only presentation in the whole of the Conference that does not address sentencing. Sentencing and the International Criminal Court is certainly a topic that we might take up in a future Conference. While it is obviously a work-in-progress at this point, there are now two sentencing decisions on the record, in the two convictions that I shall discuss in a moment. Article 78 of the Rome Statute suggests laconically that that Court shall "take into account such factors as the gravity of the crime and the individual circumstances of the convicted person". More detail is contained in the Rules of Procedure and Evidence which include lists of aggravating and mitigating circumstances. The case-law is beginning to make this operational. Sentencing is a live issue in courts across the spectrum from local to global.

The Rome Statute of the International Criminal Court entered into force on 1 July 2002, after the necessary 60 ratifications or accessions had been obtained. It now has 122 parties among the 196 entities generally regarded as States. The ratification rate has slowed; the last State to join was Guatemala in April 2012. Meanwhile, the important action in respect of the treaty itself is generating acceptances of the amendments adopted at the 2010 Review Conference in Kampala. Along the way, Trial Chambers of the Court have entered two convictions (one by a majority) and an acquittal.

Two amendments were adopted in Kampala. The one that garnered most publicity was on the crime of aggression. Aggression was included in Article 5 of the Rome Statute as one of the four crimes within the jurisdiction of the Court, along with genocide, war crimes and crimes against humanity.

Article 5 also provided that the Court could not exercise that jurisdiction until an amendment was adopted "defining the crime and setting out the conditions under which the Court shall exercise jurisdiction with respect to this crime." Resolution 6 of the Kampala Conference duly adopted a definition and a complicated set of conditions, largely occasioned by the need to spell out the respective roles of the UN Security Council and the Court in respect of the crime. This amendment wil be effective only for crimes of aggression committed one year after ratification or acceptance by thirty States Parties and only following a further decision taken after 1 January 2017 by a two-thirds majority of the Parties. The push is on to obtain the 30 acceptances by 2016. Slovakia's acceptance at the end of April brought the number to 14. The earliest ratifications were made in 2012 by Liechtenstein, whose Mission to the United Nations has been leading the campaign for ratification, and by two other stalwarts of the Court, Samoa and Trinidad and Tobago. Last year, the campaign received a big boost from the ratifications of Germany, Croatia and Belgium. A number of States are said to be actively engaged in working on the amendments and the necessary implementing legislation, including The Netherlands, Switzerland, Australia, New Zealand, Brazil and Chile. I have not seen any indication that Canada's ratification is just around the corner, but it has made occasional favourable references to the amendments. Insiders are optimistic about obtaining the other sixteen fairly soon.

The second amendment, adopted in Kampala Resolution 5, relates to the *jus in bello* rather than the *jus ad bellum* and deals with prohibited weapons in non-international armed conflict. There is a tendency in both customary and treaty law to assimilate the rules on the conduct of hostilities in civil wars, non-international armed conflict, to those in international armed conflict. Article 8 of the Rome Statute, however, reflects existing ambivalence on this issue. It contains two separate lists of prohibitions, one directed at international conflict, the other at non-international. Many of the rules appearing there for civil conflict are derived ultimately from the Hague Convention of 1907 which dealt with international conflict, but not all such rules appear in both parts of Article 8. Thus the international

provisions in Article 8 of the Rome Statute included prohibitions of the use of expanding bullets, of poison and of asphyxiating gases, but the non-international ones did not. Compare the widespread belief that the use of asphyxiating gases against the local population in Saddam Hussein's Iraq and more recently in Assad's Syria was contrary to *customary law*, if not to the Geneva Protocol of 1925, which speaks of "war", understood in an international sense. Kampala's weapons amendment removes this distinction and includes the use of expanding bullets, poison and asphyxiating gases in the non-international prohibitions. This amendment, because of the way in which the drafters interpreted the amending provisions of the Statute, applies only to those parties who actually ratify it. There are now 17 such States for which it is in e ffect, including San Marino, Norway and Mauritius who have accepted it but not yet the aggression one. The amendment is an important contribution towards banning barbaric weapons and weapons of mass destruction and towards assimilating the rules on international and non-international conflict. But we have a long way to go before the achievement of a total ban on such weapons. Mexico has been fighting a lonely battle to have nuclear weapons included in the prohibitions of the Statute and there have been efforts in other forums to reinforce the illegality of such weapons, but do not expect any quick results.

I turn to the case activity in the Court. Of necessity, given the palpable craving for food and drink that I detect exuding from my audience, I shall paint with a broad brush and be selective. I shall concentrate on issues arising from the two convictions and the acquittal. I gloss over the myriad significant items addressed by Pre-Trial, Trial and Appeals Chambers in the 20 or so cases that are still wending their weary way through the system and in the handful of cases dismissed or discontinued at the Pre-Trial stage.

In March 2012, the Court entered its first conviction, still on appeal two years later, in the case of Thomas Lubanga Dyilo. Dyilo was convicted of conscripting, enlisting and using child soldiers (defined

in the Statute as children under the age of fifteen years) to participate actively in armed conflict in the Ituri area of the Democratic Republic of the Congo. The 593 page decision was accompanied by separate opinions by Judges Fulford and Odio Benito. It was followed by the first sentencing decision in July 2012 (with an Odio Benito dissent) and a Decision establishing principles and procedures applying to reparations under article 75 of the Statute in August of that year.

Amid much criticism, the then Prosecutor had elected to keep his first case simple (a decision I thought eminently sensible). He thus restricted the charges to those on child soldiers. Even so, the imperative in a criminal case of proof beyond a reasonable doubt reared its necessary but ugly head. In a land where birth certificates are not plentiful, proving age was a challenge. This was complicated when generous donor countries provided relief funds for child soldiers. In a dramatic demonstration of the principle of unintended consequences, some, a tad over the age limit, took advantage of opportunity. They then found themselves lying to the Court as well as to the donors. So-called "intermediaries", to whom the prosecution outsourced parts of the investigation, rounded up some less than reliable witnesses. Indeed, all nine of the prosecution's child witnesses had credibility problems. Nevertheless, there was just enough evidenceto convince the Court, based mostly on videos of those involved in the hostilities.

There were echoes in Lubanga of the international/non-international armed conflict issue because of the involvement of troops from Rwanda and Uganda in the area at the relevant time. The majority of the Trial Chamber accepted that the foreigners did not have sufficient involvement with Lubanga's part of the operation to render the relevant conflict international. Fortunately, the child soldier prohibition appeared in essentially the same terms in both the international and non-international parts of Article 8 of the Statute.

The Court made a reasonable effort to interpret and apply the so-called Elements of Crimes that were drafted by the Preparatory Commission for the Court, as required by Article 9 of the Statute, to give greater detail to the offence definitions. One controversial issue was dodged by the prosecution. Generally-speaking, the culpability requirement under Article 30 of the Statute is that the perpetrator act with "intent and knowledge". In the case of child soldiers, however, the Elements introduce a note of negligence by asserting that it must be proved that the perpetrator "knew or should have known" of the age of the soldiers. Some commentators believe that the injection of negligence is *ultra vires* the Statute. The Prosecutor avoided the issue by undertaking (successfully, according to the Trial Chamber) to prove knowledge.

Two of the judges would have defined "using" the children to mean both deploying them on the front lines and also placing them in supporting roles that placed them in danger as a potential target. Judge Odio Benito agreed but would have gone further into territory that the Prosecutor and the Pre-Trial Chamber had chosen not to pursue of sexual violence, especially against girl soldiers, by their own comrades. The Appeals Chamber had set aside an effort launched by victims' representatives in the Trial Chamber to extend the charges to these crimes. The cases of Katanga and Chui, to which I shall refer shortly, included rape and sexual slavery charges. And the current Prosecutor has, this month issued a substantial Policy Paper on Sexual and Gender-Based Crimes promising more attention to this area. Her predecessor had, in fact, included charges of sexual slavery and rape in the war crimes counts against the two defendants whom I shall mention shortly.

An absolutely fundamental issue broached in this first and in each subsequent case was the proper interpretation of Article 25 (3) of the Statute, dealing with individual criminal responsibility. The structure of most criminal codes, including the Rome Statute, contains a drafting convention that the actor whose deeds are described in the special part (the offence definitions) is a "principal", the one

who does the deed. Other participants, those who order, induce, aid, abet, procure, and the like, sometimes called "secondary parties", are linked through a provision in the general part. Article 25(3) (see handout) is such a provision. In common law jurisdictions, beginning with the UK's Accessories and Abettors Act of 1861, and going forward into provisions like Sections 21 and 22 of the Canadian Criminal Code in 1892 and similar provisions in, for example, New Zealand, Samoa and the United States, principals and accessories are treated alike as "principals" and equally responsible for the crime, subject to adjustments that might be made at sentencing. I must confess that, as one who attended many of the sessions when Article 25 was being drafted, I assumed this was how it was to be approached. It is now clear that not everyone had the same assumption. In particular, many civil lawyers regard the precise category as important. They see a hierarchy of involvement in crime generally and in particular in Article 25(3) with those who "commit" at the pinnacle of the hierarchy and then progressively lower on the way down – or at least a clear distinction between the principals in subparagraph (a) and the assorted accessories in the other subparagraphs (b) through (d). The issue has been characterized as the unitary perpetrator versus the differentiated participation models. In Lubanga Dyilo, the prosecution, abetted (if you will forgive me) by the Pre-Trial Chamber, argued that the best way to characterize the accused was not as an accessory but as a "co-perpetrator". That is, one who, while he did not personally do the deeds attributed to him, was responsible as a principal, acting *through* other persons for what his foot soldiers and other subordinates did, because of a theory based on German law that he had "control over the crime". This involved both the existence of an agreement or common plan between two or more persons and the coordinated essential contribution made by the accused to the realization of the objective elements of the crime. Each of the trial judges was prepared to find that the case had been proved on this basis. Judge Fulford dissented on the interpretation and believed that it was unsupported by the plain meaning of the text of paragraph (3) and imposed an unnecessary burden on the prosecution. He added that nothing turns on the distinction for sentencing purposes under

Article 78 of the Statute and Rule 145 of the Rules of Procedure and Evidence. For the majority, it was important to classify those most responsible as principals. There were echoes of this debate in the Charles Taylor case in the Special Court for Sierra Leone. Await developments on appeal!

Germain Katanga and Mathieu Ngudjolo Chui were originally charged jointly with numerous counts of war crimes and crimes against humanity arising from an attack on the Congolese town of Bogoro, also in Ituri, on 24 February 2003. The prosecution's theory, endorsed by the Pre-Trial Chamber, was characterized as "indirect co-perpetration", another creative concept. The two were alleged to be commanders of distinct militias that they had combined for the attack. The theory was that each could be held responsible as a principal not only through what his own people did, but also through what the other's people did. The case proceeded on this basis from its commencement in December 2009 until the Trial Chamber heard final submissions and retired to consider its decision in May 2012. Six months later, in November 2012, the Chamber stunned everyone when, Judge Van den Wyngaert dissenting, it gave notice pursuant to regulation 55 (2) of the Regulations of the Court that "the mode of liability under which Germain Katanga stands charged is subject to legal recharacterisation on the basis of article 25(3)(d) of the Statute". The Court also severed the proceedings against the two accused. Regulation 55 empowers the Trial Chamber to "change the legal characterisation of facts to accord with the crimes under article 6, 7 or 8, or to accord with the form of participation of the accused under article 25 and 28, without exceeding the facts and circumstances described in the charges and any amendments to the charges." How far regulation 55 extends is a matter of great debate.

Ngudjolo Chui was thereupon acquitted on 18 December 2012 because of a simple failure of proof. He won on what I thought my most successful defence in my undistinguished criminal practice over four decades ago representing protesters against the Vietnam War: "Who, me?" It had not been shown that he was the commander at the relevant time or even *there*. A nurse with further medical

training, he had at least at some later date assumed a role as self-styled "colonel" but he was not proved to be in command on the date in question. Judge Van den Wyngaert took the opportunity of a concurring opinion to agree substantially with Judge Fulford's plain meaning interpretation of Article 25(3)(a) in Lubanga, namely that it did not contain the concept of co-perpetration espoused by some of the other judges. A fortiori, for Judge Van den Wyngaert, the theory of indirect co-perpetration had no place in there either.

That left Mr. Katanga languishing in prison in The Hague. In March 2013, the Appeals Chamber, Judge Tarfusser dissenting, held in an interlocutory appeal that the recharacterisation could in principle take place at such a late stage, but it raised several cautions about the need to have a fair trial and insisted that Katanga needed to be properly informed and have a real opportunity to respond. Almost another year passed until 7 March of this year when a majority of the Trial Chamber convicted Katanga, not on the basis of his control over the crime, but on the theory under Article 25(3)(d)(ii) that his activities contributed to the commission of the crimes by a group of persons acting with a common purpose and made in the knowledge of the intention of the group to commit the crime. Not surprisingly, Judge Van den Wyngaert dissented on several bases. She believed that the recharacterisation far exceeded the bounds of Regulation 55 and infringed upon Katanga's right to a fair trial and, moreover, that there was a failure of proof both on the basis of Article 25(3)(a) and of 25(3)(d)(ii). I must confess that I found her analysis more persuasive than that of the majority, but we'll see what the Appeals Chamber has to say in a few years.

The hour is late but my story has a moral: Relying on criminal law to put an end to impunity for the perpetrators of unimaginable atrocities, as the preamble to the Rome Statute promises, brings with it some heavy baggage but crucial about fairness to the accused and proof beyond reasonable doubt.

Rome Statute of the International Criminal Court

Article 25[8]
Individual criminal responsibility

1. The Court shall have jurisdiction over natural persons pursuant to this Statute.

2. A person who commits a crime within the jurisdiction of the Court shall be individually responsible and liable for punishment in accordance with this Statute.

3. In accordance with this Statute, a person shall be criminally responsible and liable for punishment for a crime within the jurisdiction of the Court if that person:

   (a) Commits such a crime, whether as an individual, jointly with another or through another person, regardless of whether that other person is criminally responsible;

   (b) Orders, solicits or induces the commission of such a crime which in fact occurs or is attempted;

   (c) For the purpose of facilitating the commission of such a crime, aids, abets or otherwise assists in its commission or its attempted commission, including providing the means for its commission;

   (d) In any other way contributes to the commission or attempted commission of such a crime by a group of persons acting with a common purpose. Such contribution shall be intentional and shall either:

      (i) Be made with the aim of furthering the criminal activity or criminal purpose of the group, where such activity or purpose involves the commission of a crime within the jurisdiction of the Court; or

      (ii) Be made in the knowledge of the intention of the group to commit the crime;

   (e) In respect of the crime of genocide, directly and publicly incites others to commit genocide;

   (f) Attempts to commit such a crime by taking action that commences its execution by means of a substantial step, but the crime does not occur because of circumstances independent of the person's intentions. However, a person who abandons the effort to commit the crime or otherwise prevents the completion of the crime shall not be liable for punishment under this Statute for the attempt to commit that crime if that person completely and voluntarily gave up the criminal purpose.

3 *bis*. In respect of the crime of aggression, the provisions of this article shall apply only to persons in a position effectively to exercise control over or to direct the political or military action of a State.

4. No provision in this Statute relating to individual criminal responsibility shall affect the responsibility of States under international law.

8 As amended by resolution RC/Res.6 of 11 June 2010 (adding paragraph 3 *bis*).