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## **International Justice and the Pact on Security, Stability and Development in the Great Lakes Region**

### **An Information Note**

**Prepared for the Roundtable Discussion on International Cooperation  
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## Introduction

In June of this year the Pact on Security, Stability and Development in the Great Lakes Region (the Pact) came into force, having been ratified by eight states in the Great Lakes region.<sup>1</sup> The Pact comprises a comprehensive package of new laws, programmes of action and mechanisms reflecting an ambitious range of undertakings by states in the region on issues ranging from economic integration, to mutual defence, to the principle of the responsibility to protect – and international justice.<sup>2</sup> Driving the Pact is an:

individual and collective determination [...] to transform the Great Lakes Region, [...] into a space of durable peace and security, of political and social stability, and of economic growth and shared development by multi-sector cooperation and integration for the sole benefit of our peoples.<sup>3</sup>

The adoption of the Pact is the culmination of many years of collaboration between states in the Great Lakes region, the international community and civil society in a process known as the International Conference on the Great Lakes Region (ICGLR).

### *Background to the International Conference on the Great Lakes Region*

The commission and aftermath of the Rwanda genocide in 1994 profoundly shook the Great Lakes region. The genocide not only ravaged Rwanda but sparked a conflagration of violence which engulfed much of the continent. The subsequent cycles of war and massive displacement affected Africa as far south as Zimbabwe, in the north to Libya, Angola in the west and Tanzania in the east. As the International Panel of Eminent Personalities appointed to investigate the events leading to the genocide found:

"[T]he end of the genocide was not the end of a terrible chapter in the history of one country. On the contrary, it was the opening of an entirely new chapter, almost as appalling as the first, but enveloping the entire Great Lakes Region in brutal conflict before becoming a war that has directly or indirectly involved governments and armies from every part of the continent."<sup>4</sup>

The ICGLR was born out of the recognition that a sustainable resolution to the crisis demanded "the engagement of Africa as a whole, governments and intergovernmental organizations alike, with the wholehearted support of the international community."<sup>5</sup> At the heart of this assessment was the acknowledgement that the people of the Great Lakes region were "so interlinked ethnically, culturally and linguistically that the instability initially generated by purely internal causes

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<sup>1</sup> Eleven states in the region are members of the International Conference on the Great Lakes Region: Angola, Burundi, the Central African Republic, the Democratic Republic of Congo, Kenya, the Republic of Congo, Rwanda, Sudan, Tanzania, Uganda and Zambia.

<sup>2</sup> The full text of the Pact and all the Protocols are available online at the website of the ICGLR Secretariat: <http://www.icglr.org>.

<sup>3</sup> Preamble, Pact on Security, Stability and Development in the Great Lakes Region.

<sup>4</sup> Rwanda: The Preventable Genocide, International Panel of Eminent Personalities, at Paragraph 20.1. The Panel was appointed by the then Organization of African Unity (OAU).

<sup>5</sup> Rwanda: The Preventable Genocide, International Panel of Eminent Personalities, at Paragraph 20.80.

in each country quickly spreads to generate and maintain the dynamic of conflict in the entire region.”<sup>6</sup>

Designed as a joint United Nations (UN), African Union (AU) and inter-State process to promote peace, security, democracy and development, the ICGLR formally began in 1996 with the assigning of Special Envoys by then UN Secretary General Kofi Annan to conduct initial consultations with states and experts in the region. Since then the multi-stage process has convened State and non-State actors from across the region, alongside supportive members of the international community, “to dialogue and agree on a strategy to bring peace and prosperity to the Great Lakes region” which recognises the interconnectedness of the region’s populations, insecurities and economic instabilities, and the imperative of seeking regional solutions.<sup>7</sup>

The first phase of the ICGLR process culminated in December 2006 with the signing of the Pact by the 11 states of the ICGLR and the entry into force of the Pact in June 2008.

### Overview of the Pact

The Pact comprises five key elements: the primary instrument of the Pact itself; the Dar es Salaam Declaration (the set of principles around which the Pact was fashioned); ten Protocols; four Programmes of Action (comprising 33 priority projects); and a set of implementing mechanisms and institutions (the Regional Follow-Up Mechanism, including the Special Fund for Reconstruction and Development). The Dar es Salaam Declaration, the Protocols, the Programmes of Action, the Regional Follow-Up Mechanism and the Fund are each intended to be an “integral part” of the Pact.<sup>8</sup>



Central to the normative component of the Pact are ten Protocols which furnish the necessary additional legal framework needed to achieve the goals of the four priority areas identified by the ICGLR: economic development and regional integration, democracy and good governance, humanitarian and social issues and peace and security. These are the:

- Protocol on the Protection and Assistance of Internally Displaced persons;

<sup>6</sup> International Conference on Peace, Development and Democracy in the Great Lakes Region, A Concept Paper. Available from the Secretariat of the ICGLR.

<sup>7</sup> See International Conference on the Great Lakes Region website, at [http://www.icglr.org/F\\_END/about.asp](http://www.icglr.org/F_END/about.asp).

<sup>8</sup> Pact on Security, Stability and Development in the Great Lakes Region, Article 3(1).

- Protocol on the Property Rights of Returning Persons;
- Protocol on the Prevention and Suppression of Sexual Violence Against Women and Children;
- Protocol on the Prevention and Punishment of the Crimes of Genocide, War Crimes and Crimes Against Humanity;
- Protocol on Democracy and Good Governance;
- Protocol on Judicial Cooperation;
- Protocol on Non-Aggression and Mutual Defense in the Great Lakes Region;
- Protocol on Management of Information and Communication;
- Protocol Against the Illegal Exploitation of Natural Resources; and
- Protocol on the Specific Reconstruction Zone.

### The Pact and international justice

Forefront in the minds of Great Lakes states setting out to draft the Pact was the massive failure of the international community to respond appropriately to the Rwanda genocide of 1994, both prior to the disaster and then to the security and justice implications of outflow of refugees which followed. The subsequent events had demonstrated hauntingly the intimate relationship between impunity, mass exodus and regional security, a linkage the UN Security Council recognised in its decision to create the International Criminal Tribunal for Rwanda (ICTR).<sup>9</sup> As the African experts who looked at the implications of the Rwanda genocide for the future of the region urged, “a culture where all human rights abuses are punished must replace a culture where impunity for such abuses flourishes.”<sup>10</sup> Finding ways to prevent such atrocities in the future, and ensuring that those who commit them are held responsible, was therefore from the beginning of the ICGLR process viewed as an essential element in constructing long-term solutions.<sup>11</sup>

As a result, at least five of the ten Protocols which form the legal backbone of the Pact deal with aspects of the responsibility to protect against and punish international crimes. Taken together with the other elements of the Pact, in particular the peace and security arrangements, the Protocols in the Pact furnish new tools for states in the region to address a spectrum of issues connected with international justice, from the fight against impunity for international crimes, to efforts to prevent such crimes through conflict prevention and the possibility of collective intervention in situations of mass atrocity.

The three Protocols which directly deal with the prevention and prosecution of international crimes are:

- The Protocol on the Prevention and Punishment of the Crime of Genocide, War Crimes and Crimes Against Humanity and all forms of Discrimination;
- The Protocol on the Prevention and Suppression of Sexual Violence Against Women and Children; and

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<sup>9</sup> See UN Security Council Resolution 978, UN doc. no. S/RES/978/1995, February 27, 1995, at 5.

<sup>10</sup> “Rwanda: The Preventable Genocide,” Report to the OAU by the Panel of Eminent Persons, Chapter 24, III, para II.

<sup>11</sup> See, *inter alia*, the Preamble to the Protocol on the Prevention and Punishment of the Crime of Genocide, War Crimes and Crimes Against Humanity, where states note the “persistent insecurity aggravated by the massive violations of human rights, the policies of exclusion and marginalisation, [and] impunity [for] the crime of genocide, war crimes and crimes against humanity.”

- The Protocol on Judicial Cooperation.

It is worth pointing out that these protocols are in force in eight states in the region, certain of which follow the monist approach to the domestication of international law. In such states, the protocols may already be applicable on the domestic plane.<sup>12</sup>

***The Protocol on the Prevention and Punishment of the Crime of Genocide, War Crimes and Crimes Against Humanity and all forms of Discrimination***

The Great Lakes region is the site not only of all four current International Criminal Court (ICC) situation investigations, international/hybrid tribunals and commissions but also of a number of domestic criminal law mechanisms, both formal and informal, which have been designed, with varying degrees of success, to tackle international crimes. Against this background, the Pact's Protocol on the Prevention and Punishment of the Crime of Genocide, War Crimes and Crimes Against Humanity and all forms of Discrimination (IC Protocol) attempts to deal with the question of serious international crime in the region a comprehensive manner.

The Preamble to the IC Protocol recognises the inextricable links between impunity, insecurity and under-development, expressing deep concern about "endemic conflicts and the persistent insecurity aggravated by the massive violations of human rights, the policies of exclusion and marginalisation, the impunity of the crime of genocide, war crimes and crimes against humanity." The Protocol therefore contains a mix of criminal law and human rights law provisions, dealing not just with the prosecution of offenders (particularly with regard to identifying the appropriate jurisdiction for prosecution), but also with respect to the systematic or contextual root causes of such crimes, including the setting up of regional early warning mechanisms and addressing the need to combat "discriminatory ideologies and practices."<sup>13</sup>

*Preventing discrimination and hate-based crime*

As the Eminent Persons report recognised, a huge contextual factor for the conflicts in the Great Lakes has been the regionalisation of ethnic hatred, a phenomenon "that must be added to the list of complications frustrating any serious settlement in the Great Lakes and surrounding region."<sup>14</sup> The experts found that in the region "[p]olitical rivalries and ethnic distinctions are becoming intertwined, with the result that an ugly new ethnic polarization threatens to engulf a huge swath of Africa."<sup>15</sup> Central to the IC Protocol therefore are chapters on "combating discriminatory ideologies and practices" (chapter II) and "combating prejudices" (chapter III).

Under Chapter II of the IC Protocol, states are required to "immediately adopt measures to eliminate all forms of discrimination and promote harmony among all segments of the nation."<sup>16</sup> In particular the Protocol urges the suppression of "ideas or theories based on the superiority of a race or group of people of a particular ethnic origin or which justify or encourage any form of racial

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<sup>12</sup> Although with respect to criminal procedure implementing legislation may still be necessary.

<sup>13</sup> Protocol for the Prevention and the Punishment of the Crime of Genocide, War Crimes and Crimes Against Humanity and all forms of Discrimination, Chapter II, Article 5.

<sup>14</sup> See para 20.71 Eminent Persons Report.

<sup>15</sup> See para 20.71 Eminent Persons Report.

<sup>16</sup> Protocol for the Prevention and the Punishment of the Crime of Genocide, War Crimes and Crimes Against Humanity and all forms of Discrimination, Chapter II, Article 5.

hatred and discrimination.”<sup>17</sup> Discrimination is defined broadly as “any distinction, exclusion, restriction or preference based on race, religion, gender, colour, ancestry or national or ethnic origin, the purpose or the effect of which is to destroy or undermine the recognition, the possession or the exercise, in conditions of equality, of human rights and fundamental freedoms in the political, economic, social and cultural fields or in any other area of life.”<sup>18</sup>

Under the Protocol not only must states therefore adopt concrete measures to eliminate incitement to discrimination or acts of discrimination, but they are also required to “declare that any circulation of ideas based on the superiority of one group over another” is an offence punishable by law.<sup>19</sup> The education system can also play a role. Article 7 of the Protocol provides that member states “undertake to take immediate and effective measures in the fields of teaching education, culture and information to combat prejudices leading to racial discrimination and to encourage understanding, tolerance and friendship between nations, racial and ethnic groups.” In addition to the IC Protocol’s focus on preventing discrimination, it is also stipulated that policies of *positive* discrimination can be pursued, in particular to assist those groups which have traditionally suffered exclusion, with the goal of attenuating further victimisation.<sup>20</sup>

### *Remedies*

Article 4 of the IC Protocol declares that states have an obligation to ensure that “anyone within their jurisdiction will enjoy protection and effective recourse to the national courts and other competent State authorities, against any act of discrimination which, contrary to this Protocol, may violate his or her personal rights and his or her fundamental liberties, as well as the right to seek satisfaction or fair and adequate redress for any harm of which she or he might have suffered as a result of such discrimination.”<sup>21</sup> Unlike the approach taken in the Protocol on the Prevention and Suppression of Sexual Violence Against Women and Children, there is no provision in the IC Protocol for victims of serious crimes to seek compensation.<sup>22</sup>

### *Criminal prosecution*

The principle reference point for the applicable law for criminal prosecutions in the IC Protocol is the Rome Statute of the ICC. War crimes, for example, are described in the Protocol simply as “any one of the acts set out in article 8 of the Statute of the International Criminal Court.” The

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<sup>17</sup> Protocol for the Prevention and the Punishment of the Crime of Genocide, War Crimes and Crimes Against Humanity and all forms of Discrimination, Chapter II, Article 6

<sup>18</sup> Protocol for the Prevention and the Punishment of the Crime of Genocide, War Crimes and Crimes Against Humanity and all forms of Discrimination, Article 1(k)

<sup>19</sup> See Article 6(2)(a). There is a danger that this provision could be over-broadly interpreted. Measures which have the effect of restricting the right to freedom of expression can actually contribute to the incubation below the surface of extremist ideologies which give birth to violence. In implementing this provision, therefore, states must be careful to conform to the requirements of the African Charter on Human and Peoples’ Rights and other applicable law with regard to the protection of the right to freedom of expression.

<sup>20</sup> Article 5(d) of the IC Protocol requests states “if the circumstances so require” to take “specific and concrete measures in the social, economic, cultural and other fields to adequately ensure the development or protection of particular groups, or individuals belonging to these groups, in order to guarantee their full exercise of human rights and fundamental freedoms. These measures shall be maintained until the objectives for which they were taken have been achieved.”

<sup>21</sup> It remains to be seen to what extent states will interpret the obligation to provide “effective recourse” as encompassing legal aid or assistance.

<sup>22</sup> Victims of crimes covered by the IC Protocol, which are also the subject of the SV Protocol, should, however, be able to access the compensation and victim support schemes set out in the latter.

Convention on the Prevention and Punishment of the Crime of Genocide (the Genocide Convention) is also a vital point of reference. The crimes of genocide and complicity in genocide, for example, are defined as those set out in Articles 2 and 3 of the Genocide Convention as well as in Article 6 of the Rome Statute.<sup>23</sup> The importance of preventing and punishing sexual violence is also given strong emphasis in the IC Protocol with the preamble noting that “Article 3 of the Statute of the International Criminal Tribunal for Rwanda affirms that rape is a crime against humanity when committed as part of a widespread or systematic attack against any civilian population on national, political, ethnic, racial or religious grounds.”

With respect to the principle of non-impunity and the requirement to prosecute, the IC Protocol reaffirms that, “[p]ersons accused of genocide, war crimes or crimes against humanity shall be brought before the competent courts of the Member State on whose territory the crime was committed or before competent international judicial bodies.”<sup>24</sup> The Preamble to the Protocol in fact recognises the existence, even prior to the entry into force of the Protocol, of a duty to prosecute such crimes to the greatest extent possible: “[i]t is each Member State’s duty to exercise its criminal jurisdiction over the perpetrators of the crime of genocide, war crimes, and crimes against humanity”. Article 9(3) of the IC Protocol in addition identifies a particular obligation to “take appropriate measures to neutralise, disarm, arrest and bring before the competent courts” the perpetrators of genocide in accordance with the Genocide Convention, and authors of war crimes or crimes against humanity in accordance with the Rome Statute of the ICC and the relevant resolutions of the UN Security Council. As part of this effort states are enjoined to take the necessary measures, consistent with their constitutions to ensure the domestication of the protocol and to provide “effective penalties for persons guilty of the crime of genocide, war crimes and crimes against humanity.”<sup>25</sup>

The IC Protocol also expands the bases upon which states normally take jurisdiction over a crime to include situations not just where the acts complained of were committed on its territory, but where the alleged perpetrator is a national, or ordinarily resident on its territory, or where the victim is a national.<sup>26</sup> States are enjoined in these circumstances to “take necessary measures to establish jurisdiction” over the perpetrators.

The IC Protocol further confirms that statutes of limitations with respect to genocide, war crimes and crimes against humanity shall not operate,<sup>27</sup> and that the official status of an accused shall not “shield or bar their criminal liability,” particularly noting that “official status” encompasses “a Head of State or Government, or an official member of a Government or Parliament, or an elected representative or agent of a State.”<sup>28</sup>

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<sup>23</sup> Protocol for the Prevention and the Punishment of the Crime of Genocide, War Crimes and Crimes Against Humanity and all forms of Discrimination, Article 8(2).

<sup>24</sup> Protocol for the Prevention and the Punishment of the Crime of Genocide, War Crimes and Crimes Against Humanity and all forms of Discrimination, Article 9(2).

<sup>25</sup> Protocol for the Prevention and the Punishment of the Crime of Genocide, War Crimes and Crimes Against Humanity and all forms of Discrimination, Article 9(1).

<sup>26</sup> Protocol for the Prevention and the Punishment of the Crime of Genocide, War Crimes and Crimes Against Humanity and all forms of Discrimination, Article 10.

<sup>27</sup> Protocol for the Prevention and the Punishment of the Crime of Genocide, War Crimes and Crimes Against Humanity and all forms of Discrimination, Article 11.

<sup>28</sup> Protocol for the Prevention and the Punishment of the Crime of Genocide, War Crimes and Crimes Against Humanity and all forms of Discrimination, Article 12.

## *Extradition*

Reflecting the collectively assumed obligation by states in the region to punish those who have committed serious international crimes, the IC Protocol contains a number of provisions on easing extradition procedures between member states.<sup>29</sup> Article 14 provides that all crimes within the field of application of the IC Protocol shall be considered extraditable offences in respect of which the political offence exemption will not apply.<sup>30</sup>

Where there are a number of concurrent requests for extradition in respect of the same or different offences and the same person, Articles 16(1) and (2) provide for the determination of jurisdiction in the various circumstances. Article 24 further stipulates that priority must be given to a request for rendition from the ICC where the requested state has ratified the Rome Statute.

Although member states are not *obliged* under the Protocol to extradite their own nationals to another state, they must transmit the information received from that state with respect to offences allegedly committed to *their* relevant national prosecution authorities in the region and keep the state requesting the extradition informed about the outcome of any subsequent investigation.<sup>31</sup>

Finally, in the absence of a specific extradition treaty between two states, the Protocol itself is a legal basis for extradition.<sup>32</sup>

## *Cooperation with the ICC*

States commit themselves in the Protocol to “endeavour to ratify the Statute of the [ICC] in accordance with their constitutional requirements.”<sup>33</sup> Only two Great Lakes states have not ratified the Rome Statute – Sudan and Angola. Both are, however, signatories.<sup>34</sup> Member states that have ratified the Rome Statute by the date of the entry into force of the Protocol have undertaken further commitments in Articles 22, 23 and 24. These include ensuring that procedures for “all forms” of cooperation with the Court are established by legislation (Article 22), that ICC requests for rendition are given primacy (regardless of the nationality of the accused) (Article 24) and the implementation of a specific set of cooperation activities ranging from responses to territory transit requests to the execution of prison sentences (Article 23). Cooperation is particularly key as the Great Lakes region is currently the theatre of all the situational investigations undertaken to date by the ICC (Central African Republic, Democratic Republic of Congo, Sudan and Uganda).

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<sup>29</sup> Protocol for the Prevention and the Punishment of the Crime of Genocide, War Crimes and Crimes Against Humanity and all forms of Discrimination, Article 15(3).

<sup>30</sup> The concept of the political offence exemption in extradition law is intended to protect persons from politically motivated prosecutions and provides that those who have committed a crime that is political in character should not be returned for trial to their country of origin, *inter alia*, as they are unlikely to be provided a fair trial.

<sup>31</sup> Protocol for the Prevention and the Punishment of the Crime of Genocide, War Crimes and Crimes Against Humanity and all forms of Discrimination, Article 15(3).

<sup>32</sup> Protocol for the Prevention and the Punishment of the Crime of Genocide, War Crimes and Crimes Against Humanity and all forms of Discrimination, Article 14(2).

<sup>33</sup> Protocol for the Prevention and the Punishment of the Crime of Genocide, War Crimes and Crimes Against Humanity and all forms of Discrimination, Article 21.

<sup>34</sup> The Vienna Convention on the Law of Treaties recognises that signature is one of the means by which a State expresses consent to be bound by a treaty and therefore requires that States must refrain from acts which would defeat the object and purpose of the treaty.

Although there is no specific reference in the Protocol to the ICTR or indeed to any international tribunal other than the ICC, the Protocol may provide a framework for states in the region to improve cooperation with the ICTR, particularly with respect to national capacity to assist with the Tribunal's completion strategy.

### *Mechanisms*

It is not just at a level of principle, but through institutional structures, that states in the region have agreed to prevent, detect and punish the perpetrators of genocide, war crimes and crimes against humanity.<sup>35</sup> The IC Protocol creates two new mechanisms to help facilitate this cooperation.

- Joint Commissions of Enquiry: The Protocol envisages the creation of multi-state Joint Commissions of Enquiry to assist in the determination of jurisdiction and agreement on extradition requests,<sup>36</sup> and the exchange of information, including evidence, between police forces of member states.<sup>37</sup>
- Committee for the prevention and the punishment of the crime of genocide, war crimes and crimes against humanity and all forms of discrimination: The establishment of a regional committee for the prevention and the punishment of the crime of genocide, war crimes and crimes against humanity and all forms of discrimination is also contemplated.<sup>38</sup> Constituted by one representative from each member state, the functions of the committee are broadly defined as ranging from early warning functions ("alerting the summit of the conference in good time in order to take urgent measures to prevent potential crimes") to "contributing to raising awareness and education on peace and reconciliation," recommending compensation measures and monitoring national demilitarisation, demobilisation and reintegration programmes.<sup>39</sup> In achieving its goal the Committee is urged to collaborate with the AU Commission, civil society organisations and the UN system and is mandated to resort to any appropriate method of investigation, including interviewing "any person likely to provide it with useful information." The secretariat of the ICGLR is charged with acting as secretariat to the committee.<sup>40</sup>

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<sup>35</sup> Protocol for the Prevention and the Punishment of the Crime of Genocide, War Crimes and Crimes Against Humanity and all forms of Discrimination, Article 13.

<sup>36</sup> Protocol for the Prevention and the Punishment of the Crime of Genocide, War Crimes and Crimes Against Humanity and all forms of Discrimination, Articles 17-19.

<sup>37</sup> Protocol for the Prevention and the Punishment of the Crime of Genocide, War Crimes and Crimes Against Humanity and all forms of Discrimination, Article 20.

<sup>38</sup> Protocol for the Prevention and the Punishment of the Crime of Genocide, War Crimes and Crimes Against Humanity and all forms of Discrimination, Article 26.

<sup>39</sup> Protocol for the Prevention and the Punishment of the Crime of Genocide, War Crimes and Crimes Against Humanity and all forms of Discrimination, Article 38(2)(c),(e),(f) and (g).

<sup>40</sup> Protocol for the Prevention and the Punishment of the Crime of Genocide, War Crimes and Crimes Against Humanity and all forms of Discrimination, Article 40-41.

## *The Protocol on the Prevention and Suppression of Sexual Violence Against Women and Children*

Expanding the scope of international concern around sexual violence crimes, the Protocol on the Prevention and Suppression of Sexual Violence Against Women and Children (SV Protocol) contains a comprehensive set of measures for tackling sexual violence in the region, from prosecution to compensation, and expands the range of acts which can form the subject of criminal penalty in international and national law.

Reflecting the experience of rape as a weapon of war in the Rwandan context and the jurisprudence at the Rwanda and Yugoslav Tribunals, the Protocol requires that states recognise that under certain conditions rape can be considered a crime against humanity. The legal framework for prosecution and punishment of perpetrators of sexual violence in the region is also enhanced by the Protocol, including the creation of new arrangements for the surrender of fugitives and the abolition of statutes of limitations.

The SV Protocol is a progressive instrument in many respects, explicitly announcing a break with old attitudes: Article 3(1) provides, “the principles for dealing with sexual violence” assert member states in the Protocol “shall derive from contemporary developments relating to the criminalisation of sexual violence and the punishment of the perpetrators of sexual violence under international criminal law.”<sup>41</sup>

The Protocol has three core objectives:

- Provide protection to women and children against sexual violence;
- Enhance the legal framework which member states can use to prosecute and punish perpetrators of sexual violence, including arrangements for the surrender of fugitives; and
- Provide for the establishment of a regional mechanism that will provide legal, medical and social assistance to female and child survivors of sexual violence, including counselling and compensation.<sup>42</sup>

### *A new definition of sexual violence*

The expansive definition of sexual violence set out in Article 1(5) of the SV Protocol encompasses “any act which violates the sexual autonomy and bodily integrity of women and children under international criminal law” and includes a range of acts from rape to forced pregnancy, sexual slavery and “gender based violence” (which tends to impact women disproportionately). The Protocol follows the Rome Statute in providing that “[r]ape, sexual slavery, enforced prostitution, forced pregnancy, enforced sterilization, or any other form of sexual violence of comparable

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<sup>41</sup> Reflecting this approach, member states are encouraged to ratify and domesticate the Convention on the Elimination of All Forms of Discrimination Against Women, the Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children, and the Protocol to the African Charter on Human and Peoples Rights on the Rights of Women in Africa (Article 3 (4)).

<sup>42</sup> Protocol on the Prevention and Suppression of Sexual Violence Against Women and Children, Article 2.

gravity” can constitute crimes against humanity “when committed as part of a widespread or systematic attack directed against any civilian population, with knowledge of the attack.”<sup>43</sup>

Article 1(5) of the Protocol provides furthermore that “[s]exual violence also includes gender-based violence that is directed against a woman because she is a woman or that affects women disproportionately. It includes acts that inflict physical, mental or sexual harm or suffering, threats of such acts, coercion and other deprivations of liberty, as defined by the United Nations Committee on the Elimination of All Forms of Discrimination Against Women, in General Recommendation 19.”

### *Combating impunity*

Reflecting the strong emphasis on the need to combat impunity for sexual violence set out in the Preamble, the SV Protocol removes the statute of limitations for sexual violence crimes<sup>44</sup> and urges the imposition of maximum sentences, in line with national law for any person convicted of a crime of sexual violence against a woman or child.<sup>45</sup> The Protocol, in Articles 6(1)-(3), also creates a framework for ensuring that perpetrators do not evade arrest and trial, stipulating the procedures which should be followed in making requests for the arrest and surrender of an accused person between states in the region.<sup>46</sup>

### *Supporting and compensating survivors*

Recognising the particular vulnerability of survivors of sexual violence and the barriers to pursuing remedies, the SV Protocol provides that procedures for lodging complaints by victims of sexual violence by “women, children and other interested parties” should be simplified.<sup>47</sup> It emphasises the need during the conduct of trials to take into consideration “the emotional state of the victims and survivors of such crimes.”<sup>48</sup> In such procedures states have agreed, for example, that “victims and survivors shall give evidence in camera, or by video links, and they shall neither be compelled nor required to give evidence in open criminal proceedings, nor shall the casting of aspersions on their character and integrity be permitted as part of the defence of any person charged with a crime of sexual violence.” At the regional level, to make these provisions operational, states have agreed to create a special regional facility for training and sensitising judicial officers, police units, social workers and media officers, among others, who deal with cases of sexual violence.<sup>49</sup>

Compensation of survivors of sexual violence is prioritised by Article 6(6) of the SV Protocol. Indeed the removal of statutes of limitations for the prosecution of crimes of sexual violence is

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<sup>43</sup> See Art 1(2)(g) of the SV Protocol and Rome Statute of the ICC, Article 7(1)(g). It is particularly apt that the Protocol confirms that sexual violence can constitute a crime against humanity, as it was the experience of rape as a weapon of war in the Rwanda context that spurred the change in how rape is conceived in international law.

<sup>44</sup> Protocol on the Prevention and Suppression of Sexual Violence Against Women and Children, Article 6(6).

<sup>45</sup> Protocol on the Prevention and Suppression of Sexual Violence Against Women and Children, Article 5(1).

<sup>46</sup> It is important to note that the Protocol clearly states that these procedures should not prejudice the operation of extradition and rendition procedures under the Protocol on Judicial Cooperation (Article 2(3)). One issue not tackled by the SV Protocol is the grant of amnesty or the question of immunities from prosecution, unlike the IC Protocol, which deals with the latter. Crimes encompassed by the SV Protocol which are also the subject of the IC Protocol will of course be governed by those provisions.

<sup>47</sup> Protocol on the Prevention and Suppression of Sexual Violence Against Women and Children, Article 6(4).

<sup>48</sup> Protocol on the Prevention and Suppression of Sexual Violence Against Women and Children, Article 6(5).

<sup>49</sup> Protocol on the Prevention and Suppression of Sexual Violence Against Women and Children, Article 6(9).

explicitly linked to ensuring – at least in theory – that survivors of sexual violence are compensated.<sup>50</sup>

Looking beyond the capacity of the individual perpetrator to compensate, the only *national level* funds which states have agreed to create under the SV Protocol are those focussed on putting in place “legal and medical procedures for assisting victims” and “sensitizing offenders on the wrongfulness of their sexual behaviour.”<sup>51</sup> It is not clear if these funds could include a compensation pillar.<sup>52</sup> The SV Protocol does, however, suggest that the responsibility of states to compensate survivors “may,” *at the regional level*, “entail the creation of a special facility under the fund for reconstruction and development, the purpose of which shall be to provide social and legal assistance, medical treatment, counselling, training, rehabilitation and reintegration of the survivors and victims of sexual violence, *including those who may not be able to identify the perpetrators of sexual violence*” (emphasis added).<sup>53</sup> The reference in this provision is to the Special Fund for Reconstruction and Development (SFRD Fund), a core organ of the Pact. It is not clear, however, that even if the Fund could be accessed, that individual compensation to particular survivors would be available through this channel.

### *Preventing repeat offences*

Acknowledging that perpetrators of sexual violence are often recidivists, the SV Protocol makes provision for the implementation of rehabilitation programs for perpetrators serving their sentences. While Article 5 of the SV Protocol stipulates the imposition of maximum sentences against offenders, it also encourages states to ensure that the perpetrators undergo “social correction and rehabilitation.” In particular, the SV Protocol calls for the creation at national level of a “fund for sensitizing offenders on the wrongfulness of their sexual behaviour.”<sup>54</sup>

### *Model legislation*

Model legislation was developed by the experts involved in the drafting process for the SV Protocol but not ultimately adopted by states. Nevertheless the model legislation provides a guide to modalities for implementation of the Protocol. The model legislation focuses on the criminal law dimensions of the instrument. The core innovations are the national institutions envisaged as supporting the implementation of the Protocol: a Committee for the Protection of Women and Children from Sexual Violence and a Compensation Commission for Sexual Violence Claims.

As designed, the national level Committee for the Protection of Women and Children from Sexual Violence is charged with overseeing the protection of women and children in each member state. The Committee is conceived as a permanent body, sitting at least one a week, with provision for

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<sup>50</sup> The drafting of Article 6(6) does however give rise to some ambiguity – the juxtaposition of the statement that “no statute of limitations shall apply to sexual violence crimes” with “and hence assume responsibility for ensuring that the victims and survivors of sexual violence are compensated, by the perpetrators” does raise the question as to whether the emphasis is to be on the assessment of civil or criminal responsibility.

<sup>51</sup> Protocol on the Prevention and Suppression of Sexual Violence Against Women and Children, Article 6(7).

<sup>52</sup> The model legislation created for annexation to the Protocol does, however, provide greater guidance on compensation modalities through the creation of a Committee for the Protection of Women and Children from Sexual Violence with broad oversight and complaints functions and a Compensation Commission (see discussion to follow).

<sup>53</sup> Protocol on the Prevention and Suppression of Sexual Violence Against Women and Children, Article 6(8).

<sup>54</sup> Protocol on the Prevention and Suppression of Sexual Violence Against Women and Children, Article 6(7).

the creation of sub-committees. The Committee membership comprises relevant government and UN officials in addition to such representatives of women's and children's civil society groups and representatives of women and children "as the Committee may decide." The functions of the Committee range from monitoring and supervising the implementation of the Protocol to presenting claims on behalf of survivors to the Compensation Commission. Among the other tasks suggested are the provision of advice on the harmonisation of laws and ratification of the SV Protocol and related instruments, and the mainstreaming of relevant international laws and policies. Public awareness-raising is envisaged. The Committee is further charged with coordinating the protection of women and children from sexual violence with relevant ministries, the UN and organs of the AU and civil society, and acting as a focal point on behalf of government organs on this issue.

Most critically, the Committee was envisaged by the drafters of the model legislation as being able to act as a focal point for the lodging of complaints by women and children, or other interested persons on their behalf. This might include providing advice on procedures and presentation of claims, in addition to counselling and rehabilitation services. The Committee is also responsible for ensuring that the protections for the psychological health and dignity of the victims set out in Article 6 of the SV Protocol is assured in criminal prosecutions, including through the monitoring of such proceedings.

A second body conceived in the model legislation is the national level Compensation Commission for Sexual Violence Claims, tasked with receiving the assessed claims for compensation from the Committee and deciding on the level of such compensation and the responsible person or organ.

### *The Protocol on Judicial Cooperation*

The Protocol on Judicial Cooperation (JC Protocol) creates a regional framework for the handling of extradition requests and cooperation in respect of investigations and prosecutions for both international crimes and ordinary serious crimes. Agreement on the JC Protocol in the Pact was animated by the deep concern of states in the region about "the upsurge in crime aggravated by impunity which together exacerbate a climate of insecurity in the Great Lakes Region." The objectives of the JC Protocol, as expressed in its Preamble, are therefore to:

- Combat impunity for crime in the Great Lakes region;
- Extend reciprocal judicial and police cooperation between states, particularly with respect to extradition and to fill institutional gaps; and
- Enhance the protection of citizens of the countries of the region and their property.

The offences covered by the extradition regime set up in the JC Protocol include those which are "punishable by an imprisonment of not less than six months" under the laws of each member state.<sup>55</sup> The Protocol creates a framework for the handling of extradition requests in respect of such crimes covering a range of issues such as procedures relating to accused and convicted persons (Article 7), concurrent requests by states (Article 12), the regulation of preventative detention and release (Article 8 and 9), cooperation in respect of investigations and prosecutions (Chapter III), including the creation of joint investigation commissions (Articles 17, 18, 19 and 20), and exchange of information on the commission and investigation of international crimes (Article 21). The Protocol

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<sup>55</sup> Protocol on Judicial Cooperation, Article 3.

also addresses the regulation of the extradition of what the Protocol terms “political refugees” and persons who have been accused of political crimes.<sup>56</sup>

### **Other Protocols in the Pact with the potential to contribute to combating impunity**

The Pact is a huge instrument with multiple elements and a full analysis is not possible in this short reflection. A number of the other Protocols of the Pact, however, also specifically address elements of the task of combating impunity and highlights are briefly surveyed below.

The Pact’s Protocol on Non-Aggression and Mutual Defence (NA Protocol) is a wide-ranging instrument with considerable implications for the management of peace and security matters in the sub-region. It also contributes to prevention of international crime by explicitly acknowledging the obligation of states to intervene to protect against its commission in certain circumstances. Article 4(8) stipulates that the prohibition on the threat, or use of, force by a member state “shall not impair the exercise of their [member states’] responsibility to protect populations from genocide, war crimes, ethnic cleansing, crimes against humanity, and gross violations of human rights committed by, or within a State.” This provision mirrors that of Article 4(h) of the Constitutive Act of the AU. The circumstances which may trigger the exercise of the Article 4(8) responsibility in the Protocol are, however, more expansively drawn than in the AU Constitutive Act, in particular including “gross violations of human rights.” What type of action might be entailed by this provision is not spelled out but it could certainly include the setting up or promotion of international justice accountability mechanisms in line with the AU Peace and Security Council’s interpretation of similar provisions of the Constitutive Act of the AU.<sup>57</sup>

With respect to enforcing decisions, the Pact stipulates explicitly that if states fail to comply with the NA Protocol, an extraordinary summit may be convened to consider appropriate action.<sup>58</sup> Similarly, Chapter X of the Protocol on Democracy and Good Governance envisages the convening of an extraordinary session of the heads of state summit of the Conference in the event of “threats to democracy and a beginning of its breakdown by whatever process and in the event of massive violations of human rights in a Member State.”<sup>59</sup> Article 49 of this Protocol provides that a series of “urgent and appropriate measures” should be taken by the summit to put an end to the situation, including sanctions against the responsible member state, “with a view to returning to normal institutional life and the respect of human rights.”

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<sup>56</sup> Protocol on Judicial Cooperation, Article 4.

<sup>57</sup> See, Assembly of the AU, “Decision on the Hissène Habre Case and the African Union,” July 2, 2006, AU Doc. no. Assembly/AU/3 (Vii). The Assembly noted that it took jurisdiction of the case on the basis of the protection of human rights as an objective of the Union as articulated by Article 3(h) of the Constitutive Act, coupled with the two operational principles of Articles 4(h) and 4(o): *viz*, the right to intervene in “grave circumstances” and the “condemnation and rejection of impunity.”

<sup>58</sup> Great Lakes Pact, Article 5(1)(d).

<sup>59</sup> Protocol on Democracy and Good Governance, Article 48.

## About the International Refugee Rights Initiative

The International Refugee Rights Initiative (IRRI) was founded in 2004 to enhance the protection of the rights of the forcibly displaced worldwide. IRRI grounds its advocacy in the rights accorded in international human rights instruments to those who are forced to flee and strives to make these guarantees effective in the communities where the displaced and their hosts live.

A focus of IRRI's work in Africa is understanding and integrating the principles of human rights and international justice into responses to forced displacement as a necessary aspect of moving from conflict to peace. IRRI also acts a bridge between local advocates and the international community, enabling local knowledge to infuse international developments and helping local advocates integrate the implications of global policy in their work at home.

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