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**Have prosecutors
gone too far?**

Former U.S. Attorney Debra Wong Yang
and law firm partner Melvyn I. Weiss

THE BEST ROUTE

ABA Conference Considers Options for Countries Seeking Transitional Justice

JAMES PODGERS

ONLY FOUR YEARS AFTER COMING into existence, the International Criminal Court has become the subject of rethinking among some experts.

It's not a matter of second-guessing the ICC's creation under a United Nations statute negotiated in Rome during the summer of 1998.

The court came into actual existence in 2002 as the first permanent international tribunal empowered to try individuals, including government leaders and members of military forces, for serious criminal violations of international human rights law.

So far, 102 nations have ratified the Rome Statute. One of the notable exceptions is the United States, which opposes the court on grounds that its jurisdiction might include American personnel, and that the ICC prosecutor operates independently from the control of the U.N. Security Council.

ICC Chief Prosecutor Luis Moreno-Ocampo is conducting investigations in the Darfur region of Sudan, the Democratic Republic of the Congo and northern Uganda. In March, the first arrest was made on warrants issued by the court, and initial proceedings have begun in that case, which stems from the Congolese civil war. The court also has warrants outstanding against five leaders of the Lord's Resistance Army, a rebel group that has been fighting the government in Uganda since 2002.

FINDING A FOOTING

BUT THE COURT'S EXISTENCE AS A FUNCTIONING LEGAL entity has given more focus to thinking about what its actual role should be amid global realpolitik and the sovereignty concerns of nations that want to use their own institutions as a first resort for dealing with war crimes and related violations of international human rights law.

"It's way too soon to conclude what the ICC's contribution to peacemaking and the rule of law will be," says Ruti Teitel, a professor at New York Law School. "The real question is: How will the ICC interact with processes at a national level?"

Meanwhile, more attention is being given to other ap-



Ruti Teitel: It's too soon to know what the ICC will contribute to peacemaking.

proaches to achieving "transitional justice." That is the experts' term for a society's effort to deal with past traumas—including mass atrocities, genocide and widespread human rights abuses—as part of the process of rebuilding and reconciliation after the turmoil of repressive regimes, civil wars and other conflicts.

In October, a conference presented by the ABA Section of International Law at New York University School of Law explored the impact of the International Criminal Court and other transitional justice approaches, focusing particularly on conflicts in Africa.

A society that can't reconcile with past traumatic events will undermine its efforts at constructing a national sense of justice and respect for the rule of law in the future, says Paul van Zyl, executive vice president of the International Center for Transitional Justice, which has its headquarters in New York City. But because each country's circumstance is unique, he says, it's crucial that "a menu of options" be available.

"The measures you have to adopt must be very closely related to the realities on the ground," van Zyl says.

Using national courts or international tribunals to prosecute perpetrators of war crimes, genocide and other violations of human rights law isn't necessarily the most

important goal of the transitional justice process, say van Zyl and other experts.

In some cases, efforts to build a credible record of atrocities and other human rights violations during a conflict may be preferable to criminal prosecutions. The truth and reconciliation commission created in South Africa after the collapse of apartheid is widely cited as an example of this approach.

"It is so important for victims to tell their stories," says David M. Crane, a professor at Syracuse University College of Law.

Crane served in 2002-05 as the first chief prosecutor of the Special Court for Sierra Leone, an independent tribunal created by that country's government and the U.N. to try individuals for war crimes and crimes against humanity committed during the civil war there in the late 1990s. Among those to be tried by the tribunal is Charles Taylor, the former head of Liberia who was arrested earlier this year on charges relating to the Sierra Leone conflict.

Other ways to achieve transitional justice include reparations to victims; reform of national institutions, including courts and other legal entities; and recognition of past events by constructing memorials and museums.

The past decade has seen a proliferation of transitional justice efforts in just about every region of the world, including the United States. The creation of ad hoc criminal tribunals for the former Yugoslavia and Rwanda in the mid-1990s energized the movement to create the International Criminal Court and provided a model for other international and national tribunals.

Meanwhile, the truth and reconciliation commission in South Africa—and before that in several South American countries—gave impetus to more recent efforts on that front in other countries.

ASSISTING KEY EFFORTS

THE INTERNATIONAL CENTER FOR TRANSITIONAL JUSTICE is one of two entities that came into existence during the same period that the ICC was getting off the ground. The second is the Institute for Historical Justice and Reconciliation, which is based in Austria at the Salzburg Seminar, an educational institution. The justice center is engaged in assistance projects in 28 countries on every continent except Australia.

In the United States, the center assisted the Greensboro (N.C.) Truth and Reconciliation Commission. That body was formed in 2004 to explore the circumstances and consequences of the November 1979 incident in which members of the Ku Klux Klan and the American Nazi Party fired into a crowd of demonstrators, killing five and wounding at least 10 others.

The commission, formed by a coalition of community groups, issued a report in May setting forth proposals to advance the healing process. The report acknowledges that the commission's truth-finding efforts were not universally supported.

The city council, for instance, voted to oppose the effort. And as the commission "met with surveillance, intimidation and rumor-mongering at the institutional

level, at the personal level we found indifference, fear and resistance," the report states.

Still, the commission maintains that its work "successfully engaged a broad spectrum of the community in an effort that offers hope for reconciliation."

While the transitional justice center takes a broad approach, the Institute for Historical Justice and Reconciliation, formed in 2003, "seeks to dispel public myths about historic legacies that are frequently exploited to inflame nationalistic prejudices," states the group's Web site. The center's projects include promoting dialogue between Poles and Jews; reconciling disputes between Israelis and Palestinians over their entwined histories; and incorporating a historical element into the mission of a truth commission being considered in Bosnia, one of the nations born from the collapse of Yugoslavia.

FINDING ANSWERS IN AFRICA

DESPITE ACTIVITIES IN OTHER REGIONS, AFRICA IS WHERE issues in transitional justice are likely to play out most significantly in the near future, said speakers at the conference sponsored by the International Law Section.

Besides the ICC's three investigations in Africa and the work of the ad hoc tribunals in Rwanda and Sierra Leone, a truth and reconciliation commission in Liberia began operations in June. Various forms of transitional justice entities also have operated—with varying degrees of success—in Uganda, Nigeria, Algeria, Morocco and Mozambique.

Teitel cautioned against temptations to view the ICC's role as paramount to national legal structures in efforts to address human rights violations in Africa and elsewhere. While the ICC stands for legal norms that represent the collective thinking of the international community, it still may not be the best vehicle for achieving reconciliation at a national or even local level, she said.

"I'm quite concerned about the emphasis on Africa," Teitel said. "Is the ICC a European court for Africa?"

Posing a related question, Crane said, "Are we delivering the justice that we want or the justice victims seek? That's a very important question."

Speakers also questioned whether searching for truth and achieving justice are compatible goals for a society emerging from conflict.

In Uganda, for instance, there is growing debate over the likely effect of ICC warrants for the arrest of Lord's Resistance Army leaders on negotiations to reach a truce in the country's civil war. The LRA has said it would not agree to a truce unless its leaders are granted amnesty.

"My greatest concern is that the Ugandan government will trade justice away to get a peace deal," said Richard Dicker, director of the international justice program for Human Rights Watch. "Too often, justice concerns are the first things jettisoned in talks like this."

However these issues unfold, one fundamental lesson should be evident, said Abderrahim Beyouddh, the deputy consul general at Morocco's consulate in New York City: "You can't go forward and build a better future without going back into the past." ■