



Africa Legal Aid

28 May, 2010

Kampala, Uganda

to coincide with
The First Review Conference of the International Criminal
Court (ICC)



**On the Shores of Lake Victoria:
Africa and the Review Conference of the
International Criminal Court (ICC)**

Is Africa a Participant or Target of International Justice?

Keynote Address: H.E. Judge Song Hyun Song, President of the ICC

Also by Africa Legal Aid: Viewing and Discussion 'The Reckoning', 29 May 2010 -
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Making
Human Rights
a Reality

Conference Report

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Introduction

To coincide with the first Review Conference of the International Criminal Court (ICC), Africa Legal Aid (AFLA) organized a conference on *Africa and the International Criminal Court* on 28 May 2010. The Meeting is built on AFLA's ongoing *South North Dialogue on International Justice* and will engage African legal fraternities, civil societies, gender groups and policy makers in a dialogue with their Northern counterparts on critical issues on ICC and International Justice in regards to Africa. The meeting addressed issues on the agenda of the ICC Review Conference, including the Definition of the Crime of Aggression, the Interface between Peace and International Justice, Gender Justice, and the big question: Is Africa a Participant or Target of International Justice?

The conference carried forward the lessons from the AFLA initiated Policy Agenda for International Justice to mainstream African Perspectives in International Justice. An important theme during the conference was War Crimes Division (WCD) of the High Court of Uganda. AFLA naturally has an interest in sharing its expertise and that of its extensive network with this newly established national Court in Africa, with a specific mandate to prosecute war crimes and crimes against humanity. The timing of the Workshop is opportune as African and International Civil Societies, Legal Fraternities and other stakeholders whom the newly established Court should get to know will be present in Kampala for the ICC review conference.

The galaxy of Speakers included an Opening Address by H.E. Judge Song Hyun Song, President of the ICC. At the close of the Conference, H.E. Adama Dieng launched a Special edition of the AFLA Quarterly, on the theme of the Conference, with lead article by Prof. Leila Sadat of Washington University, St. Louis, and Chair of Crimes against Humanity Initiative. As well, AFLA dedicated a side Program on 29th May to students and the youth, with a viewing of a 90 minute documentary, **The Reckoning**, a film on the activities and challenges of the ICC. The discussion after the documentary between the students and Prosecutor Louis Moreno-Ocampo of the International Criminal Court (ICC) turned out to be one of the Highlights of AFLA's activities in Kampala.

The Conference attracted over one hundred participants from a diverse background: high-level government officials, scholars, human rights and justice advocates, civil society representatives, members of the legal fraternity and of the international justice community, as well as students. The viewing of the Reckoning attracted over one hundred fifty students with a main focus on Law Students from five different universities in Kampala.

We hope with this report all interested will have the possibility to get informed in the presentations and discussions that took place in Kampala under the auspicion of Africa Legal Aid.



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Opening

Dr. Edward Kwakwa, *World Intellectual Property Organisation, Chair of AFLA initiated Steering Committee on a Policy Agenda for International Justice, Member of Governing Council of AFLA*

Welcome:

Ambassador Mirjam Blaak, *Deputy Head of Mission, Embassy of Uganda, the Benelux, Member of AFLA Initiated Steering Committee on a Policy Agenda for International Justice*

A Policy Agenda for International Justice:

Evelyn A. Ankumah, *Executive Director, Africa Legal Aid (AFLA)*

Reflections:

H.E. Luis Moreno-Ocampo, *Prosecutor International Criminal Court (ICC)*

Keynote:

H.E. Judge Sang-Hyun Song, *President of the International Criminal Court (ICC)*

Dr. Edward Kwakwa, *World Intellectual Property Organisation, Chair of AFLA initiated Steering Committee on a Policy Agenda for International Justice, Member of Governing Council of AFLA*, welcomed all distinguished guests and participants on behalf of Africa Legal Aid. The conference began officially with a welcome of Ambassador Mirjam Blaak, *Deputy Head of Mission, Embassy of Uganda in the Benelux*. Ambassador Mirjam Blaak is also a member of the AFLA initiated Steering Committee on a Policy Agenda for International Justice.

Welcome

Ambassador Mirjam Blaak, *Deputy Head of Mission, Embassy of Uganda, the Benelux, Member of AFLA Initiated Steering Committee on a Policy Agenda for International Justice*

Good morning to all of you. I bring you warm greetings of His Excellency, President Yoweri Kaguta Museveni, who unfortunately due to other important state duties cannot be here with us to address you. But he will be present on Sunday during the football match organised by victims and, of course, for the opening session. The prosecutor laughs, but publicly probably the football match is even more important than the Review Conference. I think it will be widely published all around the world, the president of Uganda playing with the Secretary General of the United Nations. But indeed it is an honour and a great privilege for me to welcome you all to the seven hills of Kampala. Those of you who looked around must have realized there are more than seven hills, like in Rome; I believe they also claim but that there are more than seven.

But any way, a couple of years ago when we first broached the idea of having the Review Conference in Kampala, it was almost unthinkable that our invitation would be accepted or even taken seriously. We, however, strongly believed that the ICC needed to come to the people for whom it was established - the numerous victims on the African continent. Our ICC extended family in the economic West who need to experience the realities on the ground have an opportunity here to interact with civil society and effected victim communities. Kampala was a strategic choice as we are neighbouring with at least three other situation countries, the Democratic Republic of Congo, Sudan, now Kenya, and with the Central African Republic not being very far. It is our hope that the publicity



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the Review Conference has given the ICC in the region will transform it in the minds of the local populations from a phantom establishment in The Hague to a court that brings oppressors to justice and justice to the victims.

I would like to take the opportunity to those who supported our invitation to hold this memorial meeting in Uganda, especially the Coalition for the International Criminal Court (CICC), No Peace without Justice, the Stated Parties and all the friends of Uganda. Thank you very much.

It has been almost twelve years since a similar meeting took place on the seven hills on Rome when the Rome Statute was adopted and time has come for us to sit together and ask ourselves the difficult questions. We need to look at ourselves in the mirror and look back to where we have come from, where we are and where we are headed. We need to own the ICC to enact implementing legislation, meet our cooperation obligations by virtue of us being state parties, and do whatever it takes to bring justice to the victims. As a country we will continue to inspire, to pioneer the course of the victims in the same spirit we had when we made the first referral to the Court under Article 14 of the Statute. The historical passing of the ICC bill by the Ugandan Parliament on the 10th of March is yet another testament of our commitment to the work of the ICC. It will encourage other state parties, especially on the African continent, to pass legislation, to facilitate the ICCs work and ensure cooperation. Our establishment of the Special War Crimes Division of the High Court will translate the principle of complementarity to reality. As a continent we owe it to our future generations to firmly say: 'No more impunity'. We must transform the hard rendering stories that originate from Africa to success stories of peace, justice and development.

One of the main challenges the court faces is the apprehension of fugitives. Arrest warrants are of no use to anybody unless they are executed. I must admit that even the arrest warrants hanging over the head of some perpetrators have made them to realize that wherever they hide in the jungles of Africa, there is no safety, and that it is only a matter of time before their luck runs out. No matter how long it will take, even in the case of an indictment president, eventually each of them will have to account for the crimes they have committed, and the suffering they have inflicted on the millions of victims on our continent.

What is of paramount importance to Africa and the world is to send a strong message out there showing the Court's independence and determination to give fair trials to the accused persons. In this manner the credibility of the Court will be greatly enhanced in the African region in particular. I hope that this Review Conference will come with a strong statement on the cooperation of state parties to affect the warrants of arrest. In the case of Uganda, this is our main expectation when referring the situation to the ICC as the perpetrators of the most heinous crimes committed in Uganda by the LRA were finding themselves safe havens in Sudan and now other places. Unfortunately, we still have not been able to pre-apprehend them even though we have cooperated with neighbouring states in joined military operations. All of you here are aware of the LRA who are now not killing Ugandans but our fellow Africans in the DRC, Central African Republic and Sudan. This impunity must end.

On the other subject to be discussed in the Review Conference here in Uganda, we fully subscribe to the notion of bringing peace through justice, accountability, reconciliation and reparation. The Juba talks are a unique example how these two concepts evolve. In Uganda's case, perhaps we can say peace first and justice later. In Rome, the African continent was very rightly represented and supportive of the establishment of a strong International Criminal Court to further the fight against impunity that the other ad hoc tribunals had started on. Little did we realize then that we in Africa



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would be the very first to request for the ICC's involvement in our situations, which had led to the unfortunate misconception that the Court is targeting Africa. This conference sheds light on the real sense of the ICC's work and highlights the plight of victims in particular.

The pre-conference visits, organized by No Peace Without Justice comprising of at least twenty seven countries, have brought vivid, first hand, lasting images of the real situation on the ground. This alone is already a real success in the sense that it has brought the ICC and states parties closer to the victims in practical ways and also resulted in the increased dissemination of victims concerns. It became obvious that more outreach needs to take place in the affected areas for the ICC to be properly understood.

I hope you will find time in the very busy schedules of the coming days to enjoy this beautiful country gifted by nature. This meeting would have never taken place without the inspiring leadership of President, His Excellency Yoweri Kaguta Museveni, and some of you most likely will meet him personally in the days to come. I would like to take this opportunity, of course, to thank the organizers, especially Evelyn Ankumah, Executive Director of AFLA, for this meeting and making it possible to bring us to the seven hills of Kampala, to take stock of international criminal justice, and here, in particular today, to discuss the ICC and Africa.

Thank you all for coming and I would like to wish you success in your deliberations and enjoy our beautiful country Uganda.

A Policy Agenda for International Justice

Evelyn A. Ankumah, *Executive Director, Africa Legal Aid (AFLA)*

On behalf of Africa Legal Aid, I would like to thank you all very much for having accepted our invitation to participate in this forum to coincide with the first Review Conference of the International Criminal Court. Africa is indeed the appropriate venue to convene this first Review Conference. Africa has been a keen and willing participant in the establishment of the ICC. The African country of Senegal was the first to ratify the ICC Statute. Africa is largely represented at the ICC and all five situations currently before the ICC are African situations.

Ten years ago Africa Legal Aid convened its first meeting on international criminal justice in The Netherlands on universal jurisdiction for international crimes. One of the points which emerged in that meeting was that even though the concept of universal jurisdiction is universal, its application is not necessarily so. As Professor Shadrack Gutto so well put it, "What would happen if a small African state, like Djibouti, attempted to prosecute a national of the United States?" According to Shadrack Gutto, Djibouti would either be bombed or it will not receive aid from the World Bank. Since that meeting in April 2000, convened in the wake of the Pinochet indictment, Africa Legal Aid has undertaken many initiatives in an effort to contribute and mainstream much needed African perspectives to the emerging regime of international criminal justice.

One of these initiatives is the adoption of the Cairo-Arusha Principles on Universal Jurisdiction in Respect of Gross Human Rights Offences, an African Perspective. The distinct features of the Cairo-Arusha Principles include its proclamation that international criminal justice should apply not only in times of conflict but also during peace time; that international criminal justice should apply not only to natural persons but also to corporations and other legal entities; the list of offences constituting international crimes should include economic and environmental crimes. The Cairo-Arusha Principles have been coined the voice of Africa on international criminal justice.



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Since the establishment of the ICC and the swearing in of the first judges, we have engaged the ICC in dialogues on the interface between peace and international justice and more recently on the Al-Bashir arrest warrant. The discussion continues with a recurring question: is Africa a participant or a target of international justice?

The first ICC Review Conference provides opportunities to address related issues and to send a clear signal to the people of Africa and the rest of the world that the emerging regime of international criminal justice is truly universal, and that it addresses and prosecutes crimes not only committed by Africans but also by the more powerful and influential states. The difficult issues on the agenda of the ICC Review Conference including complementarity, peace and justice, and the crime of aggression will need to be addressed. Peace and justice are not competing, but are complementary notions. And while peace negotiations should always be pursued, it is not a substitute for prosecutions, it is complementary. The crime of aggression will need to be addressed. Many of us have been waiting for this Review Conference so that among others the crime of aggression will be revisited. There have been some movements, and even Richard Goldstone has added his voice to this against codification of the crime of aggression. Concerns about politicization of the ICC have been cited among the reasons. The perception that international criminal law addresses crimes not only committed by weaker states but also those committed by the powerful and influential needs to be addressed.

Africa should be seen to be a truth participant, not a target of international criminal justice. Africa Legal Aid has recently initiated a project called 'A Policy Agenda for International Justice' to build on the Cairo-Arusha Principles to mainstream African perspectives in international justice and to expand the list of crimes constituting international crimes. We will intensify our efforts to engage the African Union and sub-regional bodies on discussions on un-settling issues of international criminal justice to ensure that international justice is truly universal, legitimate and effective.

Reflections

H.E. Luis Moreno-Ocampo, *Prosecutor International Criminal Court (ICC)*

I am in this panel to show the commitment of the entire International Criminal Court with the work for the big things wherever they are, and today many victims are in Africa. President Song will present the view of the Court, and we fully support what he says, and in the afternoon Fatou Bensouda, the Deputy Prosecutor, will present a specific point about the Prosecutor Office.

I am here to say how pleased we are to work with you on this. I think the reflection is that, if you see this panel, you see how we are building a new system, because in this panel you see people committed to enforce the idea that it has to be done whenever it is needed. That is the commitment we have. And this year we are in Africa, and yes, today we are in Africa working with Africans. Ambassador Blaak, a very peculiar Ugandan, told me that President Museveni has built this beautiful country and called her a Ugandan of the Dutch tribe. In this place, people from many places - North American, New York, Netherlands, Ireland, and Asia - are working together for this idea. And for me, that is the concept.

The Nazi regime, their legend says they had the right to treat the German people in the way they wanted. And in fact, when they sent people to the camps, they took off their nationality - they are no longer Germans. Basically, the idea was, in Germany we do what we want with our people, with Jewish. This is unacceptable. Now is a new idea. We work together towards one principle in the



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humanity. And that is why President Song will say that the Court is working towards integrating with Africa.

I would like to close my short remark saying that a few months ago, I was here in Uganda with President Museveni and the concept discussed there was not Ugandan, or we are an Argentinean tribe in Uganda. No, what we are saying is “We are building the ICC tribe”. And that is what we are doing here. So, Dr. Kwakwa is no second class Ugandan, he is also from Ghana, but also a member of the ICC tribe. And that is what we are building. Here, in Uganda, you have many different groups, but also we are the ICC tribe, and that is what the Court is trying to achieve. One idea that the world is pursuing is to chase this and end impunity to protect victims all over the world.

Keynote Address

H.E. Judge Sang-Hyun Song, *President of the International Criminal Court (ICC)*

Excellencies, Ladies and Gentlemen, first of all I am grateful to Africa Legal Aid for inviting me here today. AFLA has demonstrated an unwavering dedication to justice on the Continent. I am particularly pleased to note its work to increase understanding of the International Criminal Court in affected communities. On the cusp of the Review Conference, it is an honour to speak this morning at this event devoted to the relationship between Africa and the ICC. Africa has played a major role in the ICC’s past and present, and has opportunities to continue to shape international criminal justice into the future.

As everyone here is well aware, all five situations currently before the Court relate to Africa. Three situations were referred by African governments themselves, a fourth by the UN Security Council, and a fifth at the request of the ICC Prosecutor. This is a court that through its current caseload is working to serve Africa and African victims. But it is also a court of Africa. Thirty African States have committed to the Rome Statute system and form the largest bloc in the Assembly of States Parties. Five out of 18 judges come from Africa as do the Deputy Prosecutor, Deputy Registrar, Senior Legal Adviser and 20% of our staff.

But also in a much wider sense, the ICC is Africa’s court. African states were at the fore of the movement to create a permanent international criminal court. To understand why, we need only briefly consider the tragic price paid by Africans for a culture of impunity that has reigned across the continent for centuries:

- It is a story of families decimated by slave traders who enriched themselves without ever being held to accountable.
- It is a story of early foreign traders, adventurers, and leaders who took African resources and caused tremendous suffering. They were never prosecuted.
- It is a story of colonial leaders who continued to exploit the people and wealth of Africa. They, too, were never punished for crimes.
- It is a story of a war between two superpowers that may have been cold for them, but whose effects were very real for thousands of African victims. Those responsible for crimes were again never called to account.
- It is a story of conflict and suffering which continues in too many places in Africa today.

But, now there is hope for change. Where impunity once reigned absolute, accountability is increasingly an option and hopefully will soon be the norm in Africa and elsewhere.



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These changes began in the 1990s. New courts were created to respond to atrocities in the former Yugoslavia and genocide in Rwanda. Other models followed to bring some measure of justice to places including Sierra Leone, East Timor, and Cambodia. At the same time, States picked up on an idea put forth by the UN General Assembly in 1948: to create a permanent international criminal court.

With their experience of colonialism and injustice, African States demanded this Court and insisted above all on guarantees of its independence from politics. They rejected proposals to place the Court under the control of the United Nations Security Council. In a set of principles adopted in 1997, the Southern African Development Community declared that the Court should be independent and that the Prosecutor should be able to investigate crimes “without influence from States or the Security Council, subject only to appropriate judicial scrutiny.” Further, the Southern African Development Community stressed that “the independence and operations of the Court and its judicial functions must not be unduly prejudiced by political considerations.” These principles were subsequently adopted by other African States and embraced by many states from other parts of the world. The initiative succeeded, and these important principles were embedded at the very core of the Rome Statute. The ICC – your Court – is now functioning as it was designed. It has faced opposition and its supporters have been put under pressure. But we have persevered. The ICC continues to act independently in carrying out the purely judicial mandate given to it in Rome and you, its longstanding supporters, continue to advocate for fair and impartial justice.

The next era in international criminal justice will be charted by a stock-taking exercise that forms a central part of the Review Conference that starts on Monday. And once again, African States have an opportunity to lead.

As all of you are aware, the stock-taking exercise comprises four separate themes: cooperation, complementarity, the impact of the Rome Statute on victims, and peace and justice. While the Review Conference is a conference of States, I am very pleased that Court officials will actively participate here in Kampala.

In each area of the stock-taking, States have ample opportunities to meet urgent needs.

Cooperation remains an area of vital importance to the ICC’s functioning and judicial efficiency. Cooperation from States has been generally forthcoming. The Court has identified its needs, highlighting the priorities of the arrest of suspects and agreements on relocation of witnesses and the agreements on the enforcement of sentences.

Next week, States could step up to meet these needs by making concrete pledges to ramp up support for arrest efforts and to enter into assistance agreements with the ICC. They could also set goals for the adoption of implementing legislation that would ease cooperation with the Court.

The principle of complementarity is at the heart of the Rome Statute. The ICC is a court of last resort, and national jurisdictions retain the primary responsibility to conduct genuine investigations and prosecutions of crimes under the Rome Statute.

A first step in realizing complementarity is domestication of these crimes in national law. Yet fewer than half of all States Parties have adopted any implementing legislation. Beyond this, there is much more that can be done.



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I saw an example of the needs during my trip to the Democratic Republic of Congo last December. Among my meetings in eastern Congo, I met with the local military prosecutor. Under current Congolese law, military prosecutors have jurisdiction over war crimes, crimes against humanity and genocide. To my great surprise, I learned that the military court in the town of Bunia is directly applying the Rome Statute. Already four cases have been completed.

But this military prosecutor frankly admitted that he and his team lacked the expertise to ensure proper trials. They lack basic texts on international criminal law and the jurisprudence of the ICC. Following this meeting, I sent a few legal texts to the military prosecutor's office. As you can well imagine, given the scale of the challenges in the DRC, this represents a very modest contribution indeed. Government officials and outsiders universally expressed the opinion that the prison system is in need of reform. Some observers express concerns about political interference in the judiciary. Others point to a need for the government to provide greater protection to witnesses and court officials themselves. And all of these problems are compounded by the fragile security situation in a region that has long suffered from conflicts involving many states and factions.

If the Rome Statute system is to have its maximum impact, then States must ensure that they have the capacity and will to prosecute crimes, and they may assist others to do the same. I hope that Uganda's recent adoption of implementing legislation will give further impetus to States which have not yet done so.

The third focus of the stock-taking will examine the impact of the Rome Statute on victims and affected communities.

Victims, affected communities and communities under threat of future crimes should be the primary beneficiaries of the work of the ICC and the entire Rome Statute system. Next week, it is my hope that the voices of victims and affected communities – especially African victims - will receive a thorough hearing when it comes to assessing what has been done so far, and where needs remain.

And finally, it is my hope that through the stock-taking panel on peace and justice, States can commit to thoughtful engagement on how peace and justice best complement each other in practice. I hope that African States in particular will recall and bring to the debate the experiences that initially led them to conclude that justice should not be sacrificed to politics and that judicial independence must be guaranteed, respected and protected.

As important an opportunity as the Review Conference is for African States to influence the future of international criminal justice, the ICC can and must do more to engage with African States and institutions even when the Review Conference is over. Through my many meetings with government officials and ambassadors from across Africa, I have gained a clear sense of shared interest in enhanced communication between the ICC and Africa.

Indeed, last year the Assembly of States Parties – acting on the initiative of African States Parties – decided that the Court should set up a liaison office in Addis Ababa. The African Union liaison office would be invaluable to opening new channels of communication between the ICC and diplomats at the African Union.

The ICC is endeavouring to establish this office. In its dealings with the African Union Commission to set up this office and to conclude a Memorandum of Understanding (MoU) with the African Union,



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the ICC would welcome political and diplomatic support from the African States Parties that pushed for this particular office.

Africa has made an indelible imprint on the Rome Statute and the ICC. And the ICC is now addressing grave criminal allegations in five African situations. Our histories are linked and our paths forward have become intertwined. These are merging into a common path: one that promises to lead humanity to a more just and more peaceful world.

Africa and the International Criminal Court: Participant or Target?

Chair:

Hon. Benjamin Odoki, *Chief Justice, Republic of Uganda*

Presenter:

Professor Shadrack Gutto, *Chair, Centre for African Renaissance Studies & Director of Postgraduate Program, University of South Africa (UNISA), Member of Governing Council of AFLA*

Discussants:

Professor Tiyanjana Maluwa, *School of International Affairs, Pennsylvania State University, Advisor to AU High Level Panel on Darfur (AUPD) - Mbeki Panel, Member of AFLA Initiated Steering Committee on a Policy Agenda for International Justice*

H.E. Fatou Bensouda, *Deputy Prosecutor International Criminal Court (ICC)*

Chair: Hon. Benjamin Odoki, *Chief Justice, Republic of Uganda*

Unfortunately, Professor Shadrack Gutto has not yet arrived; we are expecting him. He was supposed to be the main presenter and when he comes I will give him his time to give his remarks. For the time being, we have two discussants who have time to be the presenter and the discussant. By consent or by agreement Her Excellency Fatou Bensouda, Deputy Prosecutor of the ICC, will make her remarks first and Professor Tiyanjana Maluwa from the School of International Affairs, Pennsylvania State University and Member of AFLA's Steering Committee on the Policy Agenda for International Justice, will discuss her remarks.

I also want to say how grateful I am that I have been invited to this forum and thank the organizers for organizing this forum. I consider this part of the sensitization process, of our advocacy of the ICC and international criminal justice. Because international criminal justice is a new phenomena, so is the ICC the institutional bedrock on which commemorate justices is best. So I think that this is a very good event on the side of the major ICC conference and I would like to thank AFLA as part of the civil society movement and all of those who have come to participate in this seminar.

Without taking too much of your time, those who don't know me, will know me today, but I have a small role to play, a complementary role for ICC. And I think we will be discussing the role of the Uganda courts this afternoon, and you can see what we have done in this area. The four pillars we created to promote this process; the ICC as pillar number one, the War Crimes Division as pillar number two, with the formal system and judicial mechanisms as pillar number three, and truth and reconciliation commission as pillar number four. We are about to discuss these broader issues this afternoon, which underpin our transitional justice system, which we hope will be part of the international criminal justice system. So without much, let me call upon Her Excellency Bensouda, the Deputy Prosecutor to give her presentation.



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Africa and the International Criminal Court

H.E. Fatou Bensouda, *Deputy Prosecutor International Criminal Court (ICC)*

Your Excellencies, Ladies and Gentlemen, I am grateful to be here, and I thank the Africa Legal Aid for providing me with this opportunity, for this kind invitation. I am very happy to address some words on the ICC and Africa, shortly ahead of the Review Conference here in Kampala.

As a deputy prosecutor of the ICC and as an African woman, I am proud of what the Court is doing in Africa in cooperation with African leaders and civil society and for African victims. If tomorrow we see the preparation and planning of massive atrocities in another country under jurisdiction in Africa, I want to reassure victims that we shall be there, on your side. The International Criminal Court from the beginning has received support from, and has been shaped by the people of the African continent. As early as 1998 then-president of Senegal Abdou Diouf, who is currently the Secretary General of the *l'Organisation internationale de la Francophonie*, facilitated meetings in Dakar leading up to the Rome conference. He was the first head of state to ratify the Rome Statute. In Rome the ICC was built under the guidance of Kofi Annan, then-Secretary General of the United Nations. It was built upon the lessons of decades when the world had failed to prevent massive crimes. The decision of the leading regions of Europe, of South America and Africa to build an International Criminal Court was not just a matter of principle for these regions. It was a matter of realism. Europe saw how massive crimes cross borders during the Nazi regime and the Balkan conflicts. South America and Africa witnessed how massive crimes cross borders during the Cold War.

Africa also saw how massive crimes cross borders during and after the Rwanda Genocide, which resulted in the death of one million and floods of refugees to Tanzania and Congo. And this exodus we notice today was at the root of the Congo wars, where four million are already dead and even today sexual violence reaches unspeakable levels. For these regions it was and continues to be a strategic priority to avoid a repetition of the experience having learned that all the old tools to stop violence and conflicts - amnesties or golden exiles for dictators - simply did not work.

These regions chose the rule of law as a matter of domestic security, the rule of law as a protection against global crimes. Africa's commitment to the Court, the ICC, and to the cause of international justice in general has never decreased. And this is not by chance. The same ideas are contained in African seminal norms. The constitutive act of the African Union provides that the organization shall function consistently with the condemnation and rejection of impunity and this is among other principles. And quite extraordinarily also provides for the rights of the African Union to intervene in a member state in the event of war crimes, genocide and crimes against humanity. This is a unique provision in the founding document of an intergovernmental organisation. Here, I would like to quote Phakiso Mochochoko, the senior legal advisor of the ICC, when he noted at a seminar last year in South Africa, and he said, I quote him, "No other continent has paid more dearly than Africa for the absence of legitimate institutions of law and accountability resulting in a culture of impunity." He continues, "Events in Rwanda are a cruel reminder that such atrocities could be repeated and they could be repeated anytime. And this served to strengthen Africa's determination and commitment to the creation of a permanent, impartial, effective and independent judicial mechanism to try and punish the perpetrators of these types of crimes wherever they occur."

With the Rome Statute we have established a set of rules with a new legal framework, transparent and predictable, to create certainty of punishment for the most serious crimes of concern to the international community as a whole.



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African institutions, African leaders and African activists are building the system of international justice designed by the Rome Statute. We have been inspired by the work of the ICTR (International Criminal Court for Rwanda); we are hardened to see that public figures, such as Nobel Prize winner Wangari Maathai, speak for international justice.

Thirty African States are state parties to the comprehensive Rome system. They are forming the largest regional group. It clearly demonstrates the high level of responsibility that has been expressed by African states. African judges are 28% of the Courts' bench. Four out of these five judges are women.

President Kabila and President Museveni helped starting investigations by the Office of the Prosecutor into the war crimes and crimes against humanity committed respectively in the Democratic Republic of Congo and in Northern Uganda, and they started this without controversy. Their initiative, that is the two presidents, paved the way for the United Nations Security Council to refer Darfur to the ICC and this received the positive votes of Tanzania and Benin. The African Union expressed its willingness to cooperate with the Court in such an endeavour. And subsequently, Central African Republic asked the Court to intervene with regards to crimes committed on its territory. And most recently the Prosecutor opened an investigation in Kenya with full support of President Kibaki and Prime Minister Raila Odinga. We see similar commitment on the work of the former South African President Thabo Mbeki and his High Level Panel on Darfur. We also see it in the work of former UN Secretary General Kofi Annan in Kenya. All of these people have stressed the need to ensure justice in their work respecting the role of the ICC. They need however the support of the international community.

The same is true for Guinea. On the 12th of October, 2009 the International Contact Group on Guinea made an urgent appeal to the UN Secretary General to facilitate the establishment of an international commission of enquiry to investigate the 28th September, 2009 gross human rights violations, including the massacre of unarmed civilians and rapes, identify the culprits and prosecute them in the competent courts in Guinea or at the ICC so as to put an end to acts of impunity in the country. Following the announcement of the Prosecutor that the situation in Guinea was put under preliminary examination on the 14th of October 2009, the Guinean Minister for Foreign Affairs visited the Court on two occasions dedicated to ensure justice prevails. The Office of the Prosecutor has send two missions already to Guinea in the context of this preliminary examination, one of them I headed, the most recent is just over a week ago. The Guinean authorities are extending full cooperation to the ICC. So did the representative of the African Union *Ibrahim Afal*. The Office of the Prosecutor will continue to follow closely the work of the Guinean colleagues. If they do national proceedings, then there will be no ICC intervention of course. This is what has happened in Colombia where the domestic judiciary has started national proceedings.

At the operational level, African States Parties such as Senegal, Burkina Faso, Chad, Tanzania, they cooperate with the Court on a regular basis. And what is more, even non-State Parties are clear when it comes to the work of the Court. Morocco, for example, has refused to keep President Daddis Camara on its territory because it did not want to harbour a possible ICC suspect.

Your Excellencies, Ladies and Gentlemen, the things I just mentioned show the African region was dedicated to justice. It shows how the ICC is part of the international landscape.

The ICC has accused fourteen persons, all of them Africans. Why? Because the Rome Statute says that we should select the gravest situations under our jurisdiction, and there are also more than five million victims displaced, more than forty thousand African victims killed, hundreds of thousands of African children transformed into killers and rapists, thousands of African victims raped. In this very



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country the Lord's Resistance Army has abducted and used as sexual slaves hundreds of girls. And to add insult to injury, they call those girls, those child-women, they called them wives and they raped them daily.

The ICC has accused fourteen persons, all of them Africans. And you are still asking why? Because the Rome Statute says the Court shall step in when the domestic authorities do not pursue accountability themselves. And in all cases we selected, there were no such proceedings. When the legal criteria are met, the Office of the Prosecutor shall open investigations.

We can do more. The Office of the Prosecutor is committed to investigate also those over the world, who finance the crimes and benefit from them. But we need your help. As Desmond Tutu said, "Choose your side, do you associate with the victims or the perpetrators." I am on the side of the victims, and I will not apologize for that.

Participant or Target?

Professor Tiyanjana Maluwa, *School of International Affairs, Pennsylvania State University, Advisor to AU High Level Panel on Darfur (AUPD) - Mbeki Panel, Member of AFLA Initiated Steering Committee on a Policy Agenda for International Justice*

Thank you, Chief Justice. Good morning, colleagues. I am pleased to be here as part of this conversation and I like to thank the organizers for sending the invitation to me to participate in this discussion today.

I find myself in a rather awkward situation, because I came rather ready and prepared to our main presenter, my good friend and old colleague, Professor Gutto, and comment on what I anticipated would be his usual thought provoking and very important observations on the relationship between the ICC and Africa. And as I say this, my colleague and good friend Shadrack Gutto has just walked in. We welcome you, Shadrack, and we are pleased that you were able to get here in time to speak on this session. We decided earlier on that in order to gain on time rather than wait for your presentation, you were supposed to be the main presentation, we would start off with the discussants who were supposed to be commenting on your paper, anticipate what you were going to say. This is not to suggest that we know what you are going to say or even to insinuate that you say what you have said at the last meeting, but simply to emphasize that we have had these conversations for a long time; we have heard concerns; we have heard positions on the issues that have been discussed. And that we could quite safely make these assumptions. In the mean time, we invited the Deputy Prosecutor of the ICC to make some remarks about the involvement of the ICC in Africa, the relationship between the ICC and Africa so on, and I was just about to comment on what she had said. I can go on with my general comments or if you feel you are ready to make a presentation, you could take over, because you are really the star of the show. I am just on the margins as a cheerleader cheering you on.

Africa and the ICC: Participant or Target?

Professor Shadrack Gutto, *Chair, Centre for African Renaissance Studies & Director of Postgraduate Program, University of South Africa (UNISA), Member of Governing Council of AFLA*



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Good morning. Good morning to everyone. I think Africa is becoming less and less African. When you meet and even greet people, they don't respond and that is not very African. And the way I know it, but I know that I am late, and I do apologize on behalf of Kenya Airways. I just arrived, and I was told don't even wash your face. I said I will rush here immediately.

The issue around the relationship between the ICC and Africa is one which I believe is extremely important. It is extremely important, because Africa played a major role, a substantive role in the development of the Rome Statute and from that point of view I believe that one can say that it is one of the few international instruments where Africa made full participation and a meaningful participation. There are a lot of international instruments in which Africa really was being represented by others, but not by itself and from that point of view, it is an important historical fact.

The second is of course that not just the making it, but the whole question around ratification and even attempt towards domestication. Africa is not faring any worse than any region in the world in that regard. However, I believe that the Review Conference we are going to start soon will also be very important for Africa, especially given that the Rome Statute was an unfinished business, especially in the area regarding the definition of the crime of aggression, which I understand since I just arrived, that there is some campaign among some civil society organisations, international NGOs to try and influence State parties not to adopt the definition and therefore make aggression a crime. I believe that that approach, at least the documents I have seen, is informed more by the fact that there is confusion between understanding the difference between the Act of Aggression, which is a political military act by a State against another, and the Crime of Aggression, which is very different, and I think the preparatory works have clarified those issues. That it is not the Act of Aggression, which is being criminalized, but rather the crime itself where the individual responsibility is to be taken. So it is important for Africa, because we are what you would call, not very powerful states, if you want to use and engage in a euphemism. And therefore if you are not very powerful, you don't aggress the more powerful ones, unless you want to commit suicide. And from that point of view, I think that to me it is absolutely important that any genuine African ought to support the adoption of the Crime of Aggression and for it to be criminalized. The act of aggression can remain to the domain of the Security Council and so on. [Stopped here](#)

Let me know, just look at the road so far and how Africa is related with the International Criminal Court. I think there are two views. The two views here is that Africa is probably, is this something itself or is sceptical about the intentions of the ICC, because in the ICC practice so far, which is just at the beginning, is very young, most of the cases that are before the Court involve citizens of African countries. I think that argument of course fails to take account of the fact that many of those cases were referred, and the majority of them by African States themselves. We should also indicate that Africa indeed takes the ICC seriously and not as is alleged that Africa is in opposition to the ICC. But be that as it may, I believe that there are certain fundamentals.

First of all on the question of Africans commitment to the crimes, to the three groupings of crimes; genocide, crimes against humanity and war crimes. Africa itself in its own regional system has identified these three crimes as very serious crimes to which it will not stand by and watch and I think Article 4 of the Constitutive Act of the African Union is quite clear about the political commitment that Africa has around those issues, so there is no question therefore that Africa does not see the seriousness of those crimes and do not want them to be punished. I think that that is very clear.

It is also clear from some of the post coming into effect of the Rome Statute where one can see in places like Darfur and so on and if we look at the report of Mbeki, the crimes are being taken very



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seriously. In countries like Uganda one can see domestic efforts really to try and to deal with these crimes and so on. On record Africa can be seen really on the right side of the ICC.

But we do have one very problematic case or a group of cases that have risen from the Sudan, the most prominent one of course where people are focusing on. Is the indictment and the issue of the arrest warrant for President Al-Bashir. So far I haven't personally heard the African Region through the AU as really saying anywhere that it is asking the International Criminal Court or the Security Council not to indict or to issue a warrant of arrest. What Africa has really put forward in writing and is clear about to ask for deferral, which is part of the Rome Statute. It is not something that Africa is trying to cook from nowhere. I believe that if a region is really asking for deferral which is for twelve months, maybe renewed, it is not really saying that we want President Al-Bashir to be let off the hook. And indeed a time is coming one hopes where he will face justice and if his not blame what is sufficiently adding to the will of course will be clear free.

But I think that there is more to the noise around why Africa is asking for this. And I think if we don't look at the explanation why Africa is asking for the referral then it is too easy to jump into conclusions. Of trying to depict Africa as having cold feet. I think the issue around the Sudan is one which the international community is engaged with. Even some of the big powers in the world. The Comprehensive Peace Agreement (CPA) which was signed on the 9th of January 2005 is a very important instrument which is directed towards trying to resolve the conflict in the Sudan started in the 50s. To put them to an end and start a situation with peace and security at least in the larger part of the Sudan, in the South. And hopefully the other areas of the Sudan where there are also conflicts. The CPA was indeed witnessed in writing by countries, the US, Italy, The Netherlands, and so on, by the UN, the Arab League, the AU and so forth. And all these international bodies and countries wanted to believe and want to see the roadmap to, that is said in the CPA, to be concluded. Because otherwise the conflict will continue and crimes will continue to be committed. War Crimes, Crimes Against Humanity, and so on in the larger Sudan.

And I think the recent elections that were held were useful not because they were anywhere near free and fare, but they were basically one where it has made the parties, the key parties to the CPA to commit to the roadmap. And what is left now is to begin preparations for the referendum which is on the 9th of January next year. And that is important, it is a very short time in which to wait and one does not see why that argument cannot, or the reasoning cannot persuade. Reasonable minds and fair minds looking at the Sudanese situation. Indeed, we now have of course President Al-Bashir, who now says I am a legitimate leader and so on, but as I already in plight the elections were not anywhere near meeting any standards that is reasonable. So he remains legitimate, but I think slightly better than the legitimacy which he got through the god from when they came to power.

And the South of course is there, but the indications from those elections have very serious implications, if one looks at the trend of how the elections were conducted and messages going out very strongly that the South is very likely to vote for cessation and independence and if it can do so it will have a lot of implications, because you don't want that divorce. To be a divorce which is acrimonious and one which is going to escalate. Not that many divorces are conducted happily, I have yet to see one. But one has to say that you do everything in your power to limit the fierce consequences that come with that. So that to me ought to be a compelling reason why deferral for a period is not something we should frown at, without proper consideration.

But there is also an underlying current because when we say that the ICC seems to be focusing to much on Africa it is not that there are no situations where crimes have not been committed since 2002 in the world. In fact, to decrease which come very close or even may be more then what has happened in the Sudan. And this is really the conflicts that are going on, the war in Iraq, Afghanistan,



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the Israel – Palestine conflict, particularly in the Gaza and so on. And particularly the latter indeed is going through roots to the Human Rights Council and so on. There is no direct dealing with it by the UN or the ICC by itself. And those do create the impression, and reasonable impression that probably there is selectivity. In the way the ICC is engaging with cases of a similar nature. This tears the concept of the rule of law, the quality before the law, so that law is applied to similar facts and situations and so on. A very important principle of legality and legitimacy of that law. And I think it is the question of is the ICC working towards its legitimacy, also, at the beginning, or it doesn't care at all.

But we can't blame the ICC alone, because the matter was referred by the Security Council. Another body which is undemocratically constructed, particularly the UN Security Council. And Africa since the consensus of 2005 has been asking for Africa to have permanent representation in the Security Council. You can't have a body that is so important having three permanent members from little Europe and you don't even have one from Africa. I don't think you need to convince anybody that it was meant for another world when Africa was under colonialism it cannot be sustained. And the legitimacy of that body taken seriously. So I think what Africa is also, I think the underlying subliminal suspicion around the ICC, also emanate from the fact of the UN Security Council.

And lastly we say that for example if one looks at the World Conference against Racism in Durban in 2001 and you look at the declaration, particular paragraph 99 to 102, dealing with issues of past injustices, which were crimes of slavery, of colonialism, not to mention the genocide which Belgium committed in de Congo at the beginning of the 20th century and the Germans in Namibia and so on. Not to mention how the British carried out very serious violations when the Geneva Conventions were in place in the early fifties in Kenya. Very serious crimes when even the European Convention was in force. Even the crime of apartheid, that these were crimes but nobody in this world, not a single person has been tried for those crimes. It does indicate that this history, is tortured history, of Africa's relationship with those, particularly Europe and people of the Europeans, whether they are in Australia, in the US, Canada and so on. Is a history which has been crimes with impunity. And sometimes I think in the mind of Africa, these things come up. And even though they are not articulated at front to be able to say; who are you to lecture Africa about justice. So Africa should be the one lecturing about its struggle for justice for centuries. So I think that we need to change the debate. This idea that there are people that know this thing better than Africa is a very wrong one and I think it is one we need to deal with properly. So Africa is not against the ICC, but Africa wants justice. And that justice has to be one which is applied equally to all peoples.

Participant or Target?

Prof. Tiyanjana Maluwa, *Director, School of International Affairs, Pennsylvania State University; Member of AFLA Steering Committee on a Policy Agenda for International Justice (also served as a member of the team of experts/advisors to the African Union High-Level Panel on Darfur (AUPD - "Mbeki Panel").*

Chair, I shall try to be brief. First of all, because we are running out of time, but also because I think there are important issues that have been raised by both speakers, which I am sure participants here would want to engage with. So I will try not to take up too much time.

First, let me start off with the points on which everybody agrees. You will have noticed that our two presenters - because Her Excellency the Deputy Prosecutor is also in this sense a presenter - have emphasized a number of points on which there shouldn't be any disagreement. One is the emphasis on the reminder of Africa's commitment to this issue of international justice, international criminal



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justice, and Africa's commitment to the international rule of law and human rights. Both of them have pointed to the fact that, even within the context of the African continent itself, we actually have instruments and institutions that make this commitment quite clear.

Article 4(h) of the Constitutive Act of the African Union has been mentioned by both speakers as an illustration of that commitment. So, anyone who questions whether Africa is a willing participant in the ICC enterprise ought to be reminded of that. And they ought to be reminded partly because of what the Deputy Prosecutor said. Namely, the background to Article 4 of the Constitutive Act in which African nations make a commitment indeed to place on themselves the obligation to intervene in situations of grave violations of human rights, such as genocide, crimes against humanity and war crimes. The background to that was the experience of the genocides that had happened earlier on this continent, and particularly and more recently in Rwanda. I was privileged to be part of the discussion which adopted the Constitutive Act and which debated that particular provision, in July 2000 in Togo, when in my earlier life I worked as the Legal Counsel of the African Union. It was an honest debate and I recall some eminent delegates, whom I shall not name now, took the floor and said something along the lines, "This is nonsense. How can African countries sitting here in Togo draft a provision that will essentially challenge the authority of the Security Council to determine situations in which the Security Council should authorize intervention in accordance with its powers under the UN Charter? We should not have this provision. It is not yet accepted under general international law that there is right of humanitarian intervention even in the situations that you are proposing or putting across here...." It took the delegate of Rwanda to remind his colleagues that this same Security Council that they were now worried about never came to the aid of Rwanda when the genocide was unfolding; and that it was nonsense to argue that the African Union, at that time still the OAU, would actually be adopting a provision in the Constitutive Act that would challenge the authority of the Security Council. He asked: "Where was the Security Council when 800,000 people were killed in Rwanda in a matter of ninety days?" He strongly argued that Africa cannot wait for the United Nations in New York to take positions on how we should proceed when massacres and violations are taking place in our midst.

And so this provision was adopted. So there is a context to that commitment and I think we need to remember that. But I want to come back to that point a little later on, because I would like to ask the question that if there was a commitment in 2000 and we (Africa) adopted this provision that we cherish now, how come we still have Darfur? How come we still have Guinea? How come we still have all the other situations that are happening now? And how come there has not been any intervention by the AU in these situations?

Secondly, there was also agreement in the presentations on another issue, and this is the issue of the need for Africa and the ICC to place a strategic priority not only on the prevention of violations of international humanitarian law and human rights in general, but also to place the victims of these violations at the forefront. And I think one of the debates that have to take place in Kampala is about the place of the victims. Where are the victims in all these discourses about international justice in Africa? Where is the place of the victims of Darfur, of the victims of Guinea, of the victims of the various other situations, including northern Uganda, where we are they in this debate? I think that is important because if what we are seeking is justice, one question we should ask is: Justice for whom? It has to be justice for the victims of these violations. If we don't address this, then there is a problem.

There is also agreement on these very interesting statistics that have been thrown around. It has been suggested that one way of illustrating the commitment of Africa to the ICC process is to look at the big numbers of the participating African countries. Thirty African countries that are parties to the ICC Statute have ratified it. Forty-seven countries out of 53 AU member states were present in July



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1998 in Rome when the Statute was adopted. We are told that the greatest number or block of countries that have either domesticated or drafted implementation legislation of the Rome Statute happens to be in Africa. A lot are still in the process of doing that. This morning we were told that 20% of the staff of the ICC are Africans, and that five of the judges are Africans, and so on. But what do these statistics mean? And are they relevant to the issue of the commitment of Africa to the ICC? Do they mean anything? I am sceptical about using these statistics. And this is why. The very last point on which Professor Gutto ended was a reminder of past injustices: slavery, colonialism, and the genocides committed on this continent. Why is it that Africa has the greatest number of states parties to the ICC statute? Because by statistical accident the African continent happens to have the largest number of so-called independent states: fifty-three (or fifty-four if you count both Morocco and the Sahrawi Arab Democratic Republic). And why do we have all these numbers? Precisely because of this history. Africa was the most fragmented continent during the colonial period. So, when we celebrate these statistics about so many African countries being parties, we should also remind ourselves that what we are celebrating in these statistics is really just the fact that we are the most fragmented continent. And that fragmentation is precisely the outcome of the previous history of genocide, slavery and colonialism that Professor Gutto mentioned. So, let's not get carried away by the statistics. What is more important is not just how many African countries are members of the ICC, but the value and depth of their commitment.

Of course we know that the five African members of the Court, the judges, are eminent personalities, qualified as judges, and qualified to be in those positions. As Africans we are very proud of their presence on the bench of the ICC. But it doesn't have to mean anything. The fact that you have a Ugandan national as a judge on the ICC bench does not tell us anything about Uganda's substantive commitment to the ICC. So, we should separate these things. If 20% of the employees of the ICC are Africans, what exactly are these employees? Who are they? So this is a plea to say that in the arguments about commitment to the Court let's put some of these statistics aside.

What we should put upfront is the nature and quality of participation of the African continent, of the African states, in the ICC process. What is the nature of cooperation that is going on and the kind of cooperation that we should like to see and encourage? I think that is the critical question. So, to the rhetorical question that the topic of this session suggests: *Africa: participant or target?* I would say first of all on the issue of Africa as a participant, it is not about the numbers, we all know that, we all agree with the statistics. We even agree that the greatest number of NGOs that engaged with the ICC process were African NGOs. Some of these NGOs are one-person, fly-by-night NGOs etc, but we still count them. As I have argued, the statistics don't mean anything. The issue is the quality of the participation and the nature of the participation. Why does Africa feel aggrieved sometimes (or at least that is how it appears) that their participation is not how it should be? And what are the areas that we need to look at in order to improve the quality of the participation? Part of it is politics. Professor Gutto linked his comments to the politics of the structure of the United Nations Security Council. When it comes to these issues about deferring a prosecution or referring a situation to the ICC prosecutor, the Security Council is involved and it cannot be overlooked. Now, how can we meaningfully talk about productive engagement between African states parties and the ICC when in fact one element that is important in this triangular relationship is the Security Council itself, which does not quite give Africa the kind of voice that others are given there? Furthermore, it is a body where real political power is monopolized by a few powerful states (the P5), including some that are refusing to become parties to the Rome Statute. So we need to focus on the quality of participation as well as the larger politics that constrain that participation, including the role of the Security Council in all this.



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And secondly, we need to focus on the issues of process as well. In June 2009 the African Union convened a conference not of the African Union itself, but of African Union members that are parties to the ICC Statute. They met in Addis Ababa and they discussed a number of areas of concern. What emerged from that discussion were two blocks of issues. One was what you could call the process or procedural issues that they were bothered about, including Article 13 of the Statute which deals with the power of the Security Council to refer cases to the ICC. The other concern at that meeting had to do with the perception of selectivity or selective justice. The question that was and is repeatedly asked is: Why have all the other situations outside of Africa that Shadrack Gutto talked about not been referred to the ICC? People keep talking about Sri Lanka, Gaza (the recent Israel-Palestine war), Colombia, etc. Now we know that of course some of these situations are outside the jurisdiction of the Prosecutor because either the events in question preceded the adoption of the Rome Statute or the territories or the states are not parties to the Rome Statute, and so on. But there is still an argument there that even in those situations, to the extent that they are still continuing after the entering into force of the Rome Statute, perhaps the ICC Prosecutor might still have discretion, if the Security Council does not do anything, to initiate his own investigations *proprio motu* and he has not done that. That is where the issue of selective justice, as professor Gutto mentioned, comes in. And I think we dismiss this concern by African states of the appearance of selective justice at our own peril if we don't take it seriously. I can imagine this issue of selectivity, or the appearance of selective justice, will be an issue here in Kampala. But what kind of justice are we seeking?

I also have a quick comment on something else that was mentioned by the Deputy Prosecutor, in responding to the question whether Africa is a participant or target. The ICC tells us that in fact, as part of the process of collaboration, they are negotiating with the African Union to open a liaison office in Addis Ababa, but that the African Union has not signed up to that understanding. My reaction, and I am sure that of many others, is: why do you need an office in Addis Ababa? Has the ICC initiated similar arrangements to open liaison offices in other regions of the world or has it initiated contacts? Perhaps not. One might say of course we need a liaison office in Addis Ababa to emphasize the commitment and participation of African states in the ICC process. That is a positive way of looking at it. But the negative way of looking at it would be to say that this just goes on to strengthen the perception that Africa is being targeted. Why Addis Ababa? Why not open a liaison office in Caracas for South America, or Bangkok for Asia, for example? Of course I advocate the opening of these liaison offices as a way of ensuring that the ICC enters into cooperative arrangements with regional processes, with member states in the various regions etc. But even that process itself should not suffer from the accusation of selectivity.

On that issue of regional processes, and this is going to be my last point, one of the suggestions that the African Union is likely to raise, because it was discussed in Addis Ababa, is the possibility of obtaining the regional input in the process of assessing evidence that has been collected and determining whether or not the ICC should proceed with the prosecution. Now, of course, I don't quite know if this is a brilliant idea. I for one support and defend the independence of the Prosecutor and the Prosecutor can only function effectively if we assure him or her that independence. But that independence of the Prosecutor should not rule out the possibility of opening an avenue for regional input into this issue of evidence. Now, why do I say this? I worked with, as some of you might know, the African High Level Panel on Darfur, the Mbeki Panel. I was one of the experts/advisors to that panel. We made several visits to Sudan, to Darfur in fact, and held some forty meetings in various places in a space of about six months. We interviewed either directly or indirectly through their representatives somewhere in the region of 2,700 people in Sudan, including President Al-Bashir, who was sworn in yesterday for another term, after apparently winning the elections that most observers say were not exactly free and fair, but there we are. We talked to President Bashir, we sat down with leading members of his political party, as well as leaders of the various political parties in



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Sudan, members of different segments of civil society, women's groups, professional organisations, youth groups and so on. But more importantly we spent a lot of time with President Mbeki in the IDP and refugee camps in North Darfur, South Darfur, and West Darfur in a series of meetings. One of the complaints that came out of that process was that the ICC which is indicting their president, as they saw it, has never even been to Darfur to collect evidence. And of course the ICC would say that the government of Sudan would not facilitate its visits there. That is an understandable argument. But if that is the case to what extent then can the ICC use information and evidence that has been gathered in a process such as the one undertaken by the Mbeki Panel or by other organisations that have interacted with people on the ground in Darfur to assist its prosecution efforts? This is important because one of the things I discovered during my involvement with the Mbeki Panel is that the Darfur conflict has got different, complex and often contradictory narratives. Sometimes when some people, and not just some African state parties to the ICC, question the motives or good faith of those of are advocating that President Bashir be brought to justice before the ICC, or challenge the manner in which the prosecutor has apparently assembled his evidence, it is at bottom an argument about which narrative is to be believed and allowed to prevail. Some of the Prosecutor's detractors are quick to point out that the case against Bashir has, in part, been built upon information given by self-serving international humanitarian NGOs, some of which were expelled from Darfur by the Sudanese authorities and accused of spying or passing on false information to the ICC.

But beyond the issue of contested evidence and information, we need to have an honest discussion and approach on the lingering question of the root causes and scale of these atrocities: why do we still have the Darfurs and Guineas, more than ten years after the Rwanda genocide? Why do we have Darfur, years after we adopted the commitment that we have talked about in the Constitutive Act of the African Union? There are underlying factors that need to be considered and I think those factors ought to be part of the discourse and the debate about the role of Africa in the ICC, the role of Africa in seeking and enhancing international justice and so on.

And, finally, just to throw it to the floor for discussion, there is an issue that was referred here in passing but not really articulated upon: one of the things that underlies this African Union request for a referral is the claim, and Professor Gutto sort of eluded to it when he talked about the Comprehensive Peace Agreement (CPA) in Sudan, the claim that sometimes we must make choices between justice and peace; that the ICC indictment of Bashir somehow threatened the peace process between North and South Sudan, etc. It is also argued that justice is not blind, and that this idea that the ICC Prosecutor just does the law, he does not do politics, is naïve; that the quest for justice is as much a legal process as a political process. I don't think we should be posing the issue in terms of a choice of either peace or justice. Both must be pursued and pursued alongside each other. Africans, and especially the victims of conflict and egregious human rights violations, should not have to make these forced choices, and be told: either you want peace or you want justice. We have heard that argument here in Uganda, peace or justice. So I think that is another element that we might want to focus on as we talk about Africa's relationship with and participation in the ICC. How do you reconcile peace and justice?

Thank you.

Questions and comments from the floor

- My name is Godwin Odo of the MacArthur Foundation in Nigeria. I think the panel could not have been better chosen. I am a follower of the debate relating to Africa and the ICC, Africa and International Justice as a whole, and I don't think I have had the opportunity to have the issues brought to the floor as it has been done this morning and well analyzed. I think on the end of the day there are things to be taken from both sides of the coin. One is that the perception of Africa as being



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against the ICC and international justice should be more or less mitigated, because from what we have seen and what we have heard, sometimes there are perceptions and not reality. However, having said that, we should also be conscious of what we see our leaders putting across. If you look at the AU resolutions of January 2009 talking about the issue of Universal Jurisdiction, commenting on the indictment of president Bashir, commenting also on the proposed trial of Habré by Senegal, and finally on the issue conferment of criminal jurisdiction on the African Court. There are issues to be distilled from this decision to determine which, on the end of the day would advance international justice as well as national justice. Because the concept of sovereignty be used to protect people or leaders who commit some of these atrocities is no longer tenable, because the issue of sovereignty is based on the social contract between the states and its peoples, and as long as some of the states no longer provide the basic necessities of protection of what they ought to do for their own people, then the argument of immunity and sovereignty no longer holds. If you look at the ratifications of the protocol of the establishment of the African Court on Human and Peoples Rights vis-a-vis that of the ICC Statute. We have more African states ratifying the ICC Statute than you have ratifying the protocol on the African Court on Human and Peoples Rights, which is a challenge. Why are we ratifying more of the instruments which are universal then the one that we, as Africans, have put together for ourselves? And that is why only two countries have made a relevant declaration allowing NGOs and the individuals to access these courts. So at first, I am concerned that the concept of trying to confirm to the jurisdiction of the African Court on Human and Peoples Rights in a non issue until all African states ratify that protocol. I think what lessons the ICC should take from this event, this presentations is the fact that there is a need for more deepened engagement. And even in the process of going into either indictments or investigations and arrest that more needs to be done because for the victims. I am aware that a lot of Human Rights activists in Darfur, in Sudan who played a key role in helping the ICC to access the information that was used at the basis of that indictment. Today, many of them have fled the country so the position of the victims must be brought to the forum and the ICC should devise ways of managing the post of investigation and indictment in such a way that victims are not doubly victimized.

- Professor Maluwa this question is directed to you. My name is Harriet Sali, Public Defender Association of Uganda, and my question is about international justice, particularly looking at the way Saddam Hussein was sentenced. If you follow his arrest, indictment, judgement and sentence in that order, I find that the ICC presence was particularly lacking in this case and one particular country was very present and very obvious during his arrest, indictment and sentence. What views do you have on that?

- My name is Kulihoshi Musikami a human rights defender, and I come from DRC, and I am a refugee in Uganda actually. Professor Maluwa, I have two questions. When you talk about the past events which occurred in Africa, do you think we can still rely on these past events to justify the ongoing impunity in the Africa? Then the second question. You seem to talk to be not clear about justice and peace, both to work together. In your opinion - I have heard that this seems to be what is discussed in high tables in Addis Ababa with heads of states who are trying to confuse us which one could come before the other - do you think that the one antagonizes the other and why cannot both be applied in Africa?

- * My name is Charm Helen, chairperson of the Ugandan Transitional Justice Working Group. I got more confused by the last presentation by professor Maluwa, because we were looking at whether he would give us clarification whether Africa is a participant or a target. But in the end, I am not really clear if he gave us the answer. However, looking at the two presenters, I realized that Africa has done a lot more in participating in ICC as a court, but I think when we talk about peace and



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justice, we really need to see that both are equally treated, because they all contribute to everlasting justice in Africa and peace.

* My name is Jemama Njieri. I am from the Institute for Security Studies, and I would like to applaud the speakers for very thought provoking presentations. I would like to request the presenters to elaborate as in to whether we have an African position on international criminal justice or an African voice. Because from all the summits and meetings that I have been following, sometimes it is positive; others say we will cooperate, and others are saying that we will not cooperate; others are silent and they suddenly will cooperate. For example, if I think of the 8th ASP recommendations from the African Union on Article 16 and 13, only two State parties seems to recon that recommendation, and then suddenly during the last summit the State parties to the Rome Statute where encouraged to prepare and participate on the Review Conference. So there are always mixed signals. Is there an African voice in regard to international criminal justice? And then is it necessary, should we look at, maybe, regional perspectives? We have 53 countries, we are too many, Professor Maluwa has indicated, but I would like some clarification.

* My name is Kenneth Oketta. I am the Prime Minister of Acholi. I have heard the debate. The issue of the ICC and their intension is very good in as far as justice and peace is concerned, but in the aspect of Africa, most issues are mixed with politics. You will find that even the power and the intension of the ICC sometimes is mad. And victims may not get what they want in the circumstances like in Uganda where there is now no fighting. Where you say now there is peace, the war has shifted to other areas. You will find that the voices of the victims are now not being taken, because now there is no fighting; there is now peace. So how does the ICC going to handle that? And in Northern Uganda the question of victims is also been very sticky. Who are the victims? Even the victims among themselves are still segregative. Those whose legs were cut are the victims. The other infra victims, they don't see them as such. And then also the trial of only commanders leaves so many people outside. How are you going to handle other people whom victims still regard as perpetrators? Already of course there is a system put in place in the country as the Chief Justice, the Honourable Chairman now said, that there is the ICC, the Special Court Division, there is going to be traditional justice and these truth and reconciliation commissions. But we see the ICC now as very prominent and playing its role very clearly. The Special Division was formed, the judges were met, but we still don't see when they are starting. How do they plan to go? What are they doing? Are they investigating now? Or are they also still waiting for the peace to be consolidated, and they all think to die with that. The traditional justice system, which I am part of, though I am not a traditional leader, just an administrative institution, nothing now is being done about it as far as dealing with their capacity setting systems and making them be mainstreamed in the legal system in the country.

Answers and comments of Panel

Professor Shadrack Gutto

It is important, this question, which Professor Maluwa and some of the questions are putting forward, peace and justice. But I think it is important for those of us who are really promoting international justice, particularly criminal justice, to be able to properly understand that the Rome Statute provides for complementarity and it does so precisely because it can only deal with very few cases and very serious ones. And it can do that especially where States are not willing or unable to do so. Therefore, I think we need to focus a lot on capacity building within our own legal systems really to be able to deal with serious crimes.

Secondly, the whole question around, I think in Uganda, called transitional justice, Rwanda Gacaca system and so on. And it has been recommended also for Darfur. It is critical because we are dealing



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here with what Professor Maluwa was talking about: what is justice? Is it simply to get a view of people who have committed the offence, take them to The Hague, find them guilty, lock them in and you have done justice? Or is it one in which the victims also participate in defining the kind of justice facing the criminals and dealing with the criminal, and say “this is the punishment that we, as victims, would we ask you to engage in”. That becomes quite substantive. When the situation in Rwanda was taken to the International Criminal Tribunal for Rwanda, Arusha and Gacaca system started the so-called justice parish, said that Rwanda was trying to divert from justice. Right now the International Criminal Tribunal for Rwanda wants to transform some of those cases to go to Rwanda, because it is closing down. The Gacaca system gained a lot of credibility and is something that is working for the people in that country.

Lastly, let me say that the question that has been asked about Africa sometimes blowing cold and sometimes hot. As intellectuals we need to really interpret situations, I think, much deeper than just listening to statements. If you listen to statement I read, those which are issued by our Big Brother Khadafy, the Head of State in Libya, saying the ICC is a new form of international terrorism. But that is not the only thing Khadafy has ever said. Can't you look at other things he has said? He said he is the most popular leader in Africa because he went by road from Tripoli driving along to Accra. Then he said along the way the African people have given him a mandate and now he wants to establish the African Union so that we have one president, one army. He has said so many other things which you just listen to and just say that is Khadafy talking. That is not a voice of Africa. So let us be careful not to take the voice of few leaders here and there.

H.E. Fatou Bensouda

I was thinking when the various comments were coming from the floor that for the first time I attend this kind of forum, most of the questions are not directed at me. It is quite remarkable, but very interesting. And I will take the opportunity to congratulate the other panel members for their presentation this morning.

There are just a few things that came up during the discussions which I think I can comment on. And maybe one of them starts with this issue of open engagement that the ICC should do. For that, I can say that definitely the ICC is trying as much as possible to make this happen, especially, on the African continent. And quite contrary to the view that perhaps the ICC is targeting Africa. No, the ICC is trying to make sure that it is better understood in Africa. The issue of opening a liaison office in Addis Ababa is towards this end; that ICC is always there and in a position to explain what it is doing and also to engage positively with the leaders in Africa. Maybe you will note that we have already opened a liaison office in New York, and there is also plan to open a liaison office at the European Union and other places. So, it is not that because Africa is a target that ICC has decided to go to Addis to open a liaison office.

Another thing that I would like to highlight is that from the time we started an intervention in Africa, as a result of the referrals we have received from African leaders, we have engaged the African Union. We have engaged the African Union on various times, both the Prosecutor, the President, myself, the Vice-President. We have been briefing the African Union. We have been briefing the diplomats as well as the Peace and Security Council and so on, for example, about what the ICC is doing, and on several occasions we have engaged with African leaders. We have explained what we were doing in Africa, and we also received comments and observations from them. This is really engagement that we were trying to do here, not because we are targeting Africa.

I think there was another comment that came on, which I think I should also comment on. This is to deal and to do with victims. I think a comment came from the floor that the ICC should ensure that victims are not doubly victimized. I think already if you look at the Statute, there is actually an



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obligation, not only on the Prosecutor, but on other organs, on the judges, to make sure that we take care of victims. This is a statutory obligation which we are trying to do; we are trying to take care of. And of course, you have the Trust Fund for Victims, which is an independent body which has been created when the ICC was also created. And even, for example, in Northern Uganda where we have not been able to start our cases as such, I am aware that the Trust Fund for Victims is already very active doing things for victims on the ground.

There was a question we talked about the ICC's presence lacking, I think, in the Saddam Hussein's trial. We did not have jurisdiction, maybe is the shortest answer I can give to that. It was not addressed to me anyway, but I just wanted to point out our lack of jurisdiction in that case.

I think there was also an issue raised about what are we going to do with the others? I think we need to understand also here the jurisdiction of the ICC, that we will go after those who are most responsible for the crimes that have been committed in places where we have jurisdiction. This is where the principle of complementarity becomes very important. If the ICC tries those most responsible, it does not mean that the national system should also not come up to see what they can do to bring justice for the victims and of the affected communities. It is for the ICC to work together with the national systems, but our responsibility here is to take out those most responsible to the crimes and to try them.

Professor Tiyanjana Maluwa

I made the error of speaking too much as a discussant, because the questions should have been directed to the presenters and not to the discussant. As a matter of fact, the questions directed to me are really not for me to answer. But in any case, I have been accused for creating confusion on whether or not Africa is a participant or a target. I actually said, "This is a rhetorical question." So that is why I did not answer it. But if I must answer it, of course Africa is a participant. And I think I said so. There can be no doubt about that. The issue I asked was, "what kind of participation are we talking about?" It is not just participation in terms of numbers but qualitative and substantial participation. And I was not seeking to provide an answer; I was simply seeking to throw out questions for reflection. So that is the participant beat. The question should not even be asked. Africa is a participant. Is Africa a target? I said, "There is a perception that Africa is a target."

My brother from the DRC, there is the issue of past injustices, and wanted my views on whether we should be using these past injustices to justify present atrocities etc. I don't think I suggested that. And as a matter of fact, I only made reference to the past injustices in reference to what my brother Shadrack Gutto had already said. I was being cynical about these magic numbers that we keep talking about. Africa has 53 countries, 30 of which are members of the ICC. The point I was making was that we have so many countries on the continent is precisely an outcome of past colonialism and the fragmentation and creation of all these so called states that we have ended up with. It is not an accident that Southern America, a continent which is almost as large as Africa, in terms of land service, has less than one quarter the number of states that we have in Africa. So I was just saying we need to bear in mind that there is this context, but I think that Professor Gutto made it very clear. He wasn't suggesting that we should go back to arguments about German genocide in Namibia, or Belgian genocide in the Congo to justify or explain what is happening now, but simply to say, "Forget what brother leader Khadafy said, forget the political platitudes and statements. We as most serious observers and commentators ought always to have the historical and political context of these things in mind. And here is the historical and political context to some of the things we are talking about now." I mean, the DRC has never known peace since King Leopold appropriated it as his own state. There is a history going through the decades of violation and massive violations in the DRC. And what is the historical context today in mind? We cannot just address some of these things without that.



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But nobody is suggesting that the ICC should take into account those injustices in his operations today, because that is not the issue.

Iraq. You wrongly addressed the question to me. The question should have been, “Why is the ICC not doing anything about Iraq?” And the answer is quite clear. Neither Iraq nor the US is a party to the ICC Statute, so it is not within their bare wig. So the issue is whether there is some other route that can be taken. But that is for the ICC to answer. As a matter of fact, I think Iraq is a very sad reminder of what is going on.

I was accused of not being clear on whether we should choose peace or justice. As a matter of fact, I said we should pursue both. So I could not have been more clear. In the Darfur situation in which I participated, we started off as the guiding principle. We started off by saying that the problem of Darfur, the larger problem of Sudan, cannot be resolved simply at looking at the issue of justice - whether it is the indictment of Al-Bashir and the view of people around him, or in terms of peace, by ignoring the justice issues, etc; that they are interconnected issues that should be pursued simultaneously. And we picked three things: peace, justice and reconciliation. You cannot have one without the other. When you talk to the women who have been raped in the Darfur region, in the refugee camps, they ask you and say, “Ok, so the ICC can come and arrest Bashir, take him to The Hague. But what happens to us? Is that the end of the story?” So you need to go beyond just the narrow justice of focusing on the view principle characters. And look at the larger situation of reconciliation, peace and social justice. That is what I said. They should be taken on board simultaneously.



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Proposed Convention on the Prevention and Punishment of Crimes against Humanity: an African Perspective

Chair:

Prof. Leila Sadat, *Washington University, St. Louis, Chair, Crimes against Humanity Initiative*

Presenter:

Evelyn A. Ankumah, *Executive Director, Africa Legal Aid (AFLA)*

Discussants:

Dr. Pål Wrangé (PhD), *Associate Professor and a delegate to the ICC Review Conference, representing the Government of Sweden*

Dr. Helen Scanlon, *Director of Gender Justice Programme at the International Centre for Transitional Justice*

Crimes against Humanity Initiative

Professor Leila Sadat, *Washington University, St. Louis, Chair, Crimes against Humanity Initiative*

My name is Leila Sadat. I am from Washington University in St. Louis Missouri; I am an American, and I am for the first time in your beautiful country of Uganda and the first time to Kampala. I would like to thank very much, Evelyn Ankumah, whom I have got to know through the project we are going to talk about. Meeting Evelyn has been one of the great things I think in my life. I am very grateful for having met her and very grateful for the opportunity to talk to you about international justice in a domestic context, which the Crimes against Humanity Initiative is really about. We have a very rich program today that AFLA has put on for us. So, I have been instructed to tell you that we have shortened the time for this panel to one hour, so I will take very little of the time. As well as the next panel I think. And we will try to conclude precisely at three o'clock, and we still try to leave time for questions. So I have a very distinguished group of presenters, but since we don't have much time perhaps you can just read their information on the screen. What I thought I might do is just to say a very quick word about the Crimes against Humanity Initiative to begin with.

The Crimes against Humanity Initiative is not an international justice mechanism, but it does involve international treaty law that would be applied presumably by domestic courts, and it would be a treaty ultimately ratified by states. So it is a little different from most we are talking about this morning. The initiative was born out of the desire to fill a gap. If we look at the patterns of victimization over the past sixty years, we see that crimes against humanity are front and centre in really every region of the world. Civilians are subjected to atrocities, subjected to murder, extermination, deportation, sexual violence, ethnic cleansing, apartheid, forced disappearances, and the list goes on and on. So we have, if you think historically, starting at the beginning of the last century with the massacre of the Armenians, the holocaust, the ethnic cleansing in the former Yugoslavia, torture and forced disappearances in Latin America, the Darfur situation on this continent, Sierra Leone, and the killing fields of Cambodia in Asia. You can see that, certainly relating back to the topic of the last panel, this is not an African problem. This is a global problem - the issue of crimes against humanity.

After WWII, we had the Genocide Convention; we got the Geneva Convention, but no comprehensive convention on crimes against humanity. Why? The short answer is, "because governments didn't want one." Because the biggest difference between crimes against humanity and the other crimes was, typically and as initially conceived, they were committed by states against their own citizens. So there is sort of a radical dimension of that and also the scope was potentially quite broad, and then perhaps less cynically, the definition was quite difficult to elaborate and every international instrument that tried to come up with a definition, came up with a different definition. The second problem was largely eliminated with the codification of crimes against humanity in the



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Rome Statute for the International Criminal Court in 1998 when 165 countries negotiated a definition and 120 countries then adopted that definition. In 2008 I began at the Whitney R. Harris World Law Institute at the Washington University School of Law what we called then the Crimes against Humanity Initiative, directed by a steering committee of seven persons that I chair, involving almost every region of the world, we don't have somebody from Asia on the steering committee. Their names would be familiar to you: Richard Goldstone, Hans Corell, Juan Méndez, Christine Van Den Wyngaert, William Schabas, and Cherif Bassiouni. And we decided to try to fill the gap. And commissioned then, and I want to talk a little bit about this because the background is relevant, fifteen papers on different aspects of crimes against humanity. The papers will be published in a book later this year with Cambridge University Press, and probably in a month or two, the final versions of the papers will be available on our website for anybody to look at. The papers addressed all kind of things: the need for the convention, ethnic cleansing as a phenomenon, the peace versus justice issue, the justice and peace dilemmas, as we like to call them now rather than peace versus justice, all different aspects of this. We then convened three major meetings, the first one of which was in St. Louis, which is when I got to know Evelyn, the next one was in The Hague, and the final one was at the Brookings Institute in Washington DC, and we held several intercessional meetings which were essentially technical advisory sessions on the drafting of a convention. So the convention is now in almost final form, it will be revised once more after this meeting and after the meetings we held this spring in Washington. It will be published in the same volume in English and in French as essentially an academic offering to the states of the world as a way to try to encourage them to do something about this very important legal gap.

I am going to pretty much stop her now. There is the declaration in the back of the room I would like to refer you to, if you are interested in learning a little bit more about the key elements of the convention. It was a Declaration adopted in the Washington conference that is now still circulating for signatures by individuals that have participated in the project and lays out the foundations of universal jurisdictions, state responsibility, the definition, complementarity of the convention with the Rome Statute system etc and no immunities. The existence of the ICC is a critical factor to the success of the Convention but it does not obviate the need for the convention. The Convention is a states convention for the horizontal enforcement of international criminal law. The ICC is in a vertical relationship states, largely this is about states being able to cooperate with each other to do this domestically.

Finally, like other criminal instruments it obviously does not set out to solve all the world problems. It is an international criminal law convention, it addresses the issue of mass atrocities in so far as it aims to prevent and punish them as the genocide convention and the Geneva conventions entail. It will not heal a country torn by war or by the commission of crimes against humanity. What it can do is give states a tool to essentially try to eliminate some of the worst of the problems, but the secondary process, a very important process, of healing a society that has been inflicted by crimes against humanity is the subject of a subsequent process, although they are obviously complementary.

So with that background on the project itself, I turn it over to Evelyn Ankumah for a discussion of the convention.

The Future Convention on the Prevention and Punishment of Crimes against Humanity: African Perspectives

Evelyn A. Ankumah, *Executive Director, Africa Legal Aid (AFLA)*



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Dear colleagues,

As important as the ICC may be, it is not, and it will not be able to enforce international law on crimes against humanity on its own. The Court may prosecute and convict some perpetrators of these crimes, but the Court simply lacks the capacity and resources to hold all such perpetrators criminally accountable. To combat impunity national courts will have to join the battle. In fact, as the well-known complementarity principle teaches us, it is first and foremost up to national courts, not the ICC, to enforce international law of crimes against humanity.

Most States, however, have not conferred upon their criminal courts jurisdiction over crimes against humanity. And in those States that have done so, courts often appear unwilling or unable to exercise their powers. One might perhaps have expected from States that have ratified the ICC Statute that they take the fight against impunity for those committing crimes against humanity seriously and that they therefore also include these crimes in their national criminal codes. All too often, however, that is not the case. The ICC Statute does not contain an obligation to criminalize crimes against humanity under national law and only relatively few States have done so voluntarily. As a result, there is up until today a huge gap in the enforcement of the law on crimes against humanity.

In response to this, a number of leading experts in the field of international criminal law have taken the initiative for a Convention on Crimes against Humanity. Among the experts are international criminal law icons such as Cherif Bassiouni, Richard Goldstone, William Schabas, Christine van den Wyngaert and of course Leila Sadat. The aim is to open the draft convention for signature by all States and to have it enter into force upon deposit of at least 20 instruments of ratification. The Convention, if or when adopted, will fill a lacuna in the international criminal law system: whereas specific conventions for the other international crimes - war crimes and genocide - already exist, the same does not hold true for crimes against humanity.

The main elements of the Draft Convention on Crimes against Humanity are the following:

- States must adopt legislation or other measures to establish crimes against humanity as serious offences in their national criminal law system. Crimes against humanity are defined in accordance with Article 7 of the ICC Rome Statute;
- Immunities must be eliminated: the official position of an accused person, whether as Head of State, member of Government or Parliament, shall not relieve him or her of criminal responsibility nor mitigate punishment;
- No statutory limitations shall apply to crimes against humanity;
- Upon receiving information that a person who is alleged to be responsible for crimes against humanity is present on its territory, the State party concerned must commence investigations;
- If the investigations confirm that the person in question indeed is believed to have committed crimes against humanity, the *Aut Dedere Aut Judicare* rule applies: the State party shall either prosecute, or extradite him/or her to another State, or surrender him/her to another state, or surrender him/her to an international tribunal;
- A State party must exercise jurisdiction on the basis of the territoriality principle, the active nationality principle or, when it considers this to be necessary, the passive nationality principle. The Draft Convention "does not preclude the exercise of any other criminal jurisdiction". In other words, there is a right but no obligation to establish competence to exercise universal jurisdiction".
- State Parties shall assist each other in relation to request for extradition, investigations, prosecutions and proceedings and respect each other's penal judgments.



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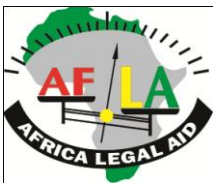
- Classic criminal law principles such as fair trial and *ne bis in idem* must be respected.
- Disputes between State parties shall be settled through arbitration or, if needed, the International Court of Justice.
- A Conference of State Parties, resembling the ICC Assembly of State Parties, shall be established.
- The Draft Convention also addresses Gender Justice, but Helen Scanlon will go into that discussion.

Ladies and gentlemen, the main goal of the Draft Convention is to intensify the fight against impunity for perpetrators of crimes against humanity. The Convention seeks to do so by conferring upon States the task to empower their national criminal law authorities to investigate crimes against humanity and to prosecute those responsible for them. In principle, these are the authorities in the territorial or the so-called national state. There is no duty for States to exercise universal jurisdiction. States may, but do not have to do so. Especially, from an African perspective, I welcome the absence of mandatory universal jurisdiction.

Firstly, a duty to insert in national law universal jurisdiction would also have rested on African States. The problem is that African courts, as a rule, often already have great difficulty in handling ordinary crimes and to deliver justice to their own people. A duty to take up foreign crimes against humanity cases on the basis of universal jurisdiction might weaken their capacity to handle ordinary, national criminal law cases. Foreign crimes, even if larger in scale or otherwise more serious, are not necessarily more important than local crimes. National criminal law systems are first and foremost meant to serve national societies. Is it fair or realistic to expect from African States to invest in foreign or international criminal justice at the expense of their national criminal justice? Let's not forget: universal jurisdiction cases are expensive. Perhaps they are simply too expensive for African court systems. Think about the Hissene Habre saga: the former Chadian leader was to be prosecuted on the basis of universal jurisdiction in Senegal. The process was halted for political reasons; then, not too long ago, the African Union called upon Senegal to re-start the case of Habre. The Senegalese President Wade, however, made a reservation. Yes, he agreed that Habre should be tried, and Senegal was willing to act as legal host. Yet: who is going to pay for the costs of the proceedings? President Wade was clear on this point: not Senegal, or at least not alone!

A second reason as to why leaving out a duty to establish universal jurisdiction over crimes against humanity is to be welcomed has to do with well-known "North-South dimension" of international criminal law. So far it has above all been Northern courts that exercise universal jurisdiction. Mandatory universal jurisdiction might have increased the number of cases in the North, especially in Europe, concerning Southern, mainly African cases. On the one hand, one may view this positively: the greater the number of cases, the greater the attack on impunity. One may regard universal jurisdiction as a positive contribution of the North to justice in the South. On the other hand, however, there are reasons to be sceptical. The AU political leaders, backed by commentators and many Africans, have condemned European initiatives to prosecute and try especially a number of Rwandan government representatives on the basis of universal jurisdiction. The AU leaders see this as "abuses" affecting political stability and sovereignty. Objectively, Northern universal jurisdiction may promote criminal justice in the South, but this is not to say that it is also *perceived* as just.

Similar things can be, and indeed have been, said in relation to the ICC. As we all know, all ICC cases so far are African cases and in particular the arrest warrant for the Sudanese President Al Bashir has triggered the criticism that the ICC is just a Northern court attacking Africa and Africans. One may dismiss such points and regard the recent AU attacks on "Northern" international criminal justice as



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mere attempts to circumvent accountability. Phrased differently, one may accuse the AU leaders of raising this North-South issue simply and only to shift the attention away from their obligations to promote accountability and end impunity, and to minimize chances that they themselves might one day be caught by the wings of justice in Northern countries. Yet, there is no denying that there is in Africa growing dissatisfaction about the way in which international criminal law is evolving in practice. Many in Africa support international criminal justice, but quite rightly, they fail to see how selective justice can be just.

Ladies and gentlemen, if the envisaged Crimes against Humanity Convention had prescribed universal jurisdiction for crimes against humanity, I doubt whether many African States would have been willing to sign or ratify it. And even if they would have signed or ratified, they might have refused to cooperate and offer foreign courts legal assistance. The Draft Convention requires that future State parties establish jurisdiction on the basis of the nationality or territoriality principle. This I support. In fact, the Draft Convention offers African States unique opportunities. Firstly, it offers them the opportunity to demonstrate that they take the fight against impunity seriously. They can show both the African people and the rest of the world that they are able and willing to work on criminal justice. Secondly, by signing, ratifying and actually implementing the future Convention, African States are in a position to take control and, be it legally or politically, to prevent the ICC and/or European courts from exercising universal jurisdiction over African situations. The Convention provides space for finding African solutions to African problems.

A delicate issue, which is likely to trigger debates and may still constitute an obstacle to African ratifications, concerns the duty included in the Convention to eliminate immunities. Criminal justice requires abolition of immunities. Yet, as often argued, lifting of immunities might endanger peace negotiations and obstruct peace. Will African states and governments accept the Convention, knowing that the Convention does not allow for reservations on the point of immunities? This will really be a test-point, a fundamental question. Ratification of the Convention will imply a commitment to hold perpetrators, whatever their official capacity may be, criminally accountable.

The Convention does not leave the option open to substitute criminal justice with alternative justice mechanisms, such as truth and reconciliations commissions. Such alternative mechanism may supplement criminal justice, but does not replace it. Thus, saying "Yes" to the convention implies full acceptance of criminal justice. Will African States and their leaders in particular, be willing to make this commitment? Is the recent stance of the AU against universal jurisdiction and the ICC arrest warrant for president Al Bashir truly and only an anti-Northern stance or is it also a covert expression against criminal justice as such? I do not know the answer, but the future Convention does offer a unique opportunity for African States and their leaders to demonstrate that they take the fight against impunity seriously.

Strengthening the Rome Statute

Dr. Pål Wrangé (PhD), *Associate Professor and a delegate to the ICC Review Conference, representing the Government of Sweden*

I would just supply a couple of brief general comments, not going into the details of this potential very useful convention.

My first comment concerns the potential role of the convention in the international legal system. As you know, the Rome Statute contains several levels. The ICC and the Rome Statute is perhaps at the top of that edifice and at the bottom you have the communities and people who necessarily need to embrace the principles and the values entrenched in this system for it to fully work. But perhaps the



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most important level is the one in between, the national level. As rightly has been pointed out, it would be national jurisdictions that would have to bear the heavier burden to eradicate the impunity. Almost all cases would have to be prosecuted and judged in national jurisdictions for that to happen. The ICC's Rome Statute contains criminalization of three crimes: war crimes, crimes against humanity and genocide. It is clear which acts are criminal under international law. But what are the incentives for domestic jurisdictions to enforce that in the national setting? The principle of complementarity. As has been pointed out, is one such incentive. By prosecuting, a state can avoid that a case or a situation from being referred to the ICC. However, that only applies in certain cases. It applies in cases where crimes have been committed on the territory or by a person of that nationality of the state. And it is probably the case that even in such cases, even when a crime is committed on the territory of the state or by a national of the state, that government is concerned and is not really interested in prosecuting. There might also be other incentives for states to prosecute. They might want to show their good will; there might be causes for prosecution from the domestic constituencies and states or governments might want to contribute to the rule of law in general. But I think it is the case that in a great number of instances there will be no jurisdiction that will be interested indeed in dealing with the case. And of course we will all see that as empirical evidence of that around the world. By themselves states will not fulfil that task of prosecuting and adjudicating cases on whether to eradicate impunity. So, there is a need for international regulation in this field. However it is a hot spot of various instruments and rules, which come from different sources, negotiated at different points in times.

As far as war crimes are concerned, most war crimes are called grave reaches of international humanitarian law. And when they have been perpetrated in international conflict, a war between states, there is an obligation for states to prosecute them under the Geneva Conventions. Which are now universally ratified and under the first edition of the Protocol, which is almost universal. So there is a good regulation. It is not that deepened, but it is there. There is a principle duty to prosecute or extradite in those cases.

When it comes to genocide there is a duty to prosecute, but only for that state in which territory the genocide has occurred. So it is only, for instance, a duty for the government of Rwanda to prosecute for genocide. Not for the government of Uganda or Sweden. There are also such obligations on torture and disappearances; however there are some huge gaps in this regime, the international criminal law regime.

So, there is no obligation to prosecute for war crimes in domestic conflicts. Of course, the last majority of wars are domestic conflicts are civil wars.

Furthermore, as been pinpointed out, there is no duty to prosecute crimes against humanity. This means that there is, with the exception of a few specific crimes as genocide, there is no obligation to prosecute atrocities in peace time. States have the opportunity, they may prosecute for all of these different crimes, but there is no obligation. So, this treaty would fill an important void in this respect. It would obligate States to prosecute atrocities in peace time. That is the great merit of this treaty. It would provide a huge building stone in the international criminal justice.

Let me make a couple of short remarks on the content of the treaty. First, I would say that there is a negative trend in the field of international criminal law. States have become more reluctant to enforce international criminal law in their domestic jurisdictions. There is a movement that states restrict the application of universal jurisdiction. And States have been much more willing to accept obligations to fight terrorism than they have been to accept obligations to fight impunity, with regard to international crimes. That is war crimes, crimes against humanity and genocide. This convention would obligate States to prosecute then the crime that has occurred on its territory or by one of its



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nationals or rather alleged suspect is present on the territory of the State, which means that States would be obliged to prosecute when they have a tangible interest, like the nationality or the territoriality, but also in some other cases when the perpetrator happens to be on the territory of that State. I think that states would in general want to have some leeway here. As you know, there have been a number of incidents in which visiting high officials, but also officials at lower levels, have inhibited the travel plans, or changed them abruptly because they have feared prosecutions in foreign countries. Some countries might think that this is not particularly conducive to international relations and might be a bit hesitant to increase the obligations to prosecute. It is unfortunate, but that is the way things are.

In my reading, the Convention would retain what is called procedural immunity. That is anyone who commits a crime against humanity would be liable in principle, but as long as the president is the president, he cannot be prosecuted under this convention. He or she could be prosecuted by the ICC, but this convention would not change the basic rules of immunity, which protect sitting heads of states, of government and foreign ministers and some other categories of people as well. I think that if that is the correct reading of the Convention, it is very wise, because that would make it much more likely to be ratified by States. That is the way the world is.

I think that the comments made by Evelyn regarding universal jurisdiction are very appropriate. Prosecution of foreign cases is very expensive. So it shouldn't be a burden. Perhaps one could imagine some sort of trust fund for states with less financial resources that would never the less be willing to prosecute cases like this. Like the Hissène Habré case which has been going on for ten years now.

Regarding prosecutions of foreign persons, there is also the risk of misuse, of politicization. I, for sure, do not know whether the prosecution of Rose Kabuye and others in the Rwanda administration was guided by political considerations; I do not think so. I rather think it was something that a French judge Bruguière thought was the right thing to do. But it was for sure perceived as politicization. It was very unfortunate that prosecutions happened to occur in France, which has a particular relation with Rwanda. I think that in my mind there have been quite a few cases where prosecutions have been really politicized; there is still that perception.

I would end by saying that in fact, quite a few of them all, prominent prosecutions under universal jurisdiction have not been directed at Africans. They were even not against persons from the third world; they were in the western world. The most famous case of course is Augusto Pinochet. Even though Chile is not technically part of the Western group in the UN, it is very much a part of western culture. Another very famous case was the effort to prosecute Donald Rumsfeld in the wake of the invasion in Iraq. Efforts in Belgium, which in fact triggered quite a diplomatic conflict between Belgium and the United States.

Gender Mainstreaming

Dr Helen Scanlon, *Director of Gender Justice Programme at the International Centre for Transitional Justice*

I am just going to comment briefly on the Convention. I agree with Evelyn. There is obviously a unique opportunity for African states to demonstrate that they take the fight against impunity seriously. The ICC is simply not in the position to prosecute the amount of crimes that have been perpetrated. And the idea that the Convention awards criminal courts with jurisdiction over crimes against humanity and within that section gender based crimes has to be welcomed, but there is a "but". I could start with going into some of the problems in terms of adopting Article 7, but I will not go into that. There is a lot of controversy over the interpretation of gender, but I think everyone will



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fall asleep when I go into that. I am going to focus more generally on what I see the limitations are or the problems that we face. While it is a welcomed initiative, what are the problems we need to consider?

What are the issues? We have already heard, and it has been mentioned a number of times, when we talk about crimes, we are talking increasingly about crimes against women and children during conflict that are the major casualties of war. And this has been taken on board in the international community in a range of resolutions, in a range of developing international jurisprudence, the ICC is being quite critical in developing the legal framework that is in existence, but we are not seeing an end of those crimes. There is an impunity gap here that we need to understand.

We have the international community, the international media very much focused on African women as victims. Recently, we had Mia Farrow coming crawling to the ICC to intervene in Guinea. We can go into the politics of that, the way that women are being portrayed at the continent and the victimhood that is being put forward, but the important thing is that it is being recognized. Within the continent itself, the AU has incredibly progressive protocols in place in terms of addressing gender based violence during conflict. We have the framework in place. This is a welcome addition to this framework, but why are we not implementing the framework? That is the critical issue. We can keep developing and we can keep expanding our definitions of what gender based crimes are, but if we are not achieving the prosecutions, if we are not seeing perpetrators being punished, there is not much utility to carrying on with developing the processes. Instead, we need to be looking at implementation.

As much as we have seen these developments in terms of the progress, we have also seen significant regression in the same period of time. We have seen a significant regression on the continent in terms of commitment to democratic rule. We have seen unrest in Guinea, Kenya, Madagascar, Zimbabwe, all showing disputed elections and impunity so far to the crimes that have been committed. We have seen a failure to address the ongoing conflicts in places like the eastern DRC, which has resulted in systematic violations committed against women.

But more importantly connected to that, we have seen normalization of sexual violence in post conflict settings. And that is what is not being addressed. The Harvard Humanitarian Initiative just brought out a report on the eastern DRC looking at 2004 till 2008. During this period there was a seventeen fold increase in crimes committed by civilians against women. Rapes perpetrated against women. So while we have seen a decrease in crimes committed by combatants, it is normalized within society and that hasn't been addressed.

There is also been an impact of the global economic crisis on funding. That is immediately seen in gender based initiatives being hit. This is being important, in terms of quite often emphasis is put on gender ministries to implement all of these mechanisms. They simply don't have the resources and those resources need to be spread across in the criminal justice system, into development systems, because surely we have a completely holistic approach when we talk about gender based violations.

In addition, there are several reasons why sexual and gender based crimes are often overlooked in indictments for crimes against humanity. First and foremost, there is a continued perception that systematic rape in conflict is an exception or just an unfortunate by-product of war. There is also shown that investigators often neglect cases of gender based violations if they haven't been specifically told to investigate those crimes. Also, it has been shown that when you have male investigators who haven't been sensitized to the issues, women in many cultures will even not admit to the violations that have been committed or they might be using local euphemisms which the investigators do not understand.



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Globally, the stigma which surrounds rape in all cultures often impeach women disclosing their experiences of sexual violence, and on the other side, we have seen the increase of sexual violence against men and boys in conflict, particularly, in Kenya recently, and also in the DRC. We have not created an international mechanism of how do we actually address these crimes, which is even more stigmatizing and there are no mechanisms in place to address them.

We have also seen a number of international cases that if there is a lack of communication between the investigator and the prosecutor you often overlook the crimes, and this was particularly relevant in the Lubanga case. More importantly, we have seen bad experiences of women giving testimonies on sexual violence, the lack of psycho-social counselling, the insufficient preparation of the testimonies, and the absence of financial assistance. All of this the international community is trying to adjust and learn from its mistakes, but if we are looking at implementing these types of prosecutions for these crimes at a domestic level and deplete the judicial systems, how are we going to assure that these processes are fully implemented?

I believe that the need to supplement capacity of national courts is a welcoming addition and the idea that we can start looking addressing sexual and gender based crimes at the domestic level is quite critical. We do though need to look about things such as protection for female witnesses, child care protection and protection of confidentiality, the long term support of gender specific consequences of testifying and balancing the rights of the accused against the witness protection. We saw recently in the DRC, a case where a military court used the Rome Statute to prosecute sexual violence cases. This was sort of applauded internationally. There was a mass rape of more than a 190 women in December 2003 and the officers who rebelled against the commanders were actually caught and charged. The ICTJ, my organization, was actually with the people working on this case. There was a prosecution, the victims were rewarded reparations, and their families were also rewarded reparations. In reality, what happened is, in a remote part of the western DRC, 300 women had just heard that this court was taking place and walked to the court in order to tell their stories, but were told when they got there that there were no mechanisms to help them and it was a specific case. They were only there for a few days, so they could not actually deal with the case. Despite the conviction the perpetrators escaped and the reparations have never been paid. A huge amount of money was invested in this case and the feeling among victims in this area was very much that they have been abandoned by the international community. There was a lot of emphasis placed that they would receive justice and justice has not been served.

Again this comes back to the question we have spoken about that international prosecutions are expensive, but so are domestic prosecutions, especially in these depleted post-conflict environments. So we have to start thinking what mechanisms can we put in place if we are to ensure and challenge impunity.

There is a global problem affecting proper prosecutions for gender based crimes. The idea that suddenly we can start prosecuting crimes in conflict is actually a big leap of the imagination. We need to start looking on how we can better implement this at the national level across the board and expand our focus on this. And beyond consideration of those crimes against humanity we need to also consider about reintegrating those women who have been victims of gender based crimes. How do we deal with the children that were born out of rape? What mechanisms do we put in place for the bush wives who are ostracized from their communities and what reparations will be put that can create a long term impact in the society? And how can we challenge the idea of stigma so it is the perpetrator that is stigmatized and not the victim. So I think there is this whole host of issues that we need to think about while I welcome the initiative, but I also do think we also need to look at the reality on how it is going to have impact on the ground.



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Questions and comments of the floor

* The first question I would like to address to Ms. Ankumah is about legal aid. It is about the practicality of the victim trust fund and the ICC. We had a short presentation about the victim trust fund and to me it would be more practical if that trust fund cooperated with legal aid NGOs who are on the ground because these are the people who work with the indigent and the indigent are always the victims in such ICC crimes, so I don't know if you can expand a little more on how legal aid can help the ICC or the victims.

* Number two, is to Dr. Wrangé, you did mention something about Belgium taking on Donald Rumsfeld about the Iraq issue. I wish you could expand on that a little more.

* Ms Ankumah mentioned the African perspective of justice, of how we perceive the ICC. I am wondering, because I am a bit offended when you generalize that the whole African, including me, might be having a negative perception to the ICC. I believe that this might be a clique of people who I sometimes meet in different cases and do not really represent the voices of the masses. Probably it can be in that way. On the issue of the Draft of the Declaration which we have here, I am really wondering why Dr. Wrangé is saying that it does not put into consideration the possibility of prosecuting the heads of States and other people surrounding the top seats. This gives it a perception of a law of the weak people, those who are defenceless and protects the other person. And this may, at a certain point, make people believe that the ICC is today supporting a mechanism of our ongoing governments.

Answers and comments of the Panel

Dr. Pål Wrangé (PhD)

About the effort to prosecute the American Defence Minister; it raised the spectre that there would be a host of prosecutions against various US officials, some of them protected by immunities and some not. So the US administration quietly or perhaps semi-quietly explained to the Belgium government that if you do not change your laws we cannot come and visit your country very often anymore, and then, we will have to move NATO Headquarters. So Belgium went ahead and changed their laws so it would no longer be possible, I believe, to prosecute Rumsfeld and that quieted that matter. However, it is interesting that he is no longer the Secretary of Defence so if he would travel anywhere where the laws are appropriate he will not be protected by immunities anymore.

That leads me to the issue of immunities. There were initiatives to prosecute or efforts to prosecute for crimes against humanity and other international crimes succeeding the *Pinochet* case. And I think that in most cases the outcome was that procedural immunity is still held. That is, that a diplomat is protected in the country where he or she is stationed. The foreign minister or Head of State or government and some other officials as well are protected when they are on an official duty. That is more or less established among those States where there have been universal jurisdiction prosecution. That is the old rule. The rule was tested and upheld. Is that good or bad? Well there are contradictory concerns here. On the one hand we all want perpetrators of great crimes to be prosecuted on the other hand the world is far from a perfect and there is the need sometimes to speak to bad people as well, and there is also a need for international relations to go on without excessive interruption. So there is a need for immunities to prevail. And it has been that latter more realistic view that has won the day. Immunities still stand under general international law.

What about the Convention on the Prevention and Punishment of crimes against humanity. I am not the expert on that Convention, we have at least two perhaps three experts on the text of the Draft



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Convention as such, but maybe the thing is that the Convention would delete substantive immunities. That is, you would be in principle, responsible even though you acted on behalf of a State or on behalf of a government. However, what is called the procedural immunity would stand. Which means as long as you are a Head of State you would be protected. However, when you resign or when you are no longer the Secretary of Defence then you are not protected by the procedural immunity. That is my reading of the Convention, but I am certainly ready to be corrected.

Evelyn A. Ankumah

I cannot say much about the ICC Victims Trust Fund I think there are others in the room that can probably speak about that. On the point about the African perception of the ICC, I am sorry that you are offended, but I was not trying to say that the African perspective is that we believe that the ICC is targeting Africans, but there are some important issues to pay attention to. International justice, not just the ICC, should be perceived to have universal application. It should not just have that notion, but it should be seen as such. A very good example is the far reaching genocide laws of Belgium. Those laws were used to prosecute people from Rwanda for the genocide in Rwanda and then when those same laws, were attempted to be used against people from the more powerful and influential countries, there was a threat to Belgium that they would remove NATO when Belgium does not do something. Belgium obeyed and changed its far reaching genocide laws. So these are some of the concerns about the universal application of international justice.

Prof. Leila Sadat

I might just add one other issue. You are absolutely right about the procedural versus the substantive immunities. One of the things that was very difficult in negotiating the text of the Convention was to keep the progressive development of the international criminal law and not push so far into new areas where a convention would be completely unacceptable, were States would just reject it right out of hand. But we got into some of the issues like gender based violence and Rome really advanced the ball on that a lot. But it is difficult to take it further given that there is this push back from States now and this retrenchment. The only other thing I would add is that, it was really the German case against Rumsfeld that I think people thought was going to go further, although it didn't.

Questions and comments of the floor

My name is Martin Mennecke, Professor from a law school in Denmark. I wanted to continue what you just said yourself. The push back and the interest of States. I am wondering how much you, as the initiative takers behind this, feel that there is a change to really put this to practice. I am still also wondering if this is the most pressuring issue in terms of international criminal law. When you look at the ICC States, all 111, they all have this very definition already as a treaty obligation and they should probably look into their national legislation already on that basis. I am just wondering if in the future this was put on the table and some States started ratifying and others do not what the situation then would be. Whether that would weaken, for example, the current status of international law as to what customary law has to say on all of this because, for now, you could probably say many of the things that have been said exist under customary law, the jurisdictional questions, the immunity questions, the definition of crimes against humanity. But once you have a situation where only fifteen States ratify this Convention you could turn that around and say, 'there is very little support among States for this definition, for this sort of jurisdiction etc. And I really wonder if that would help the status of international criminal law or whether it would weaken the status of international criminal law.



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Answers and comments of Panel

Prof. Leila Sadat

I will take that as addressed to me. It is a lot of very good questions wrapped into one. Essentially, is there a need? sure. When you think about the semantic indifference of the world today so much is put on whether it is genocide or not genocide and we have forgotten completely that it is all about crimes against humanity. So you think of what the extraordinary chambers of Cambodia are dealing with where the public really wants a genocide prosecution and whether it was genocide? Probably not under the Convention definition and not under the interpretation of that definition at least by the ICTY and other international criminal tribunals. So there is lack of a legal basis for crimes against humanity, not just for ICC party States, most of whom have not yet implemented the Statute, but for the ICC non-party States. Particularly the many who unfortunately will not ratify any time soon I think is a fundamental problem in international relations. It is technical, you also get a lot of other things, inner State conventions that can't be put in the ICC Statute, you get State responsibility as a possibility. There is this idea in the Convention creating not a Trust Fund for Victims but a treaty body that can engage in prevention and capacity building and transfer development assistance. The kind of thing that Dr Scanlon was talking about. States need resources. And really Evelyn you talked about this too. States need money to be able to do this.

And in terms of whether adoption of a new Convention advances or defects from the law? That is always a difficult calculation. The Enforced Disappearance Convention is a new Convention with very few ratifications. Does the fact that there are still enforced disappearances, including those carried out by my own country going on in the world lead to having a new Convention? I think that the calculus would be that those new treaties represent an initiative that the international community is trying to do something about a problem. Whether they are not ratified quickly enough is something obviously beyond our control. One of the difficulties in international criminal law development now is that you have a whole group of States now parties to the Rome Statute and a whole group of States not party to the Rome Statute. So that really was the interesting and difficult technical question to finesse. You want a complementary Rome Statute to provide a facility for non-State parties to be able to participate. That is why with the Convention we are stuck pretty much with the Convention definition and cannot get rid of that pesky provision on gender.



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The Uganda War Division of the High Court of Uganda (WCD) and International Justice

Chair:

Judge Joseph Mulenga, *African Court on Human and Peoples' Rights*

Presenters :

Mariana Pena, *FIDH (International Federation of Human Rights) Permanent Representative to the International Criminal Court (ICC)*

Complementarity: From Principle to Practice

Mariana Goetz, *REDRESS' ICC Advisor*

The Role of Victims in Strengthening Justice

Mr Gabriël Oosthuizen, *Chief of Party of the Uganda Project of the Public International Law and Policy Group*

Lessons from International and Hybrid Tribunals

Elizabeth Nahamya, *War Crimes Division of the High Court of Uganda (WCD)*

Gender Mainstreaming

Complementarity: From Principle to Practice

Mariana Pena, *FIDH (International Federation of Human Rights) Permanent Representative to the International Criminal Court (ICC)*

First of all, I would like to thank the organizers for having put together this programme and for having invited me to present at this conference. My presentation is going to be brief and it is going to focus mainly on the “dynamic nature” of the principle of complementarity of the Rome Statute.

The principle of complementarity was conceived by States when they created the ICC in order to safeguard elements of their sovereignty. As a consequence, they retained responsibility to try alleged perpetrators of the most serious crimes.

Complementarity is an admissibility criteria. The Office of the Prosecutor and the judges verify at different moments during the proceedings that there are no national proceedings for the crimes under investigation or prosecution. Or, if such proceedings exist, they check whether the way those have been conducted or are being conducted show that, in reality, the State concerned is not genuinely able and willing to carry out national investigations and prosecutions.

It has been said that the Rome Statute thus introduces two “new” concepts: *inability* and *unwillingness*. However, it must be emphasized that, although these ideas might sound new, if we look at what is behind them and how they are interpreted in practice, we realise they basically refer to principles related to the right to a remedy which a number of tribunals, including regional human rights courts and other bodies, but also national courts, have made extensive interpretations and findings on. Inability and unwillingness refer, *inter alia*, to:

- Independence of the judiciary: non-interference of the Executive branch; avoiding that the structure involved in the commission of the crimes is given some role in trying those crimes (for example, this is violated when military tribunals are allowed to try members of the army for ordinary crimes).
- Respect for the due process principles, including the right to be tried within a reasonable time.

Given the direct interest of the States in the interpretation and application of the principle of complementarity by the Court, it would be helpful to have advanced ICC jurisprudence on the matter spelling out the relevant obligations of States in a more detailed way. However, we find that after a



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few years of implementation of the Rome Statute, and these have been years when the Court has looked mainly at preliminary issues, there are very little developments on that aspect. There are a number of reasons for that; but one important reason is the fact that it has been States themselves who have referred cases to the Court. So, as a consequence, they have not challenged the admissibility of cases. Defendants have done so, but the types of challenges Defendants submit are different from the ones States could bring.

I would like to focus now on the “dynamic” nature of complementarity. I think it became quite clear when peace negotiations were ongoing here in Uganda, that once you have requested the ICC to come in, you cannot simply “turn it off” the same way to “turned it on”. This has also been clear with respect to the situation in Sudan and other situations currently not under investigation but where the ICC could intervene: if States want to “avoid” ICC action, they must conduct national proceedings for the crimes and incidents the ICC is focusing on or is likely to focus on.

Although States' obligation of bringing perpetrators to account existed before the Rome Statute was adopted, the principle of complementarity now acts as an incentive for national proceedings. Amnesties are not acceptable because a State which grants amnesties could be considered unwilling by the ICC. So, as I said, there is an incentive to conduct national prosecutions. This could be described as a great “spill-over effect” of the creation of the ICC.

It must be noticed, though, that States must carry out proceedings not just to “avoid” ICC action, but also to complement it (given that the ICC will only try very few cases in contexts where the number of crimes and thus the number of perpetrators is quite considerable).

In making an evaluation (or “stocktaking”) of what has been done so far by State Parties on the complementarity front, we note that while there are initiatives here and there, States have not fulfilled their obligations fully. What I mean here is that discussions about setting a structure or even the set-up of a structure itself, and/or the adoption of relevant legislation are not sufficient to consider that the State concerned has discharged itself of the obligation to try alleged perpetrators. Those persons must actually be brought to justice and that must be done according to high standards. Those high standards include impartiality, i.e. that members of all parties allegedly responsible for atrocities are brought to account. This was the sense of the 2009 ICC decision on Uganda, where note was taken of the creation of the War Crimes Division, but it was noted that the Division had not been operationalized. Therefore, it was concluded that the ICC continued to have full jurisdiction over the case against Joseph Kony et al.

The ICC regularly monitors the existence of national proceedings, and, in such a way, it acts as a sort of custodian.

When making reference to the dynamic nature or the dynamic side of complementarity, what has been called “positive complementarity” comes to mind. Positive complementarity has been defined by the ICC Office of the Prosecutor, which is where the term was coined, as a proactive policy of cooperation aimed at promoting national proceedings. So, it basically refers to a situation where the ICC, rather than sitting, waiting and assessing what has been done by the national Judiciary, adopts a more proactive role, at times assisting, at times encouraging, at times both assisting and encouraging States to conduct national proceedings.

Within this framework, the ICC could, for example, pass on information it has collected which it is not using for cases it is carrying out (for example because they refer to low-level perpetrators). This,



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however, can pose problems in cases where by transferring information, the Prosecutor would be doing harm. For example, the ICC Office of the Prosecutor made it quite clear that although it would like to transfer dossiers to the local Judiciary in Congo, it would not do so if the appropriate mechanisms for protection of witnesses are not in place.

Another way in which the Court could lend support to and encourage national prosecutions, is through training and experience-sharing. For example, the ICC Office of the Prosecutor has put in place a so-called Law Enforcement Network, which gathers representatives of Law Enforcement bodies from different countries to facilitate exchange of information and practices.

Yet another way in which the ICC can contribute to national proceedings is by encouraging national prosecutions through statements, letters, meetings, etc. The impact such actions may have ultimately depends on the context. For example, the fact that the ICC has made statements and sent letters to some States indicating an interest in a situation and enquiring about steps undertaken to address impunity has contributed to enhance political will to conduct national proceedings (examples: Colombia, Kenya to some extent, and Guinea).

The positive complementarity policy which I have described is primarily a policy of the ICC Office of the Prosecutor. Nevertheless, efforts have been undertaken to make this a policy of the Court as a whole. Complementarity is, at least in my view, the real future of the Rome Statute system.

One could imagine that judges could interact with local judges, not on particular cases (because that could pose problems of independence) but rather on ways to address legal issues related to international criminal responsibility. The ICC Registry could also play a more prominent role on the issue by increasing and expanding the training of lawyers. In this regard, it must be acknowledged that facilitating access to the Court by local lawyers especially from countries where grave crimes have been committed, is a way to contribute to complementarity.

Of course, all these issues raise questions as to the extent to which the Court can or should devote efforts on this front, given that its core mandate is and will continue to be the prosecution of the most serious crimes. It also raises the matter of resources needed to undertake these activities.

This also brings us to the role that States Parties to the Court should play in this regard. What do/can they do to encourage other States to conduct national proceedings? This has been partially addressed within the framework of discussions on complementarity in preparation of the stocktaking exercise to be conducted at the Review Conference. In the lead-up to those discussions, States have mainly focused on the need for building capacity, and on the best possible way to coordinate provision of technical assistance. However, States have made little to no effort to evaluate (individually or collectively) their performance on the principle of complementarity, i.e. whether they have been willing and able to conduct national prosecutions for serious crimes within their jurisdiction. There has also been little discussion on how to address problems related to lack of political will, since preparations have focused heavily on boosting capacity. Hopefully, those issues will be addressed during the Review Conference to take place in the coming days. This is certainly a matter for African States but also for other States.

It will be interesting to see what the outcome of those discussions is. One can already anticipate that, given the extent of the matters to be addressed, the set-up of a follow-up mechanism to carry on discussions and monitor implementation of decisions after the Review Conference, would be highly desirable.



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The Role of Victims in Strengthening Justice

Mariana Goetz, *REDRESS' ICC Advisor*

Thank you very much judge, and also a very big thanks to AFLA and for Evelyn for having organized this event and also for having put victims on the agenda. We are beginning to feel a growing momentum in terms of victims rights' becoming part of the mainstream discourse. Some years ago, those who we were in Rome, will remember that the victims rights' working group was created. Before then Rome, was seen as a very marginalized side issue, seen very much as these difficult people. They are always wanting more. They are making a lot of demands. But now we are beginning to see that the rights of victims, as they are embodied in the UN Basic Principles of the Right of Remedy and Reparations in 2005, are actually beginning to be recognized. Not only as part, obviously of the ICC system, but also in terms of opportunities to implement the rights of victims at national level as part and parcel of implementing and domesticating the ICC Statute as well. That is something that is a very exciting development and the in fact stocktaking on the impact of the ICC on victims and affected communities is also part of the agenda next week. It is all part of this interesting new dynamic that we are experiencing on this issue.

In fact the title that you have given us for this item is a very exciting concept. 'The role of victims in strengthening justice'. I hope that this is part of this new discourse that we are beginning to open up. Which really is beginning to go beyond the simple facts of justice. I think for many years we have been fighting so hard to see mechanisms put in place to end impunity. That justice is really been seen as an end in itself, the mere fact of justice is enough. Now are we beginning to move to a second phase where we are looking at the quality of that justice. What kind of justice are we talking about? Who is it for? What is the content? In a sense I feel that the opportunity of implementing victims' rights and giving effect to victims' rights in the international criminal justice process is allowing us to move on from the mere fact of ending impunity to a qualitative content driven debate about what actually the whole process is about.

I will try and shed some light. In a sense I sort of came up with two main areas where you can see that victims can have an impact in strengthening justice. The first I would call 'strengthening the quality and scope of justice' and the second one perhaps, 'focusing more on the processes and outcomes of justice'. But in essence they are all mixed up in one and each other. To break it down more easily I thought maybe I would look at it at one hand, as more of a theoretical approach and then looking more practically at the different rights and of each of them. I will not go through them all, but a handful of them may have some positive impact on our understanding of what justice is.

On the theoretical idea, perhaps something I can draw a parallel with, is the whole debate that took place at the beginning of the 90s on development. Initially development was all about economic growth. There was an obsession with GDP per capita and development and economic growth was very much an end in itself. In 1990 Amartya Sen, a famous economist, looked at this and used the famous phrase from Kant 'Actually development is not an end in itself only, it is also a means to an end. And the end are human beings, there are people'. And then the whole movement of human development was born. So in essence grounding the idea of development in actual human beings and the whole human development index, looked at education and health and other social economic developments as being central, took a hold. So in essence perhaps we can draw a parallel with justice and that we are moving away from the idea of ending impunity as a kind of hollow but important statement, something that is actually meaningful and is grounded in human beings and those who



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are to benefit. That is a bit the theoretical underpinnings that we are considering. Moving away from a retributive form of justice to something that is also reparative.

Perhaps it might seem very revolutionary to some, but there is a considerable resistance about the rights of victims at the ICC about their rights to participate. And for many Common Law countries there is a similar resistance, there is a sense that it is already complicated enough to have this adversarial process where you have to balance the rights of the accused with the interest of justice. And how are we also going to fit in these third participants, the victims and will it not completely throw the balance of scale? Will it not jeopardize fair trial? All sorts of arguments come in, particularly in Common Law countries, like my own in the UK, and also here in Uganda. But this idea of justice having this reparative element is really nothing new. Civil Law countries have it next door in the DRC, it is common place, but also traditional justice mechanisms, in fact most systems of regulating society in origin were about using the two parties to a dispute and having some form of compensation or settlement being the outcome. The taking over of the State of the function of prosecuting is actually quite a recent phenomenon. In most of the ancestry of our legal systems we find a much more reparative, restorative process that is there in traditional justice systems even here in Uganda. That is really the core value of the process; the victim and the perpetrator and finding some form of settlement between the two. So, it is not really such a revolutionary idea.

What I am going to do now is to talk a bit about the theoretical underpinnings and how these might be changing with this idea of implementing victims' rights as a means of strengthening justice. I am going to look at views of the different rights that exist and how those individually might have a role in strengthening justice.

Perhaps I will start with the right to be informed. This is a right. In fact all these rights we are talking about when we talk about the UN basic principles on Rights of Remedy and Reparation there is some sort of sense that this is some sort of soft law and that it is not really binding. But those rights are very strongly grounded in areas of human rights treaties; there is the Convention of the Rights of the Child, the Conventions on the Elimination of all forms of Discrimination against Women. Whether it is international civil or common political rights or regional conventions which set up treaty bodies all those provisions include these rights. The treaty bodies themselves have all adjudicated and developed jurisprudence on interpreting what these rights are. In a sense the codification in the UN principles is just as an ease of reference to what is already out there and widely accepted for example, in the judgements of the Inter-American Court or the European Court of Human Rights. These have been translated into the ICC Statute in a particular way. It is not necessarily the only way interpreting them, but it is an example.

Let's take the right to be informed. We can translate this right into a role for victims. Let's put them active in the driving seat and see in fact what role victims have in strengthening justice through exercising their right to be informed. And I think one can see two interesting results from doing that little exercise. The first is the scope if one ensures the right of being informed, if one ensures that victims are informed about decisions that affect them, that concern them. One will find that the scope of justice will become a lot wider. More people that are affected will engage with the process. And in a sense this is a strengthening of the process, that it is not an exclusive process, but it is something that has a wider reach. People will know about it and that is very important. Secondly, there is a sense about quality of the process by implementing the right for victims to be informed and by ensuring that they are informed. There is a role in bringing new content into the process and that is the search for truth. Victims have the right to be informed, they have the right to know the truth. And in a sense this is not something that is necessarily prevalent in Common Law jurisdictions,



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it is very common in South America, for instance, where the right for truth and justice seem to go hand in hand. Whereas in other jurisdictions that is not so much the case. So in an essence giving the victims the role of exercising their right to be informed can on the one hand broaden the scope of justice and on the second hand it can also inform it with the truth and with a pursuit of the truth, as in, to go into the justice process.

Just to take a second example of the rights of victims to raise their views and concerns, the right to participate has been interpreted at the ICC. Of course there is a huge impact here in terms of the content of justice. We have seen through the very first trial at the ICC. The fact is, victims have been participating at the ICC and that participation has worked well for the justice process. How has it changed the trial? Would it be different if the victims had not been there? I think in many instances, as we have seen during the trial in the Lubanga case that actually the victim participants are often the only ones who were there, who knew what happened, who had a full picture of the conflict. So often it is their representatives who are able to put things into context, to bring in an important perspective, add local knowledge, local customs, add for instance an understanding of the way in which identity is defined, in the DRC for instance that was an issue. The victims' representative was the one that brought an expert to have the court informed about how the usage of names were made in DRC, which is quite particular. Immediately by bringing the victims into the courtroom in order to raise their views and concerns shed a huge amount of light on a context of the conflict itself.

I am just going to consider two more, because the next one I was going to look at was the right of protection. It might not seem obvious how by implementing victims' right to be protected you are going to strengthen justice. But if you think of it perhaps from a gender perspective suddenly you realize without witness protection, without protecting victims who are victims of gender violence, you have a great lacuna in your justice which is usually lacking in prosecution of crimes of gender violence, because of the fact of lacking capacities to assist victims of gender violence to help them, protect them and ensure that they testify. In a sense one can look at the right of protection as a means of reinforcing justice from that point of view. Reassurance that testimonies come to light and that cases are brought can lessen the burden that they have suffered because they are sure that they will be protected. From a gender perspective this is extremely significant. The vast majority of crimes of a sexual nature are never reported and are never prosecuted because of lack of protection.

Finally, we come to reparation, the role of implementing this right and how it strengthens justice. Again it provides an outcome to the process. One looks at the Rwanda tribunal or the Yugoslavia tribunal where there was no reparation at the end of the process. It sort of seems like an anti-climax in a sense for the entire population that is there. Perhaps there is no sense of closure. One of the concepts or underpinning theory is that justice is supposed to provide a sense of closure. In a sense, the notion of satisfaction and closure and an outcome of a role is really brought by implementing the right of reparation. Also at the national level, implementing the right of reparation can have an interesting impact on shedding light on other areas which need reform. One of the forms of reparation being restitution, there is often very big and complicated issues to do with land rights for instance. Often one sees that after conflict of the natures of DRC or Uganda. There is a need to reform land laws. There is often a need to look again at laws of succession. Often laws of succession are very unfavourable to women. In resolving some of the land issues in order to restore restitution of land, women are the ones who tend to lose out on that respect. In that respect implementing the right to reparation has other aspects of reinforcing other areas of injustice that might be within the context of the post-conflict situation.

Lessons from International and Hybrid Tribunals



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Mr Gabriël Oosthuizen, *Chief of Party of the Uganda Project of the Public International Law and Policy Group*

Thank you very much Judge Mulenga and thank you very much for the organizers for putting this event together and for inviting me. Before I continue I would like to throw your attention to an important disclaimer. The organizers invited me to speak as an executive director of International Criminal Law Services, the NGO which I headed until recently and where I co-wrote a paper on land issues. We subsequently agreed that I should speak to you in my new capacity as Chief of Party of Public International Law and Policy Group (PILPG). My request not to speak Uganda specific issues was granted. PILPG is a global *pro bono* law firm providing technical and other assistance to justice sectors and authorities. It would be improper for me to speak of client specific issues.

Let me move on to the main part of my presentation. AFLA asked me to speak on lessons from international and hybrid tribunals. For the purpose of this panel I have tried to narrow it down. First I will be covering lessons learned from international and hybrid criminal courts dealing with atrocity crimes, these are war crimes, crimes against humanity and genocide. I have largely thought of the lessons that one could learn from the ICC, the UN Tribunals for the Former Yugoslavia and Rwanda, the Special Court for Sierra Leone, the “Khmer Rouge” Court in Cambodia and the War Crimes Chamber in Bosnia Herzegovina. You will note that some of these courts are actually predominantly nationalistic in character. Second the lessons covered would be those seemingly most relevant for national systems dealing with these atrocity crimes. And third there are many relevant lessons from international criminal courts. What follows are a few examples. I also try to stay clear of issues that might be covered by my co-panelists.

I will highlight 8 lessons . Several are closely related and some of them are fairly self-evident.

- The first is that atrocity crime proceedings are very sensitive. They are that by nature. They stir raw emotions and they expose political and socio-economic fault lines in societies. They often make the political elite itchy. They always are victims and others who feel short-changed. It usually is impossible to prosecute everyone who could be prosecuted and it often is impossible to charge them with all the crimes that they have committed. Inevitably criticism and accusations of hidden agendas and selective justice will follow. Atrocity crime proceedings are always in the limelight and draw attention in ways and from a range of stakeholders that are usually unique to such proceedings. All of these issues call for wise and comprehensive policy making and planning. They also call for appropriate and timely public relations and outreach strategies. However, not even the best laid plans can fully address such concerns.
- The second lesson is that atrocity crime proceedings will be used and abused for self serving and sometimes divisive purposes by third parties. One group might see the praises of such proceedings today and tomorrow it will call it a farce or worse. When powerful third parties do this the challenges for the relevant institutions of managing such risks are amplified.
- The third lesson is linked to the first two. Atrocity crime proceedings and systems usually cannot do without political support from key players, especially from those who are going to assist in arresting the accused, facilitating the trials and providing financial and other resources. But quite often such key players have interests and agendas that do not overlap with the institutions tasked with serving justice fairly, impartially and properly. This challenge calls for a wise and strong strategy by the relevant justice institutions underpinned by the appropriate legal framework.
- The fourth lesson is that it takes time to establish these institutions and the necessary legal framework. None of the existing international and hybrid courts came about and started functioning speedily. Creating, qualifying and retaining the laws required for such proceedings takes time and has often proved a far greater challenge than at first imagined. It is difficult to



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manage consequent criticism and questions about the commitment to justice of the creators of such systems.

- The fifth lesson is that many atrocity crime cases are very lengthy and quite complicated. The reasons for this are many, such as that the crimes often were committed years ago or in areas still affected by conflict. Therefore significant evidence collection poses challenges. The number of victims and potentially participating witnesses is usually larger than in other criminal cases and the law is fairly specialized and demanding. This places fairly unique demands on the skills of all involved from the police and prison authorities, to the judges, prosecutors, defense council and administrators. Where reliance has to be placed on cooperation and assistance of international governmental organizations and other States, for example for the collection of evidence abroad or the facilitation of travel to the court by witnesses an extra layer of sometimes considerable complexity is added. Maintaining interest and support for lengthy and complicated proceedings is very difficult and ensuring that all *the cogs of the wheel* work together is even more so.
- The sixth lesson is closely related to the just mentioned one. Serving justice for atrocity crimes is very expensive. A single large case can cost many millions of dollars. A number of smaller cases can be even more expensive. This is true for international, hybrid and national forums. Does justice have a price? We might believe it doesn't but especially in poorer countries with many development needs this can be a nettlesome question. As soon as one adds things like demands for community wide reparations the treasury officials usually would be quick to gap a price on justice.
- The seventh lesson is on the legacy and broader impact of atrocity crime proceedings. Whatever broader value atrocity crime trials may have and should have may come to nought without a well executed and timely plan to increase the long term societal structural and rule of law impact. Furthermore atrocity crimes are committed in circumstances of war, social upheaval and the tearing apart of the social fabric of societies. Prosecutions can never heal and reconcile, they have to be supplemented by non-prosecutorial mechanisms. But which approaches to pick? How to make them fit the purpose? And how to fit them with the other approaches always seem to produce technical policy or financial challenges.
- The final and eighth lesson is that atrocity crime proceedings can have a remarkable positive impact in divided societies, on the development of the rule of law in those societies and in the restoration of faith in a formal criminal justice system. But I suggested earlier for this potential to be realized such proceedings have to be linked to and planned as part of one component of a broader multi dimensional process.

I would like to conclude with questions and a suggestion. Should we perhaps consider unlearning some of the lessons of international and hybrid criminal courts, especially when planning for national proceedings? Why do atrocity crime proceedings have to be large in scope and why do they have to require so much of an effort? Could they not be narrower in scope and simpler? Even if it means that only one or two senior accused are tried. Even if only one or two instances of crimes out of many are charged. Even if only a handful of victim witnesses participate in the trials. And even if the trials throw light on only a sliver of the atrocities of the past.

Perhaps a key challenge for the future of international criminal justice lies in us as lawyers, elites, victims and social healers scaling back what we have come to expect and demand of atrocity crime proceedings. The burden that such ideals and proceedings can place on the fiscus, policy makers, law makers, and bureaucracies and the unmet expectations for justice, truth and redress that can be created by larger comprehensive trials may be the undoing of or a break on the incredible progress that has been made by international criminal justice since the early 1990s. Part of the answer I would like to suggest is that seeking to bolster the role and importance of non-prosecutorial transitional



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justice avenues, some of them like truth telling mechanisms may be better vehicles on shining light on the past, bringing closure and providing redress. In this instance less may be more. Although even less would present its own challenges.

Gender Mainstreaming

Elizabeth Nahamya, *War Crimes Division of the High Court of Uganda (WCD)*

I am very delighted ladies and gentlemen to be part and parcel of this conference organized by AFLA. AFLA has been very supportive of the War Crimes Division and has always wanted to find out the progress of the War Crimes Division. Before I start I would like to welcome AFLA in Uganda because I have been attending conferences outside Uganda, so you are welcome AFLA and delegates that are from outside Uganda, you are welcome.

I have been given the topic of mainstreaming gender and the War Crimes Division. One of my colleague here was asking me how come you are talking about gender mainstreaming and the war crimes division? That is exactly how I felt when she asked me to write about this. Nonetheless we still have a lot to talk about as far as mainstreaming is concerned.

Part II of the ICC Act of Uganda of 2010, which is yet to be assented to by President Yoweri Museveni encompasses inter earlier crimes against humanity as provided in Article 7 of the ICC Statute. And Article 7.3 of the ICC Statute defines gender as the two sexes, male and female, within the context of society. It states that gender does not indicate another meaning. This definition as I found out is usually termed 'a social construction definition' whereby society gives stereotyped roles and responsibilities to men and women. A society itself is not static so also the definition of gender is bound to change. It differs from time to time and from place to place and we should take into consideration that although that is the case there are gender differences.

This will bring me, because I only have a few minutes I have cut down on what I am going to say, to the gender mainstreaming. Mainstreaming a gender perspective is the process of assessing the implications for women and men of any planned action including legislation and policies. Gender mainstreaming will not achieve equality just by itself. The concept of gender mainstreaming has moved away from focusing solely or mainly on women to focusing on broader concepts of gender equality and gender perspective. The policy term gender mainstreaming sets a global policy framework to effect gender mainstreaming and advancement of gender equality. Thus, the concept relies on the assumption and concurrent initiatives of other gender specific and holistic programs, approaches and policies. This is the UN economical and social council definition.

In principle gender mainstreaming is a commitment to guarantee that every part of an organization assumes responsibility to ensure that policies impact evenly on women and men. While gender analysis is the tool for policies to ensure that they pay due to the differential location and experiences of women and men. The concept of gender mainstreaming was proposed at the 1985 World Conference on Women in Beijing and was formally recognized as a public policy framework at the fourth World Conference on Women in Beijing in 1995.

This brings me to Uganda policies on gender because there is no way I am talking about gender mainstreaming in the War Crimes Division without telling you what we have already. In the Uganda Constitution you find that Uganda is one of the few countries often referred to as having the best gender responsive constitution in the whole world. Our Constitution provides for gender equality and



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freedom from discrimination. The Constitution of Uganda, 1995, as amended, provides the overall framework for the national gender policy in Uganda. It is the supreme law of the land and any other law that is inconsistent with it, is denied and void to the extent of the inconsistencies. The preamble of the Constitution talks of establishing political order through a popular enduring national constitution based on the principles of unity, peace, equality with an underscore of democracy, freedom, social justice and progress. Paragraph 15 of the Constitution deals with national objectives and directive principle of this policy. It provides *inter alia* that the State recognizes the significant role that women play in society. Chapter 4 of the Constitution provides for fundamental Human Rights and articulate equality. I singled out particularly Article 21.1 of the Constitution which provides that all persons are equal before and under the law in all spheres political, economic, social, cultural, and all shall enjoy equal protection of the law. Article 21.2 of the Constitution prohibits discrimination on any ground, including sex. It can therefore be implied from these articles that gender based discrimination is prohibited in Uganda. This shows that the government in principle is committed to doing away with customary and cultural practises which discriminate against women and which perpetrate violence against women. This commitment is reinforced by Article 2.2 of the Constitution which prohibits all laws, cultures, customs or traditions which are against our dignity, welfare or interest of women or which undermine their status. Uganda is committed to making a difference as far as gender is concerned. We also have the first national gender policy, which was approved in 1997. The policy provided a legitimate point of reference for addressing gender inequalities at all levels of government and by all stakeholders. The major achievements of that policy include, among others, increase for awareness on gender as a development concern among policy makers and implementers at all levels. Influencing national, sectarian and local government programs to address gender issues. It also strengthened partnerships for advancement of gender equality and women's empowerment and increased the impact in gender activism. Of course it has already been improved on so we now have the national gender policy of 2007. In my paper you also find that I included a chapter on Uganda's commitment to international and regional treaties but I will not go into those within these fifteen minutes. And in the same paper you find that I have articulated something about ICC and the War Crimes Division whereby I have indicated the crucial section on adoption by Uganda of the ICC Act of 2010. References have been made to Article 7 and 8 of the Rome Statute and this has been incorporated into our Act in part 2 of Uganda's Act, which is soon to be ascended on. So there is really no need to go over them. If you know the ICC Statute then you will find that it is covered.

Now the mandate of the War Crimes Division, I cannot forget to talk about this because otherwise I don't have a framework to work with. The Division is enjoined to try, convict and sentence persons who have committed crimes referred to in the ICC Act of Uganda 2010. The ICC Act of Uganda has international crimes and this can be found in Part 2 of the Act from section 79. These include genocide, crimes against humanity and war crimes. These are some of the stipulated crimes but there are others like corruption and corrupting a judge. It also provides for the requirement of concern before the prosecution of war offenders. And this is usually done by the DPP. You should note that the crimes are exactly the same as they are in the ICC Statute. The Act gathered from the jurisdictions of Courts in offences committed outside Uganda for the application of general principles of criminal law. The penalty provisions are similar to what is pertinent in other international tribunals and criminal courts, hence there is no death penalty.

The structure of the War Crimes Division

The War Crimes Division was established after the Juba Agreements. As you know the Juba Agreements are signed by the Government, the LRA representatives signed but Kony did not sign. So



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they are there but they never had impact. However the Government went ahead to put into effect its own part as a way of demonstrating that it was serious with reaching a peace settlement. So as a result the onerous responsibility of ensuring that, was the establishment of the War Crimes Division. The various Ministries including Prisons, Ministry of Gender, Ministry of Internal Affairs brought up the establishment of the War Crimes Division. It was established by the Principle Judge whose duty is to handle all administrative affairs of the Court. And he is assisted by the Chief Justice in this. This is provided for in section 1.41 of the Constitution, which provides for the appointment of the Principle Judge. So he set up the War Crimes Division as an administrative arrangement. Because we have other divisions already in existence, it was not a very difficult decision to make. The legal notice, and the appointment of officials follows the Ugandan Constitution. Article 1.42 of the Ugandan Constitution provides for the appointment of judicial officers. It states that the President of Uganda appoints the Chief Justice, the Principle Judge and the judges of the Supreme Court, the justices of appeal and judges of the High Court. Article 41 a. and b. states that the Principle Judge is the Head of the High Court and shall assist the Chief Justice with the administration of the High Court and support his calls. We also have the Director of Public Prosecutions, who is also appointed by the President pursuant Article 20 of the Constitution. The DPP assigns a State Attorney who is recruited by the Public Service Commission. Then we come to the Inspector General of Police. He is also appointed by the President, pursuant to Article 3.3.34 and employs investigators whenever they are needed, for example, for the War Crimes Division and these are also recruited by the Public Service Commission.

Now, you find that the reason why I gave you all these is because as the War Crimes Division we are trying to take on the structure as it appears in international courts, whereby you have an investigative unit, you have the bench, and you have the lawyers and you have the prosecutor. That is why I had to let you know about the structure.

Now, gender mainstreaming and the War Crimes Division. The WCD is a court that will apply international law and adopt the gender based jurisprudence and procedures established by the ICTY, ICTR, Special Court for Sierra Leone, and the ICC. The Uganda ICC Statute of 2010 provides ways of incorporating gender based approaches and gender mainstreaming through the provisions incorporated from the ICC Statute. There is currently no conscientious effort to effect gender mainstreaming in the WCD unfortunately, let alone the judiciary. Hence, right now this is a very particular topic and we can brainstorm about it and see how we go about it, but the Division is yet to take off. So this is very I must say , very timely. So right now my job is to raise issues on how we can gender mainstream in the War Crimes Division. And I do this through recommendations because I told you, though we have all those beautiful provisions detailed, I think they have done gender mainstreaming in water in all other sectors but not the judiciary unfortunately.

Now, WCD must recommend and must ensure that gender equality occurs through action, impartial adjudication, investigation and prosecution. Although the Ugandan Constitution and the ICC Act of 2010 contain provisions to ensure that gender is protected, and gender equality is pursued, such change and initiatives have not yet fully occurred. I must underscore that incorporation of gender mainstreaming is crucial to the eradication of gender biases and promotion of gender equality in the judiciary and across all sectors of government.

The overall approach of the WCD is to ensure that prosecution of these crimes and the development of jurisprudence is done timely and effectively. So, there must be on-going training on gender, human rights and international humanitarian and international criminal law. Gender training programs should be a part of the court training by all personnel of the legal system. The training should be a continuous exercise and must include programs on gender policy and gender



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mainstreaming and should involve decision makers at all levels including judges and magistrates. Training should also be carried out for law enforcement officials who comprise mainly the police and those who have a critical role to play in protecting and promoting human rights of women and girls. I am sure of one fact, and that is that the judicial studies institute will not relent in its effort to upgrade judges and they know that training of the judges on gender mainstreaming will be effected. And this is one area where positive complementarity can occur.

Now, I also looked at the War Crimes Division and I came up with a recommendation that the structure and composition of the War Crimes Division must be gender neutral. The War Crimes Division comprises both male and female judicial officers, though the numbers are still low. Out of the four judges I am the only lady judge. I remember very well when we went on an outreach program to a certain area, the ladies there had a very pertinent issue to raise. They said 'listen, we know you are a judge, a women judge, but you don't come from this region. We need a women judge who comes from the region who actually understand and articulate issues that the women will bring up'. I thought that was a good idea. Anyway.

Another recommendation is that in our incorporation of the provisions of the ICC Statute we should particularly pay attention to Article 36.8 a.3 of the ICC Statute, which provides that a fair representation of female and male judges should be ensured and that we should take into account the need to include judges with legal expertise in specific issues including violence against women or children. Although this law is not particularly directly applicable to us I am saying that we can use it and bring it to the attention of the appointing authorities, the judicial service commission and the President so that it is adopted.

Next, the judges must understand crimes and war situations. We should be able to explain any lacuna in the local law, by utilizing other laws such as international human rights law in order to fully render justice for victims of the war.

I also looked at the working power and I say that there must be training and orientation of judges for them to be able to understand how women behave in a war situation. The judges must also appreciate issues being raised by witnesses, litigants or complainants. And the judges and lawyers, both prosecution and defence should be of both sexes, should be active and gender sensitive during investigations and proceedings. We already have these provisions gathered because we have incorporated the various specific sections of the ICC Statute, which spell out what the prosecutor should do, take into account the gender aspects. What the prosecutor and investigator should take into account we already have.

I noted particularly the fact that one of the judges in one of the courts in ICTR, Judge Pilay, had a lot of influence in ensuring that rape and other forms of sexual violence were adequately prosecuted. I can take a cue from that practice.

During investigations and throughout the proceedings the prosecutor is enjoined to investigate and prosecute crimes in a way that respects interest and personal circumstances of victims and witnesses, including gender. And this has already been incorporated in our law through section 5d. of our ICC Statute 2010. The prosecutor is also required to take into account the nature of the crime in particular where it involves sexual violence, gender violence, or violence against children. And I know that this will be effected because it is part of the law.



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This brings me now to a recommendation on victims and witnesses. As you may have heard from Marianna Goetz we really don't have any witness protection programs, and this is one of the areas we really need to, we need assistance to start. So, I am saying that a strong victims and witnesses unit must be established and it must be sensitive to gender based issues. Of course this is stipulated in Article 68 of the ICC Statute which Uganda has incorporated in Section 5e. of its own Act.

Now, when WCD is carrying out its work it must conscientiously consider certain issues which are related to gender mainstreaming. For example, is a law encompassing expected outcomes of the victims? The Court must take into account the gender of witnesses and their situations. For example, maybe a witness is pregnant or has children that she has to take care of so she needs to obtain food for the children. However the court on the other hand is calling that witness to come and testify. These things must be taken into account as we expect witnesses to come or victims to come and testify. There are other things that we should take into consideration. I am not saying we should look at only women, there are other things that are neutral based, like take into consideration the cultural festivals, the cultural beliefs, farming seasons, hunting season that affect witnesses from the Northern part of Uganda who are going to be witnessing for the Court. And on top of that the War Crimes Division should ensure that it provides a forum for women who suffered through the war, that is, the victims to participate in peace initiatives, consultations, and therapy to foster their confidence and to give them skills and give them hope for the future. This forum, as far as I understand it, would translate into the outreach program of the War Crimes Division.

Other issues I looked at in my paper were things like , in the actual sense do we have the comfort and consideration for the witnesses? For example, the Court must be sensitive for to loss of earnings regardless of gender or occupation. Many of the victims may be farmers because most of the witnesses that I have come across are usually farmers, but may not be limited to farming. It should be taken into account what will happen to them when they are not going to work. The other incidental issues that entail to female witnesses for example is who looks after the kids. Because when they have kids and bring them along to Court, I have seen so many of them do that, they have no place for their children. They have to carry their children when they testify or if they are Accused parties they have to be standing up. We don't have anything to accommodate for this.

WCD should also give priority to genuine cases of gender roles. You find that the women are the ones that look after the sick, they are the ones who look after relatives and extended families. So a witness might tell you that they cannot make it at such and such a day because I have a sick relative. The Court should be able to understand. And if they say they are sick themselves the Court should not insist on asking for doctors reports because how many people in the village can get such reports anyway.

Additionally, before I leave this issue of victims I would like to raise an issue, which is actually, incidental to the work that the War Crimes Division does and this is the issue of reparation which Marianne Goetz talked about. Reparation is legally enforced by the mandate of the WCD, however during our visits to the war affected areas it was brought to our notice that the Court may fail to achieve anything if there are no parallel efforts made to provide reparation. And all I can advocate for right now is the creation of women's' groups. These should be utilized to explain reparation policies and provide the right information on efforts being done to provide reparation.

Lastly, I have a view on another recommendation, on the working environment. Whether there is equal employment, whether the environment was user friendly. I don't know how to explain this to you, because some of you may not be aware of what goes on, but this Court might sit in other areas,



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other than Kampala, which means that we have to have facilities that are user friendly. I was talking to one of the gender specialists and he gave me a very interesting example which I can't fail to bring to your notice. He told me that you know a country people use their pitlar doctrine and in this particular court they had the pitlar doctrine from its inception. But then the door was just half way making it just really difficult for female gender to use, because if she, the lady had to squat the men would be seeing her. But the men stand in whatever they have to do, so you know, I think we really have to think about the working environment if the court is going to work, especially in a country. And there is another aspect to it and this is where you find women cannot face the people who raped them or who allegedly raped them, or sexual assaulted them in which case we might need to look at facilities like videoconferencing to allow witnesses to testify behind the scenes if they are not bold enough to face the perpetrators or the assaulters. There should also be no need for collaboration of sexual offences, which we still have in Uganda, and we are trying to do away with.

Lastly, you know that you cannot gender mainstream without planning. In the paper I talked about planning of court decisions and when I said it I said that the schedules must be convenient to the people who are going to attend court, particularly those who are going to testify. We found that in normal courts witnesses may not arrive on time. They are late and they tell you that they have to take care of their families or to do digging or farming before they come. And of course they cannot come at a certain time because it is 4 pm or so because they still have to go and take care of their families. You also have children, a lot of them who participated in or who were abducted during the war. These children if they have to testify, schedules have to be taken into account. When they are in school they can't come to testify. And as I said before other cultural and societal aspects have to be taken into account like is it a farming or a hunting season.

Lastly, we have to look at monitoring and evaluation. That means we have to have an input and output of results. We have to have a beginning and an end. We should have performance indicators, what was supposed to be achieved and what was achieved. Usually after any court session there is a report made. But the only problem with this report is that it does not indicate or does not have gender disaggregated data, but that is the only thing that we should have to add.

So lastly, when we make the courts list, that court's list should be used to monitor the process of the case, the number of days spent on the case and the number of witnesses. And of course when we talk about the number of witnesses we should specify whether they are female or male.

Thank you for lending me your ears.