



REPORT

THE INTERNATIONAL CRIMINAL COURT IN A POLITICALLY
DIVIDED WORLD

GABORONE, BOTSWANA, 21-22 OCTOBER 2011

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INTRODUCTION

The conference on the “ICC in a Politically Divided World” was convened by Africa Legal Aid (AFLA), in cooperation with the Commonwealth Secretariat, and the International Legal Assistance Consortium (ILAC). The meeting was held from 21-22 October, 2011 to coincide with Africa Day of Human Rights. Gaborone, Botswana, was chosen as the venue for this conference because of Botswana’s principled stance on international justice. The categories of participants included several NGOs, human rights and justice sectors, legal fraternities, and high level officials of ICC State parties from various parts of Africa particularly Commonwealth African countries; International organizations and high level officials of the International Criminal Court including the Deputy Prosecutor participated. Incidentally, the conference coincided with the killing of the former Libyan leader Moamar Ghadaffi, on 20th October and so participants reflected on the events leading to Ghadaffi’s death and its implications for International Justice.

To achieve the conference objectives to strengthen ICC cooperation in Africa, increase ratification and implementation of the Rome Statute, thereby contribute to promoting accountability and ending impunity, the meeting addressed the following:

- The Rome Statute and Complementarity in Africa.
- Incorporating Gender Perspectives in International Justice.
- ICC implementing Legislation (in cooperation with the Institute of Security Studies (ISS).
- International Justice and Conflict Prevention in Africa.
- Peace and International Criminal Justice in Africa: Making the link.
- Update and brainstorming Session on forthcoming ICC elections.

CONFERENCE PROCEEDINGS

Opening of Conference

His Lordship Hon. Justice Dingake, representing Chief Justice Dibotelo of Botswana

I commend AFLA and other associated bodies for holding the conference in Botswana. In many respects, Botswana is an appropriate host for a conference that seeks to interrogate the ICC in a politically divided society. There are various reasons for this. Firstly, Botswana is a party to the Rome Statute. Secondly and more significantly, Botswana believes in the rule of law and human rights. Indeed if there is lesson the State parties to the Rome Statute can learn from BotswanaIt is the principle entrenched in the Constitution of Botswana’s very architecture, that the protection of the rights of every person and the delivery of justice to all

without fear, ill will, or favour, cannot be dependent on the integrity of the political leadership only, but also must depend on solid institutions of democracy including an independent judiciary that can administer justice without fear and favour.

History is replete with many examples of governments colluding in the commission of War Crimes and Crimes against Humanity. We have witnessed Crimes against Humanity in countries such as Rwanda and the former Yugoslavia. These crimes were committed pursuant to official State policy and authority. These facts raised fundamental problems of International Criminal Jurisdiction.

It is unlikely that a government that is responsible for crimes would be keen to investigate and prosecute them. For this reason, to place sole reliance on municipal law enforcement would be misplaced.

It is estimated that over 170 million people died in over 200 conflicts that have occurred since World War II. For too long perpetrators of Crimes against Humanity have brutalised, raped and maimed with impunity. The establishment of the ICC was an attempt to enforce International Humanitarian Law. Perhaps at last, the victims of these crimes would find justice and the international community would be able to send a clear message that those who commit Crimes against Humanity would not be shielded.

Until all of us are held accountable under an equitable system of law, International Justice cannot be said to be done. It is appropriate that the Rome Statute plays a complementary role with national legal systems. However, where the latter are prejudiced, non-existent or dysfunctional to ensure justice is done, there must be an effective alternative.

Although not a perfect instrument, the Rome Statute does represent the substantial and positive development in International Law. To this extent, I do hope you will have the time to discuss all the tricky questions that find a pride of place in the agenda at hand.

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

Can Africa Ensure International Justice without External Assistance?

Distinguished participants, dear friends and colleagues,

I am very happy to be in Botswana and to convene this conference here for various reasons. One of these has to do with the theme of our conference: The ICC and its role in a politically divided world. As small as it is, Botswana has had the strength and the courage to stand up and defend the ICC. It has not given in to the pressure of the bigger and influential AU member states that unfairly condemn the Court in The Hague.

Ladies and gentlemen, I have no other choice than to start with the latest news, yesterday's news: Moammar Ghadaffi was killed. The impact of his death and how it happened will probably trigger numerous and lengthy debates, also among international lawyers. We have to wait for the precise facts, but it would seem that the NATO forces did more than just protect

the civilian population in Libya. It would seem the NATO forces did not directly kill Ghadaffi, but they may have exceeded their mandate. Apparently, NATO's reasoning is that Ghadaffi constituted a threat to the civilian population and hence his elimination would be covered by a Security Council Resolution. I will not enter into this debate here, but this interpretation is not free from criticism and unlikely to be supported by China and Russia. Many Libyans may support the role NATO played in their country, but that role may very well paralyze decision-making in the UN Security Council, for example, in relation to Syria.

Regardless of personal views on the killing of Ghadaffi, for all those who take the pursuit of International Criminal Justice seriously, the killing of Ghadaffi is bad news. He will not be tried, not in Libya, not in The Hague, not in a foreign national court nor before a regional African Criminal Court. He will not be held publicly accountable for his deeds. Ghadaffi was known for his anti-Western or Northern stance and he was one of the toughest opponents of the ICC. He played the African card. All cases before the ICC are African cases. Hence: the ICC would be anti-African, a Northern stick to hit Africa and Africans.

Ghadaffi certainly was not the only one expressing such views on the ICC. Yet, it would be incorrect to state that Africa as a whole shares the heavy critique on the ICC. There are African countries and leaders that fully support the ICC. Many Africans view the ICC in terms of what the court was meant for: a contribution to justice in cases or situations in which national criminal law systems are not or cannot be used to hold alleged perpetrators of international crimes accountable.

Now, in response to all the critique on the ICC, suggestions have been made to establish an African criminal law system. In theory, this may not be such a bad plan. Justice must be done as close as possible to home. Justice done at home offers greater guarantees for legitimacy. Perhaps such a court could have added value for example if it were given jurisdiction to try crimes that are of particular importance to Africa but fall beyond the ICC's jurisdiction, such as kleptocracy or environmental crimes.

Yet, when thinking about an African regional court, questions must be raised. I will only raise two. Firstly, will that African court function properly and independently? Our continent does not have an impressive track record when it comes to supranational courts. The AU Court of Human and Peoples' Rights does not even exist yet the Human Rights Court has delivered one or two rulings. When the Court of Justice of the East African Community passed a ruling disliked by political leaders, those leaders decided to alter the EAC Treaty and to extend the grounds for dismissal of the judges, as a result of which at least one Judge was expelled. When the SADC Tribunal ruled against Zimbabwe and the Mugabe Government, the SADC leaders decided to freeze the entire Tribunal. Given the manner in which many of our African countries are ruled and politically organized, is it realistic to expect that an African regional court will function properly? Is the quest for such a court a genuine call for justice in Africa or an excuse to ensure impunity of some leaders?

Secondly, is there really a need for an African court? Is the ICC functioning so poorly, so one-sidedly as its opponents suggest? Is it really targeting Africans? Is all that critique on the

ICC Prosecutor, Mr Luis Moreno Ocampo justified or is he simply doing his job: collecting evidence and starting cases against those that sufficient evidence is found? Certainly election of the highly qualified African endorsed candidate, Fatou Bensouda as the next ICC Prosecutor would increase the ICC's legitimacy in Africa.

The ICC is here to stay, and it will continue to play a role in Africa, even if an African Criminal Law Court were to be established. At this conference, we will debate this role and various more detailed aspects of International Justice. Criminal justice must be done and it must also be perceived to be done. We may be critical, but our goal ought to be how to increase accountability in Africa. There is too much impunity. With that in mind I look forward to our debates.

Hon. Dr. Athaliah Molokomme, Attorney General, Republic of Botswana

I humbly accept, on behalf of the Botswana Government, the accolades we have received from the organisers for Botswana's principled stance on International Criminal Justice and the work of the ICC. However, this is what State parties to the Rome Statute, or any other international instrument to which they are signatory are bound to do. That is, to demonstrate their commitment by supporting the work of the ICC and the International Criminal Justice system in bringing perpetrators of International Crimes to justice and ending impunity.

It is also fitting to be opening this conference today, on the 21st of October, which is Africa Day of Human Rights, a day when we should reflect on our achievements and challenges as a continent in the field of human rights.

I am therefore pleased to note that this high level conference aims to engage stakeholders, including African State Parties to the ICC, the African Union and the Sub-regional bodies, and the human rights and justice sectors in Africa in dialogue on topics as wide ranging as:

- The Rome Statute and Complementarity,
- Gender perspectives in International Justice,
- ICC implementing legislation,
- Conflict prevention, and
- Making the link between peace and International Criminal Justice in Africa.

These are weighty and controversial subjects, but they need to be discussed openly, frankly and in great depth, so that we can come to some common understanding of how we intend to end impunity in the world to ensure justice for victims of International Crimes.

Let me say a few words about how we in Botswana see our obligations as a State party to the Rome Statute of the ICC. In recognition of its duties at the international level, Botswana ratified the Rome Statute of the ICC on 8th September 2000, thereby becoming the 18th country to do so. Since then, Botswana has been exceptionally vocal about the issue of supporting the ICC and fulfilling its obligation under the Rome Statute. This was

demonstrated in May/June 2010 when we participated in the first ever Review Conference on the Rome Statute of the ICC, which took place in Kampala, Uganda.

At that conference, ICC State parties, observer States, International organisations, NGOs, and other participants, discussed proposed amendments to the Rome Statute and took stock of its impact to date, making the Conference a critical milestones in the evolution of the Rome Statute. In addition, the Conference adopted the Kampala Declaration, reaffirming States' commitment to the Rome Statute and its full implementation, as well as its universality and integrity.

Since then, we have been taking steps to fulfil our obligations under the Rome Statute and are in the advanced stages of drafting a Bill to demonstrate the Rome Statute into national law, with the generous assistance of the ISS, who are also present at this Conference.

As we all know, the Statute was adopted in Rome, and the Court itself is based in the Netherlands, another European Country, the ICC's relationship with Africa runs deep. All those who have followed the process of the adoption of the Rome Statute and the establishment of the court, also know that the African countries, through both their Governments and NGOs, played no small role in the conception of the ICC.

The Southern African Development Community (SADC) played an important role in the establishment of the Court. Delegations from Botswana, Lesotho, Swaziland, Tanzania and South Africa have participated in the efforts to establish the ICC from as early as 1993 when a draft Statute was presented to the General Assembly's Sixth Committee for consideration. The SADC Ministries of Justice and Attorney-Generals later issued a 'Common Statement,' which became the instruction manual for SADC's negotiations during the Rome conference.

There was a follow-up meeting in July 1999, following the adoption of the Statute in 1998. Delegates representing 12 SADC Member States participated in the SADC conference on the Rome Statute of the ICC in Pretoria, South Africa. At the end of the conference, participants adopted a Model-Enabling Act- Ratification for the ICC and 'Common Understanding' setting out general principles, which would guide the SADC approach to ratification and subsequent Preparatory Commission meetings.

It is no wonder therefore that African countries constitute the largest single bloc of State parties to the Rome Statute, and that Africans constitute a significant number of staff at the ICC. I consider it important to remind this gathering of this history, which should be a source of pride to us as Africans, especially at this time when the relationship between some African State parties, especially the AU, and the ICC are going through turbulence.

We need to ensure that our continent continues to occupy its pride of place in the work of the ICC and the development of international criminal justice generally. That is the positive, easier side of the relationship; there is the more difficult side, the challenges that confront Africa, the parent, in its relationship with its progeny, the ICC. As we all know, all five of the situations or cases with which the ICC is seized are African, with the most controversial

being the referral by the UN Security Council in March 2005 of the conflict in Darfur, in exercise of its powers under article 13(b) of the Rome Statute.

Perhaps the most dramatic development was the approval, for the first time, by the pre-trial chamber of the ICC of an arrest warrant for Sudan's sitting president. These developments, as we all know, have led to all manner of accusations by some against the ICC, including allegations of selective justice and bias against Africa in the work of the ICC. Others have blamed the UN Security Council's handling of the request by the AU to invoke Article 16 of the Rome Statute to suspend the processes against President Bashir for one year.

At several meetings, the AU took the position that prosecuting the incumbent Sudanese President could impede the prospects for peace, and went so far as to direct all AU members not to cooperate with the Court in the arrest of the Sudanese President. This matter has once again come to the fore in recent months in the context of the situation in Libya where an arrest warrant was issued against Colonel Gaddafi. Although this has been overtaken by events, the position of the AU at the time was to reiterate its earlier request for the deferral of the proceedings initiated against President Bashir of the Sudan (Assembly/AU/Draft/Dec4 (XVII) Rev.1).

With respect to Libya, the AU decision expresses its concern that the warrant issued by the ICC prosecutor *'seriously complicates the efforts aimed at finding a negotiated political solution to the crisis in Libya, which will also address, in a mutually reinforcing way, issues relating to impunity and reconciliation.* The decision further states that *'AU member States shall not cooperate in the execution of arrest warrants and requests the UN Security Council to...defer the ICC process in Libya, in the interests of justice as well as peace in the country.'*

The AU position reflects a view that the pursuit of justice could, in some cases, undermine on going peace processes, and others have gone further to argue that this is why Article 16 of the Rome Statute allows the UN Security Council (UNSC), in appropriate cases, to request the Court not to commence or proceed with an investigation or prosecution under the Statute for a period of 12 months.

I know that these are some of the issues that will be discussed during this high level conference. For our part in Botswana, we do not see peace and justice as being in conflict at all; rather, they should be pursued as complementary sides of the same coin.

In our humble view, whatever we say or do about peace and justice should be done with a view to strengthen the ICC, rather than weakening it; enhancing rather than undermining its independence. It is also my considered view that what took place in Libya demonstrates the role of the ICC and its issuance of arrest warrants in facilitating the tracking down of perpetrators and motivating victims to continue with their quest for justice and freedom. Let me end on that promising note by expressing the hope that you will have rich and fruitful deliberations on this most important subject. I have no doubt looking at the list of

distinguished participants at this conference, that its outcomes will contribute positively to the quest to end impunity and bring justice closer to victims of international crimes

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

The International Criminal Court was created in 1998 in Rome under the guidance of the then Secretary-General Kofi Annan. It was built upon the lessons of decades when the world had failed to prevent massive crimes. The decision of Africa, Europe and South America to build an International Criminal Court was not just a matter of principle but a matter of realism. These regions have suffered massive crimes: they learnt that a national State alone cannot protect its citizens.

Europe saw how massive crimes crossed borders during the Nazi regime and the Balkans conflict; South America and Africa witnessed how massive crimes crossed borders during the cold war; Africa also saw the Rwanda Genocide, which resulted in the deaths of one million people and flows of refugees into Tanzania and Congo. This exodus was at the root of the Congo wars, where four million people died, and where, even today, sexual violence reaches unspeakable levels. For these regions, it was and continues to be a strategic priority to avoid a repetition of their experience.

States in other regions, Canada and Mexico; Japan and South Korea; Jordan and Afghanistan; Australia and New Zealand are also State Parties. The Ambassador of Costa Rica to the UN once explained why his country was so active in the Security Council on the issue of Darfur and why Costa Rica had to show leadership on an issue apparently so far from its interest: *“There are 26 countries with no armed forces in the world; Costa Rica is the biggest among them”*. Thus, for Costa Rica, promoting the rule of law internationally is a matter of domestic security.

By now 119 State Parties, if we include the latest entry of Cape Verde, all have chosen the International Criminal Court as a forum that provides solution to massive crimes. This represents 2.2 billion people in this world. The Rome Statute of the ICC is the new instrument of peace creating global governance without a global Government but with international law and courts. Accountability and the rule of law provide the framework to protect individuals and nations from massive atrocities and to manage conflicts.

It is in this sense that the world is divided indeed; divided between those States that have joined the Rome Statute and those that have not. For those that have, the law is clear: no more impunity for alleged perpetrators of massive crimes; no more golden exiles for people like Idi Amin Dada. In the Rome Statute community, leaders using massive violence to gain or retain power will be held accountable.

Naturally, we have seen that international criminal law is regularly put to test, such as during summits of the African Union. As you know, past AU decisions included the refusal to cooperate with the ICC in the arrest and surrender of President Al Bashir of Sudan, and the

refusal of an ICC liaison office at the AU in Addis Ababa. Anti-ICC elements worked hard to discredit the Court and lobby for non-support, with complete disregard for legal argument. It shows that those few leaders that have an interest in protecting themselves from justice being done - those who emphatically hang on to their power - have the upper hand. Leaders like President Al Bashir, and previously Colonel Muammar Gaddafi.

Leaders of the State Parties of the Rome Statute should unite against this to ensure that justice can be done; to ensure that the victims of massive crimes do not lose hope. In fact, looking at the support from the African region for the ICC, practice indicates that engagement and cooperation of individual African States with the ICC has not diminished over the last 8 years. African states have consistently helped us at each step of our activities: in opening the investigations, in conducting the investigations, in pursuing and arresting individuals sought by the Court, in protecting our witnesses, etc. Those are not just words. African States receive more than 50 per cent of our requests for cooperation. 85 per cent are met with a positive response.

Let me give you some examples of positive African engagement and dedication to ending impunity for the most serious crimes: Uganda, DRC(Democratic Republic of Congo) and CAR(Central African Republic) all referred their situations to the Court requesting its intervention, thereby helping to start investigations without any controversy.

- UNSC Resolution 1593, which referred the situation of Darfur to the Court, included positive votes of Benin and Tanzania and an abstention of Algeria.
- All segments of Kenyan society have welcomed the Court's investigation into the post-election violence.
- Botswana, as principle supporter of the Court, continuously and publicly calls for the execution of arrest warrants.
- The arrest of Callixte Mbarushimana last year in France is the result of almost two years of investigations conducted by France, Germany, as well as the DRC and Rwanda, the latter being a non- State Party.
- UNSC Resolution 1970, which referred the situation of Libya unanimously to the Court, included positive votes from Gabon, Nigeria and South Africa.
- In May this year President Ouattara confirmed his wish for the Office of the Prosecutor to conduct independent and impartial investigations into the most serious crimes committed since 28 November 2010 on the entire territory of Côte d'Ivoire.

This is what we should keep in mind.

This African commitment to ending impunity is the reality and we have to find the way to focus our attention on that. Naturally, the ICC is still a somewhat new institution and States are still learning to adjust to the new framework. But the world increasingly understands the role of the Court.

We can see that the Court is affecting the behaviour of Governments and political leaders; International Organisations factor in the ICC in their activities; armies all over the world are adjusting their operational standards to make sure they stay within the legal limits; conflict managers and peace mediators are also refining their strategies taking into account the work of the Court, respecting the legal framework. As described by Prosecutor Moreno-Ocampo and by UN Secretary-General Ban Ki-Moon, there is now a large “shadow of the Court”, referring to the impact of the Court or a single Court ruling, extending to its State Parties, and even beyond, to reach non State Parties.

Let me give you just some examples:

In our first trial, Thomas Lubanga is charged with the war crimes of enlisting and conscripting children under the age of fifteen years and using them to participate in hostilities in the DRC. On 25 and 26 August the closing arguments were presented and a decision is expected before the end of the year. But already we see that it has triggered debates and helped demobilization in various other States, including non-State Parties like Sri Lanka and Nepal. The Lubanga ruling could change the lives of little boys and girls; never again should they be left out of the assistance provided by demobilization programmes; never again should they be used as fighters or sexual slaves.

Another example is the situation in Guinea. Shortly after the Office publicly announced that it was monitoring the serious allegations surrounding the events of 28 September 2009 in Conakry, the Guinean Foreign Affairs Minister travelled to the Court and met with me on 20 October 2009. The Minister described the events and set out what measures had been taken by Guinea to ensure that the crimes allegedly committed would be investigated. The Office also met with other senior members of the Guinean Government, who affirmed that Guinea would “*strive to ensure that justice prevails within the country, in partnership and with the concurrence of the Office of the Prosecutor.*” Since then, the Office has sent four missions to Guinea seeking to encourage and cooperate with national and international efforts to conduct genuine national proceedings, thereby ensuring that the commission of new massive crimes is prevented.

Another example is Colombia, where the prospect of the ICC attaining jurisdiction was mentioned by prosecutors, courts, legislators and members of the Executive Branch as a reason to make policy choices in implementing the Justice and Peace Law, thus ensuring that the main perpetrators of crimes would be prosecuted. This is the way forward.

Regarding the shadow of the Court, over the last 8 years, I saw a great evolution. I just mentioned cooperation with Rwanda in the case against Callixte. The Chinese authorities describe themselves as a “non-State Party partner of the Court”; Russia sent more than 3000 communications to my Office on alleged crimes committed in Georgia; my Office regularly interacts and cooperates with Qatar, Egypt, and regional organizations such as the League of Arab States. Perhaps the most significant moment was the unanimous referral of the situation of Libya to the Court; positive votes included 5 non State Parties.

The above illustration shows the Rome system has become a reality. Firmness from State Parties and international organizations on the law will determine its long-term success. For justice to have an impact; the most important condition is that justice follows its own rules, without interference and without being subject to political considerations; and that international actors take this into account.

The impact of the ICC in deterring violence will emanate from the certainty of application of law by all. Commentators have observed that: “Trials deter future human rights violations by increasing the perception of the possibility of costs of repression for individual State officials.” Certainty regarding the investigation and prosecution of massive crimes will compromise the calculus of any leader thinking to use violence for power. Certainty that law will be applied is the ultimate tool to ensure lasting peace.

As UN Secretary-General Ban Ki-Moon said last year at the ICC Review Conference in Kampala, *“Now, we have the ICC, Permanent, increasingly powerful. There is no going back. In this new age of accountability, those who commit the worst of human crimes will be held responsible. Whether they are rank-and-file foot soldiers or military commanders; whether they are lowly civil servants following orders, or top political leaders, they will be held accountable.”*

SESSION II

THE ROME STATUTE AND COMPLEMENTARITY IN AFRICA

Chair: Prof. Shadrack Gutto, Director, Centre for African Renaissance Studies Centre, University of South Africa, Member of the Governing Council of Africa Legal Aid

From an African perspective, it is important for us to see the world as a global village. Yet it remains divided. That division is political, economic and ideological. For Africa, that divided world is the world in which we got incorporated through slavery, a world in which genocide was carried out in Africa as it was globalising, plunder of Africa’s resources which then fed industrialisation and wealth in some parts of the world but not in Africa.

We were globalised through colonisation. We struggled against that. It is still globalised despite our political freedom. There are still colonial relations that exist in the world. The powers that colonised us are still the big powers in the world. It has not changed. I think it is therefore very important for us when we discuss issues of criminal justice to be aware of that.

Within that framework, we do have institutions of global governance such as the UN with all its agencies, which is thoroughly undemocratic and yet it is those institutions that lecture to the rest of the world about democracy, justice and so on. But these institutions themselves do not want to democratise and be representative of the people of the world, particularly Africa.

Within that context, the ICC becomes one of the few institutions in the world in which Africa was involved in the Fertilisation process. Africa was involved as independent countries. All the other bigger institutions such as the IMF(International Monetary Fund), WTO(World Trade Organisation) were established while African States were subjects of the colonisers. So the ICC is important because we participated in it freely making it one of the legitimately universal institutions in the way in which it was constructed.

That is one of the reasons why we need to own it and make it more legitimate than it probably is seen to be since it started operating. International criminal justice is not perfect. In terms of the ICC, the question of jurisdiction arises. It does not have jurisdiction to prosecute corporate criminals. In Africa, some major crimes are committed by corporations. So that is a limitation and we need to do something about it. We also have exclusion of certain crimes such as economic crimes, corruption, environmental crimes and so on.

The ICC was established to be complementary to national jurisdictions. It is important for us to look at how Complementarity is being used, but also importantly we need to look at it from an African perspective to be able to criticise what appears to be selectivity in application of justice. This is because the principle of the rule of law and equality before the law require that the ICC works without fear, favour or prejudice. Otherwise it becomes a racial profiling institution.

It is within that context that we should deal with the above theme.

Dr. Jeremy Levitt, Director, Center for International Law and Justice, Associate Dean for International Programs, Florida A&M University, Orlando

The ICC and the AU: Politics and Universality

Distinguished guests, honourable ambassadors and your Excellencies, I am honoured to be in Gaborone.

I come to the podium as a historical successor or legacy of a slavocratic international system; the European Slave Trade of Africans or the Transatlantic Slave Trade. My ancestors were stripped away from Africa and brutalized in the United States of America in what was the predominant international crime – spanning four centuries, involving over 100 million people and spanning six of the seven continents. My great great grandparents were born in a continent with an ancient traditional of local and international law, but were forced to live in America’s lawless slavocracy, and my grandparents and parents an illegal regime: a segregated America.

In this context, I do not think of Europe or Europeans as the sole subjects, instigators, guardians or originators of international law.

When we speak of Human Rights and International Law, these are not European inventions. While Europe has made its mark in the modern era, it has brought little to Africa in the realm

of “human rights”. Much of what Europe came to know about “natural law”, statecraft, peace craft, and international rules governing commerce were known by Africans at least 3,000 years before the birth of Greece and Rome.

There is ample evidence to argue for the African Origins of International Law. It is not popularly known or discussed but we are preparing research on this issue because our discipline believes that justice and equality are gifts given to us by the civilized North, by hegemonic superpower. We do not have to look beyond ourselves for a history of international human rights law and humanitarian law. We need not look geo-spatially to study Africa’s contribution to modern international criminal law.

The ICC and Africa have an interdependent relationship. They need each other. The AU and the ICC are relatives, distant cousins whose parents live in different villages.

Over the past year, I have been distraught by the international response to the crisis in Libya and wonder how the death of Gaddafi will affect the relationship between the ICC and the AU. Was Gaddafi’s position in the ICC influenced by a self-fulfilling prophecy, an authentic case of the chickens coming home to roost? Perhaps Western military muscle, NATO, have replaced the function of the ICC as the preferred tool of international justice by big powers.

We do not have to discuss the issue of ICC and the AU Complementarity and Universalism if we pursue or accept a policy of assassination—a seemingly cost effective form of justice. What utility do they have when it seems that there is international ambivalence? Surely we save money by not having a long just trial. What will the AU’s response be now? Will the AU and its member States be silent now that Gaddafi is dead? Will there be multilateral acquiescence?

To me it is quite clear that someone shot Gaddafi, that it was not crossfire. Having been involved in investigations, having served as the International Technical Advisor of the Liberian Truth and Reconciliation Commission (TRC), I understand the types of wounds that bullets make. A cursory glance at Ghadaffi’s entry and exit wounds tell you that it was a small calibre weapon. The powder burns on his face will tell you that it was at close range. You do the math.

I am sure there will be an investigation. Perhaps the AU should insist on one as well. Maybe the situational dynamics of the ICC and Libya has changed. Maybe the ICC needs to not only investigate the character of Gaddafi’s regime and allegations of Crimes Against Humanity by February 15th 2011, allegations that may not be supported by the shifty findings of the Human Rights Council’s Commission of Enquiry Report. This is not to say that he was not a despot who brutalised and oppressed his people but let us look at the timing of the Security Council’s referral. Were those crimes committed at the time the Security Council referred the case? Now that he is dead, will the ICC not only investigate his killing but the actions of NATO, the actions of the rebels especially towards African immigrants in Libya?

This ball has been thrown in the court of the ICC. Will it be Michael Jordan or Manute Bol? We will see. It will be very interesting to see how this situation or prosecution goes forward.

If we turn our eyes on a possible policy of assassination, we are in deep trouble and so is the international rule of law. It is no more justified when someone of African hue and Islamic culture sits in the Presidency of a superpower and pulls the trigger, than when it is done by someone else.

The AU has made various pronouncements, some of which may be correct or incorrect. They have criticized the notion of European imperialism and colonialism. But they have not confronted Arab slavery, colonisation and racism in Africa. We do not have to back our brothers who commit crimes in Africa. The challenge of Afro-Arab violence seems to be something that the AU wants to stray away from. That tradition is no less brutal than the tradition committed by Europeans on the African continent. Let us have the courage to address these issues.

Why are we tacit when it comes to confronting these regimes? Now that Bashir's lobbyist is no longer here, and there is no one to pay the arrears of numerous States, how will that affect the AU and its political disposition? This is where States like Botswana and others have to become more assertive within the AU.

AU leaders have claimed that the ICC is harassing Africa. If not the ICC, who will harass them? Some of them need to be harassed; some of them need to be put in prison for oppressing Africans. In fact, the ECOWAS (Economic Community of West African States) has been a better advocate for "humanitarian harassment" than the AU. We need just look at its robust actions in Liberia, Sierra Leone, Guinea Bissau and so forth.

Is the AU behind African civil society in cooperation with the ICC? From country to country, people who have been oppressed want justice. For instance, in Liberia, there is a thirst for justice that is not being quenched by the President Johnson-Sirleaf. Her inability and unwillingness to take up the recommendations of the Liberian TRC is very unfortunate. We have to look at these processes more clearly. The standard for winning a Nobel Peace Prize has withered considerably, especially considering that President Johnson-Sirleaf's early support of Charles Taylor's NPFL in Liberia. Did she aid and abet him?

With regard to universalism, is it more than a belief in the universal application of certain international standards? Is it the equal application of the international rule of law? Are AU rules more universal than UN rules? Certainly, the UN has not adopted a framework for humanitarian intervention. In fact, the UN expects Africa has to wait on the UN Security Council to rescue Africans faced with genocide. Not a very good investment. Does it mean that the AU should apply its own rules uniformly, meaning no human rights exceptions for autocrats no matter where they may rest? Does it mean that the ICC should pursue justice outside of Africa with the same rigour it has sought justice inside of Africa? It is time to see a situation before the ICC that is non-African? There several situations that could be referred to the ICC. Does it mean that the ICC prosecutor needs to use his/her discretion to investigate all international crimes by all actors that fall within the court's jurisdiction?

Since the Libyan case was referred to the ICC by the Security Council, it would appear that the prosecutor has great discretion to investigate all categories of crimes committed during

armed conflict in Libya. In this case, no stone should be left unturned particularly a NATO stone. NATO can do very little without American support.

It is unfortunate because we were hoping that the rule of law and international justice would resonate more with the current leadership in the United States. I am not so sure if this is happening.

Should the AU launch its own international commission of enquiry into the legality of the NATO intervention and the conduct of hostilities in Libya? Why can't it? Why shouldn't it? On the issues of Complementarity and Hierarchy and Admissibility, can there be Complementarity between the ICC and the AU when the Security Council issues a referral under Article 13 in International Criminal justice matters? Perhaps the delegates could not forecast what the impact of that would be. Does Security Council referral authority render the question of complementarity mute? What about Security Council abuse and unilateralism, especially when such action conflicts with universal principles?

The big powers, it appears, can refer their enemies to the court under the Chapter 7 powers of the Security Council and then help enforce the Court's mandate while simultaneously pursuing national strategic interests. It is a great scheme because if you can get the resolution passed, you actually have a mandate to chase after the people you want to chase after and you are protected by the rule of law. This works particularly well if you are not party to the Rome Statute but a member of the UN Security Council.

Should the AU be able to refer a situation to the ICC prosecutor under article 14? Should it be able to lodge a declaration on behalf of a non-party that may have a de facto government? What do we do when there is an illegal seizure of power and a de facto regime? Could we have then a non-party lodge a declaration? Does or should the Rome Statute allow for complementarity with regional courts? Isn't the AU working on a penal chamber? What then? Can regional prosecutions by regional courts satisfy the inadmissibility standard under Article 17 of the Rome Statutes?

Can the ICC prosecute cases in domestic or regional courts? Does the Sierra Leone Special Court provide any guidance here? Perhaps if we want to build true and authentic capacity in African States and regional institutions, we need to have ICC prosecutions in those States so they would be more cost effective and accessible.

Again, when if ever can regional prosecutions by regional courts satisfy the inadmissibility standard under section 17 of the ICC Statute? In the ICC and AU context, does complementarity build or resolve rather than proliferate international tensions. The AU framework seems to allow for cooperation with external entities such as the ICC in achieving peace and security, stability and the rule of law, whether it is technical cooperation or combating impunity. This goes to the question of illegal seizures of power brought about by violence.

What role can the ICC play in informing and shaping peace agreements that permit power sharing and amnesty? How does the issue of complementarity play in this context? ICC State

parties have shown limited support for the AU's proposed amendment to the deferral provision, (article 16 problem), and how it could impact international accountability efforts in the Sudan; thus, further damaging ICC's credibility in Africa. We have to have technical debates on these issues.

This unresolved issue also has wider significance given the matters that underline the tension—meaning how ICC prosecutions may be reconciled with peacemaking initiatives and the role and power of the UN Security Council in ICC business – will likely arise in future situations around the world.

While there is little time to prescribe, I must refer you to the cogent suggestions made by Charles Jalloh on these issues:

1. “ICC State parties especially from Africa should work towards increased and deeper engagement with the Security Council, the AU and the ICC. There should be a liaison office in Addis Ababa, Ethiopia. Having such an office will not conflict with the AU's decision not to cooperate with the court because such non-cooperation was only related to President Bashir's indictment. The AU's decision is not technically a general call for non-cooperation with the ICC but that seems to be the political outcome of it.
2. With regard to affected States and Inter Governmental Organisations seeking a deferral under Article 16 of the Rome Statute, African states may request that the ICC be cautious when becoming involved in conflict situations. Until the Rome Statute is amended, the 31 African State parties should only make calls for a deferral of investigations on the basis of proper assessment on the publicly available evidence in a manner that would respect the internal processes of the Rome Statute. In cases where a prosecution or investigation has commenced, the aforementioned questions are critical, such as the investigation and prosecution of would be warlords and rebels and how that might affect peace and security in a region. Making a reasoned case for deferral under article 16 and how refusal of a deferral may pose a threat to international peace and security.
3. Where credible alternative justice mechanisms exist, affected States should be able to call for effective use of article 53 to ensure that the broader interests of justice are followed. Truth and reconciliation goes hand in hand with prosecution. Where a state in transition from conflict has established credible alternative mechanisms aimed at achieving the twin goals of restorative justice and reconciliation (e.g. a truth and reconciliation process), the ICC Prosecutor should be invited by relevant states and intergovernmental organizations to consider whether the continuation of investigations or prosecutions before the Court would be in the interests of justice. Under Article 53(1)(c) and 53(2)(c) of the Rome Statute, the Prosecutor (subject to approval by the ICC's Pre-Trial Chamber) may decide not to proceed with an investigation or prosecution where such action would not serve the “interests of justice”. Although the OTP has thus far construed the meaning of that phrase quite narrowly, the concept is wide enough to include considerations of whether the alleged perpetrator of the crime has been the subject of justice mechanisms other than a criminal prosecution. The provision in question should be

interpreted as allowing for a deferral to an alternative process like a broadly accepted and credible truth and reconciliation process.

4. States should expand the use of domestic prosecutions of those suspected/accused of ICC crimes. In circumstances where states regard the ICC investigation or prosecution as undesirable, steps should, in the first instance, be taken to seek domestic prosecution of those allegedly guilty of genocide, crimes against humanity and war crimes. Article 17 of the Rome Statute embodies the principle of complementarity which permits a state that has jurisdiction over a crime that is the subject of proceedings before the Court to raise an objection to the admissibility of a case on the grounds that the state is willing and able to prosecute the crime. Such an objection to admissibility can be made even by a non-party to the Rome Statute, and where it is upheld, the ICC would not be entitled to continue with an investigation or prosecution. For examples, it is clear enough that this is a more appropriate statutory vehicle than Article 16 for Kenya to voice its opposition to Court involvement in its post-election violence. Engaging the ICC on matters of admissibility has its merits. It makes it clear that the state concerned is not in favor of impunity. The state will have to show that it has taken appropriate domestic measures and is willing and able to prosecute the international crimes that are at issue. Furthermore, since arguments based on admissibility and complementarity are made to a judicial body, the Court has an obligation to reach a reasoned decision on those questions, unlike the UNSC – in the case of a deferral – which may not issue a decision and which, in any event, will not give a reasoned decision.”

In closing, I am an eternal optimist, a dreamer, a King school dreamer, I believe in the mission and mandate of the ICC. Evil charlatans must not be allowed to strangle their citizens and the rule of law.

I HAVE A DREAM

1. I say to you today, my friends, that in spite of the difficulties and frustrations of the moment, I still have a dream. It is a dream deeply rooted in the African CONSCIOUS.
2. I have a dream that one day the African masses will rise up and live out the true meaning of PEACE AND JUSTICE: "That all people, from Compton to Capetown and Bahia to Botswana, should be treated with dignity."
3. I have a dream that one day in the fig trees of Sirte, the sons of the Hegemon and the daughters of the old world will be able to sit down together at a table of equality.
4. I have a dream that one day Africa's leaders will despise tyranny and impunity as much as colonialism and imperialism.
5. I have a dream.
6. I have a dream that one day even Libya, a desert state, sweltering with the heat of injustice and oppression, will be transformed into an oasis of freedom and justice.
7. I dream of a just African oasis, not an Arab spring, I have a dream.
8. I have a dream that my daughters will one day live in a world that will not judge other nations and peoples by their race, creed, color, religion or natural resources, but by their willingness to advance through law the cause of humanity.
9. I have a dream today.

10. I have a dream that one day the lips of Western leaders, which are dripping with the words of interposition and nullification, will be transformed and the developed world will be able to join hands with the developing world with humility, empathy, peace and justice, and walk together in brotherhood
 11. I have a dream today.
 12. I have a dream that from the sands of the Sahel-Maghreb to the sites of the French Riviera, despots and war makers will be prosecuted.
 13. I have a dream that one day every valley shall be exalted, every hill and mountain shall be made low, the rough places will be made plain, and the crooked places will be made straight, and the glory of the Lord shall be revealed, and all flesh shall see it together.
 14. This is our hope. This is the faith with which I return to the Global South. With this faith we will be able to hew out of the mountain of despair and injustice a stone of Netherland hope. With this faith we will be able to transform the jangling discords of our world into a beautiful symphony of justice and equality. With this faith we will be able to stand up for freedom, protect the oppressed, safeguard the rule of law, develop the underdeveloped, knowing that a world free from war is possible.
 15. I have a dream.
- It gives me great pleasure to have the opportunity to address a topic that is close to my heart in many ways. Firstly, as a Ugandan, I have had first-hand experience of the debilitating effects of International Crimes on a nation, a community and individual victims. I have for the last few years made seeking justice against these International Crimes a top priority in all my work. The main motivating factor has been to bring criminals to justice and justice to the victims. But what is justice if I may ask?
16. You will all agree that That my dreams are not in vein, That the ICC will embrace the Black Man's Burden.

Thank you.

Ambassador Mirjam Blaak, Deputy Head of Mission, Ugandan Mission to the Benelux

Justice and Reparations for Victims of International Crimes in Africa

this monster justice has got many faces. Today, I would like to invite you to think with me about justice as bringing those who destroy the lives of others to accountability while at the same time, taking deliberate measures to assist those who have suffered, rebuild their lives. I would like us therefore to think about a delicate marriage between retributive and restorative justice. I am not sure if it will work but our job today is to explore together what we can do to make it work.

A lot has been said in regard to “the nationalisation of International Crimes” and as a nation, Uganda has indeed moved to enact law to make it possible for our judicial system to adjudicate on International Crimes so one would say, we are indeed implementing International Law in our local courts, which is a big leap of faith.

An aspect of international justice that has not received as much attention as it deserves is the issue of justice and reparations for victims of international justice. We can therefore ask ourselves the question, when we speak of complementarity, international justice, whose justice are we talking about? Of what benefit and essence are all the international gatherings, debates, discussions, today's included, to the victims? How do we practically translate all the hard-work put in the developing of these universal standards of internationally recognised crimes and rights for the benefit of victims of International Crimes into something that they will be able to consider as justice. In other words, how can we put a face to justice for the victims of these heinous crimes at the local level? These brief remarks will identify the challenges arising out of the process of rendering out justice to victims of International Crimes at national level and will also offer some thoughts on the way forward for emerging International Crimes divisions.

Justice

For a very long time, the State assumed to have the interests of victims at the core of its existence. A crime that was committed against a victim was indeed a crime committed against the State. It is no surprise that we find ourselves with the wording "Regina vs. John Dow" in many Commonwealth Countries. This was later reworded to "The State vs. John Dow" or at the international level, "The Prosecutor vs. John Dow". The State only needed the actual victim of the crime as a witness to prove the commission of the crime. The punishment was intended to "inflict pain or loss" to the criminal. The criminal was to suffer some deprivation of either freedom (custodial sentence) or loss of income (fines) as a punishment for committing a wrong against the community or the State for that matter. In criminal cases in the Common Law system, where an accused person was levied a fine for contravening a law, the money was never given to the victim. In reality, the victim only benefited psychologically from the knowledge that their offender had received punishment. The only difference was that rather than carrying out revenge on their offender, the punishment was meted out on their behalf by the government. In many ways, it was retributive justice, "an eye for an eye and a tooth for a tooth". National Penal codes clearly identified and named possible crimes and also prescribed matching punishment. The victim was not very visible in the equation. It was the State against the criminal.

International Crimes and International Justice

The end of the Second World War marked the coming together of world nations to agree that certain crimes were against the entire human race. 1948 saw the birth of the crime of Genocide while the emergency of the Geneva Conventions' brought with them many of the crimes that we now know in International Humanitarian law or the Law of War. The Universal Declaration of Human Rights, The International Covenant for Civil and Political Rights, the various regional charters, such as the African and Peoples Rights all brought into existence a long catalogue of rights and criminalised their violation as International Crimes.

What is significant is that although many of these documents instituted rights for “criminals”, they were all silent about rights of victims.¹

Several phrases were coined, “never again, no hiding place, stumping out impunity, etc.. I am sure you all have your favourites but all these gestures concentrated on either punishing the offenders so heavily so as to serve as a deterrent for others who may be contemplating committing similar crimes, but not much regard was paid to the victims or the issue of reparations for victims of crime.²

In 1985, the then UN Human Rights Committee delegated the looking into the issue of remedies and rights for victims of crime but the final outcome of this good gesture remained a “declaration” at best, with no powers whatsoever. This was eventually adopted as the United Nations Declaration on the Basic Principles of Justice for Victims of Crime and Abuse of Power in December 2005 twenty years after the adoption of the declaration and after such large populations had become “victims”.

The two *ad hoc* Tribunals of Rwanda and Yugoslavia did not even define the word victim or mention reparations for victims. Several attempts by NGOs and other stake holders to draw the attention of the first International Tribunals to the plight of victims were dismissed as a destruction of the Judges for their mandate, which was to stomp out impunity. What justice would it be that accused persons maintain a very stringently internationally adhered to regime for all their rights, their right to medical treatment, a balanced diet, etc but the poor victims are suffering in their homes with ailments, many of them, a direct infliction of the same convicts? There has got to be something wrong with this approach. If the International Community is conducting International Prosecutions in the interest of the victims, how is it that they did not look at providing rehabilitation or remedies for victims as a priority?

This development however turned out a blessing in disguise for future victims. The plight of Genocide survivors in Rwanda and victims of the worst sexual offences in the former Yugoslavia must have awakened something in the civil society. For the first time, we had groups of people comparing the VIP guaranteed rights to accused persons, which included their 5 Star Hotel accommodations and the best cuisine in town to the suffering of victims who were brought to appear before the Tribunals.

¹ As early as the Magna Carta of 1215, the international community was already conscious of Rights of an accused person. Closer to home, Article 7 of the African Charter on Human and People’s Rights, Article 6 of the European Convention for the Protection of Human Rights and Freedoms, Article 14 of the International Covenant for Civil and Political Rights, Article 10 of the Universal Declaration for Human Rights and more recently the Rome Statute in several provisions gives substantive rights to accused persons.

² In ICTR’s sentencing, accused persons who received life sentences were sentenced « to spend the remainder of their lives in prison » in case life sentence could be construed or interpreted to be 25 years as it is the case in some jurisdictions. Trial Chamber II of the Special Court for Sierra Leone handed down sentences of 52 years in prison. This were tough sentences intended to send out a clear message to potential perpetrators and a demonstration that the international community would not tolerate impunity.

The ICTR Registrar, Dr. Agwu Ukiwe Okali started campaigning for justice with a human face. He presented a paper on restorative justice in one of the annual reports and encouraged donating to a Trust Fund from which resources could be drawn, that could be used to not give reparations, but provide some alleviation, however minimal to the victims. I call this approach, AMBULANCE Services. When a patient is put in an ambulance, they do not expect to be cured in the ambulance but they have some confidence that the ambulance personnel will sustain them until a more lasting solution is availed. Unfortunately, for the two *ad hoc* Tribunals, they are winding down before the poor victims have been provided with a lasting solution.

ICC

The ICC was born against this background. In his opening remarks at the Rome Conference, the UN Secretary General then, Kofi Annan, called upon the International Community not to let down victims again. He said the ICC would be a victims' oriented Court. This explains why Articles such as 15 (victims are among the people who may supply information to the Prosecutor), 19 (3), Victims may have a say on issues of admissibility, Article 68 (Victims may present their views if only they do not contravene the fair trial rights of accused persons) to mention a few examples of provisions that take victims' rights into consideration in the ICC regime. Then there is the TRUST FUND FOR VICTIMS and Rule 85 which broadened the definition of victims to make it more realistic and recognise that when one individual is victimised, it usually affects those around them and the community as a whole.

There is no doubt that the institutional framework for making good the international community's promises to the victims is very strong. The challenge however is translating these good promises to practice. The first challenge is with numbers. The ICC will usually come in because the situation is so serious and the numbers involved big. Does the Court have the capacity to reach out to all victims? The answer is no and those from the Court may correct me but if you look at the issue with the same glasses as prosecutions, the ICC can only prosecute a few people. Is it then expected that only a few lucky victims should be given reparations? The Prosecutor would have developed a criteria he used to choose his targets. How do you do that for victims? Who do you take and who do you leave out? Do you choose for example those who suffered most? But who did not suffer in the war in Northern Uganda for example? All people in the region would have suffered in one way or another, so how do you determine who benefits?

The process of gaining access to the Court or getting to enrol in the Reparations Programme does look even to an informed sophisticated PhD researcher complicated. How do traumatised, demoralised, many times illiterate victims get around completing this form. The decisions pronounced in the Court as to whether they are accepted usually give rise to controversy even between the Registrar and the Prosecutor, how does the system expect victims to decipher their contents?

The other aspects are the rules and regulations. 8 years down the road and the Court is still trying to figure out how to deal with victims with each Pre-Trial Chamber designing their

own rules, mainly depending on where they come from and what they are used to. If it is so complicated to the ICC, how more complicated will it get for national jurisdictions? As African States draft legislation to nationalise international justice, are they going to fall in the trap of importing the ICC Statute in its entirety? Or should they take out the good and throw out the complicated, which includes reparations.

International justice is very costly and one of the main reasons why many Western countries had not put in place victims and witness protection and support programmes is because it is one of the most expensive aspects of administering justice. Do African governments have the means and resources to consider reparations for victims? I may be wrong but many of us are relying a lot on cooperation and financial assistance to support several of our legal and judicial programs. What would be the source for the funds to be used for reparations? There may be a few cases where the accused persons are rich with the capacity to pay awards handed down by courts but we do not have such many. In Rwanda we have Kabuga who remains elusive, Bemba maybe could pay victims in CAR but mind you, Charles Taylor was found to be indigent so no Liberians or Sierra Leoneans would have received awards from him. Where community programmes are preferred to individual reparations, it maintains an element of injustice as the perpetrators and their families also benefit from the programmes. A man like Joseph Kony for example, what would he have to offer to the entire region of Northern and parts of Eastern Uganda which he has terrorised for two decades. Even if he were to be arrested, tried and convicted, what would he have to offer the victims who may be awarded reparations? It means so little in terms of reparations to the victims whether or not he is arrested and convicted, unless the Court has an independent fund from which to award reparations.

The last challenge to consider relates to legislation. Some of us from the Civil Law tradition are lucky to have had the *Partie civile* engrained in our systems so none of this is surprising. There is already an existing mechanism which can be used to give victims a more visible role and prospects for reparations are comparatively brighter than those of us from the Common Law system. In Uganda we are in the process of brain storming on a working document to streamline the rights of victims but I am not at liberty to discuss this document here so suffice it to say that it is not an easy process.

Way Forward

At the ICC, reparations can only be awarded following a conviction. If we the African Governments are going to fall in the same trap, then we can as well close this discussion. This is because there are going to be many cases when prosecution is not going to end in a conviction. In Uganda we are still hurting or is it recovering from the shock of our first case in the International Crimes division collapsing more or less on a technicality. What happens to the victims in this case? How about the case of amnesty? This is legal; the bad guys not only get amnesty but they are facilitated to resettle and reintegrate in the society? Do we have the capacity to do the same for the victims? I doubt.

This is where the Trust Fund for Victims comes in handy. Their mandate is broad in that it covers all victims of crimes within the jurisdiction of the Court. In fact for many people in Northern Uganda and Eastern Congo, it would not be an exaggeration if I stated that the Trust Fund for Victims is the face of the ICC. This is the institution that has come in and identified communities that have been supported with community based programmes. They are doing a lot on the ground, to sustain the hope of the victims that one day justice will come from The Hague. So we go back to my term of ambulance services. They do not give reparations but they give assistance that takes away the immediate pain or difficulty, or at least alleviates the suffering.

My proposal would be for each government which is establishing a division to try International Crimes to establish a special fund for victims. This Fund should be entrusted to impeccable Trustees, and we should then encourage the culture of donating to this Fund. Governments should consider making donations to this fund a rebate for taxes as an intensive for donors to give more. The International Community which is very keen on internationalisation of the Rule of Law should also invest in this Fund. In the same way that Staff Assessments levied against Staff of International Organisations are put towards the countries' dues to the organisation, a token percentage should go to this Trust Fund. It should be insulated against corruption or any other form of abuse and it should not be politically exploited.

Conclusion

It took the UN 20 years to translate the declaration for victims into principles. The ICC which had all the laws handed down ready for implementation has spent the last 8 years trying to figure out what to do with victims and how to give justice and reparations to them. This is an institution which does not have to worry about raising the money (they only have to convince the CBF that they are doing the right thing) but they have still not finalised how they will deal with victims' reparations. This means that for the national countries which are yet to legislate and iron out conflicting provisions in their laws, it is likely to take even longer. Funding remains a challenge which I believe can only be addressed by the International Community agreeing to put their money where they say their hearts are.

Umesh Kadam, Regional Legal Advisor, International Committees of the Red Cross (ICRC), Nairobi, Kenya

The Work of the ICRC on the Rome Statute

The ICRC has always supported the creation of an international tribunal with jurisdiction over the most serious International Crimes. For the ICRC, an international tribunal has the capacity to act as a catalyst and as an incentive for national courts to fulfil their obligations to prosecute those who commit War Crimes. We therefore welcome the establishment of the ICC.

The ICRC was very active in the preparatory work leading to the Rome Statute and took part in drawing up the elements of crimes. The Rome Statute is clearly a major advance in the implementation of International Humanitarian Law (IHL)

The approach that the ICRC adopts in relation to complementarity between the jurisdiction of the ICC and the domestic criminal justice system

The concept of complementarity is fundamental for the ICC to be effective. The provisions in the Rome Statute concerning complementarity are founded on certain assumptions.

There is the assumption that there is the ability and willingness of the State party to prosecute persons charged with ICC crimes in domestic courts. When it comes to the ability if a State to prosecute such persons, the question arises whether the State has necessary domestic law that provides for such prosecution. Thus, for the principle of complementarity to operate in practice, States need to have a complete regime under domestic law for the prosecution of Genocide, Crimes against Humanity and War Crimes. If a state does not put the above crimes into its domestic law, then it will be forced to cede jurisdiction to the ICC, including for its own nationals.

The Rome Statute does not explicitly ask State parties to enact national legislation to domesticate ICC crimes. However, according to some experts, this obligation is implicit in the principle of complementarity.

One of the areas in which the ICC is supporting States is to enable them to adopt adequate national legislation for implementing the Rome Statute domestically. To implement the Rome Statute fully, States should create offences reflecting Genocide crimes, Crimes against Humanity and War Crimes as set out in articles 6, 7 and 8 of the Rome Statute. The simplest and most effective way to do so would be to the relevant crimes that set out these articles and schedule them to the legislation.

Another area in relation to War crimes and implementing legislation, which the ICRC has particular concern is prosecution of grave breaches of the Geneva Conventions and their additional protocols. The ICRC has been encouraging and helping state parties to these core instruments of IHL (International Humanitarian Law) to domestically implement them through adoption of appropriate national legislation. Some States already have such legislation in place while some are in the process of doing so.

The question that arises here is: what could be the possible relation between the Geneva protocols and Conventions implementing legislation and the Rome Statute implementing legislation? As a matter of fact, at the moment, almost all States are parties to the Geneva Conventions and a large number of States to the additional protocols. South Sudan is not yet a member to the Geneva conventions. However, discussions with authorities provide evidence that it is quite likely that South Sudan will deposit the instrument of succession in relation to the Geneva Conventions and additional protocols.

The Geneva Conventions did not provide for any international criminal liability for grave breaches. Rather, grave breaches constituted a category of violations of those conventions

considered so serious that States agreed to enact domestic penal legislation, search for suspects and charge them or hand them to another state for trial.

The Rome Statute has listed grave breaches as a category of War Crimes under article 8(2) clause (a). The concept of War Crimes under the Rome Statute is wider than the concept of grave breaches under the Geneva Conventions since the statute contains a long list of War Crimes drawn from customary law in addition to grave breaches under the Geneva Conventions. Thus, when we talk about implementation of the Rome Statute and Geneva Conventions, we must ensure that the provisions covering grave breaches and other serious crimes covered by Geneva Conventions implementing law are not adversely affected by the law incorporating the Rome Statute.

As the Geneva Convention implementing law invariably provides for universal jurisdiction for grave breaches, care must be taken that this jurisdictional basis is not affected by the Rome Statute implementing law. It would be useful to make reference in such legislation stating that the current law in no way is to affect or limit any Geneva Convention implementing law.

One very positive element of the Rome Statute is that it includes War Crimes both International and Non-international armed conflicts. This is the first time such a list has been enshrined in an international instrument. This approach in relation to criminalisation of violations of IHL in non-international armed conflicts, which has amply been reflected in the jurisprudence of the ICTY and ICTR, will go a long way in enhancing the effectiveness of IHL applicable to non-international armed conflicts. In keeping with this spirit, the amendment to article 8(2)(e) of the Rome Statute was adopted at the Kampala Review Conference in 2010. It may be recalled that this amendment extends application on prohibition of use of poison, poison weapons, asphyxiated gases amongst others to non-international conflicts. Before the amendment of the above article, use of such weapons was considered a War Crime only in international armed conflicts.

Another amendment adopted in 2001 to the Conventional Weapons Convention, which has a specific number of provisions dealing with weapons, has extended application of these protocols to Non-international armed conflicts. This is significant because sometimes it is claimed that the law relating to Non-international armed conflict is not well developed or effective. However, the steps to amend the above sections are very significant developments.

Of course, the amendment is subject to ratification and acceptance thus while adopting the Rome Statute implementing legislation, States may take into account this change as well. If a State has implemented the relevant crimes set out in articles 6, 7 and 8 of the Rome Statute by scheduling them to the legislation, this new amendment can be added to that schedule. States employing another method of incorporation should ensure that they have made adequate provisions to allow for the prosecution of these acts.

It is worth noting that most Geneva Conventions and additional protocols implementing laws do not provide for criminalisation of violations of those instruments in times of Non-international armed conflicts.

States need also to ensure that there is no conflict between ICC implementing legislation and other domestic law or their obligations under other international treaties.

How the ICRC may help states in fulfilling their obligations in relation to implementing domestically the Rome Statute as well as the Geneva Conventions and additional protocols

The Conventions have currently nearly achieved universal acceptance imposing the obligations, they contain on every government. As noted earlier, states must adopt legislative measures to prohibit and repress grave breaches regardless of the offender's nationality and regardless of where the acts were committed. Governments should also provide for punishment of other serious violations of the Geneva Conventions and other protocols.

The Geneva Conventions also oblige States to search for people alleged to have committed grave breaches and bring them to trial or extradite them to another State for prosecution. States are expected to provide judicial assistance to each other in these matters.

The ICRC plays a key role in the national implementation and enforcement of IHL. Its advisory service assists States in enacting domestic legislation through the provision of technical assistance, publications including ratification kits and model laws. The ICRC's advisory service was created following a recommendation of the Inter Governmental group of Experts on the protection of War Victims endorsed by the 26th International Conference of the International Red Cross and the Red Crescent in 1995 and provides a specialised structure to tackle the issue of national implementation on a systematic basis.

The service has set up a national implementation database, which provides a means of exchanging information on national implementation. It covers a wide range of subjects including the punishment of IHL violations, regulating the use of distinctive emblems, legal guarantees for protected persons, dissemination and training of IHL and contains legislation and case law of states relating to IHL. There are four legal advisors in Africa working for the above service based in Pretoria, Abidjan, Nairobi and Cairo,

Therefore, in conclusion, the advisory service will be happy to extend legal support in the process of domestic implementation of the international obligations under the IHL treaties.

SESSION III

COMPLEMENTARITY AND GENDER PERSPECTIVES IN INTERNATIONAL JUSTICE

Chair: Dr. Godisang Mookodi, Department of Social Studies, University of Botswana, Gaborone

Just by way of provoking discussion, victimisation is something that we need to be constantly reviewing and understanding the nuances and complexities associated with victimisation.

Quite often we are talking about the victimisation of girls and women. For instance with regard to a child soldier, it is quite challenging to establish at which stage you are a victim and at what stage you become a perpetrator.

When we talk about victimisation, we must also, within the discourse, understand that the situation of young boys and men actually occur within our cultures within the context of hegemonic masculinities that perpetuate violence and glorify violence as power.

Within that context I would like us to take gender in its totality within the discussion and try as much as possible to see how we can move these concepts forward.

Presenter: Gloria Atiba Davies, Head of Gender Unit, International Criminal Court (ICC)

Contribution of Gender Justice to Peace-building.

As an opening to my presentation on the topic “Contribution of Gender Justice to Peace Building”, I would like to pose this question: “Is justice an element of peace-building?” In the last two decades, we have witnessed unprecedented violence and violations of Human Rights in the conflicts which erupted in Africa to name a few, Sierra Leone, Democratic Republic of Congo, Uganda, Kenya, Cote D’Ivoire and Libya which is still going on.

At the initiation and even during the investigation by the International Criminal Court of the conflict in Northern Uganda, there were calls to halt the process because of the view of some that peace should precede justice. Like many others, however, the Office of the Prosecutor held the view that there will not be sustainable peace without justice; any peace-building effort and long-term development process especially after conflict will not succeed in the absence of justice.

The drafters of the Rome Statute clearly recognized the link between peace and justice. As reflected in the preamble of the Statute, by putting an end to impunity for the perpetrators of the most serious crimes, the Court can and will contribute to the prevention of such crimes, thus having a deterrent effect.

In Rome in 1998, Lloyd Axworthy, Minister of Foreign Affairs of Canada, explained it as follows: *“By isolating and stigmatizing those who commit War Crimes or Genocide, and removing them from the community, [the Court] will help to end cycles of impunity and retribution. Without justice, there is no reconciliation, and without reconciliation, no peace.”*

One recognizes the challenges achieving justice post conflict because of breakdown of structures, fragile security and protection issues, competition for resources and sometimes power sharing and amnesty agreements.

Nevertheless, in order to make peace-building processes successful, challenges to overcoming justice need to be addressed with a focus on gender justice either through transitional justice mechanisms or formal legal machineries. The question which readily comes to mind is “why”. What can gender justice contribute to peace-building? In answering those questions, one first has to take a step backwards to see what the concept of gender justice is. Simply put, it means equal treatment of the sexes and recognising that men and women are created equal and gifted without distinction or partiality. Gender justice means encouraging both men and women to exercise their rights in all spheres of life especially in the political arena, and opening traditionally masculine leadership roles and activities to women, while at the same time, encouraging men to discover and cultivate their gifts for activities traditionally performed by women. Article 7 (3) of the Rome Statute states that the term “gender” refers to the two sexes, male and female, within the context of society.

Justice aims to contribute in building sustainable peace especially after a conflict, mass violence or systemic human rights violations. Formal justice through a legal system involves investigating the commission of crimes and prosecuting perpetrators, giving victims the opportunity to participate in proceedings, providing victims with the required support needed for meaningful participation and making appropriate reparations orders from which victims can benefit. Justice, as essential component to building lasting peace, includes the aspects of gender justice.

Gender-based violence has been and continues to be used in armed conflicts for different reasons including propaganda reasons in order to demonise and dehumanise the adversary, punish civilians for their perceived support of the enemy, or to demonstrate power and superiority by humiliating and debasing the victim.

Prosecutions can serve to deter future crimes, recognize the harm suffered by victims, reduce victims’ sense of marginalisation, hurt and grievance, re-establish social order and reflect a new set of social norms for peaceful co-existence and nation building. The prosecution of perpetrators who have committed gross violations of human rights as is currently being done in the cases before the International Criminal Court is critically important for any effort to end impunity and establish the Rule of Law.

Therefore various provisions of the Statute proscribe what can be characterised as gender crimes, such as rape, sexual slavery, enforced prostitution, forced pregnancy, as a War Crime and/or Crime against Humanity. 7(1)(h) of the Rome Statute stipulates that persecution against any identifiable group or collectivity on grounds of gender could constitute a Crime against Humanity if committed in connection with other types of crimes against Humanity or any other crime under the jurisdiction of the Court, thus making the Statute the first instrument in which gender is an element of a crime in positive law, specifically of persecution as a Crime against Humanity. The Rome Statute has therefore broadened the traditional categories concerning grounds of persecution to include persecution based on gender.

Gender crimes are prominent in our prosecutions because they are prominent in the contexts being prosecuted. Sustainable peace cannot be built in a situation where victims bear anger and hatred for the terrible crimes committed against their person. Ensuring accountability for women's experiences in the arena of international justice should therefore be a priority issue. Increasingly, justice mechanisms such as truth commissions and courts are being created in post-conflict societies, in order to prosecute War Crimes and to promote justice, peace, and reconciliation.

The Office of the Prosecutor (OTP) of the ICC ensures that gender-based crimes are effectively investigated and prosecuted. Reference will now be made to some of our cases:

In *The Prosecutor v Thomas Lubanga Dyilo* case, which is the first case that went to trial in the ICC, the gender dimensions of the crime of enlisting and conscripting children under the age of 15 years were presented. The evidence in this case showed how Mr. Lubanga instrumentalised sexual violations to subject child soldiers of both sexes to his will, and made them tools to further his own violent goals. In the camps, girl soldiers, some aged 12 years old, were used as cooks and fighters, cleaners and spies, scouts and sexual slaves. Closing arguments in the case against Lubanga concluded on August 26, 2011 and we are now awaiting the decision of the Trial Chamber.

In our second DRC case, against Germain Katanga, former leader of the Force de Résistance Patriotique in Ituri (FRPI) and Mathieu Ngudjolo Chui, one of the top leaders of the Front des Nationalistes et Intégrationnistes (FNI), both men are also charged with gender crimes, namely, sexual slavery and rape, both as Crimes against Humanity and War Crimes. Mr. Katanga and Mr. Ngudjolo are held responsible for alleged crimes ordering the attack upon the village of Bogoro, in the district of Ituri, on 24 February 2003. Hundreds of civilians were massacred during the attack, civilian's residences were looted and destroyed, and women and girls were raped.

According to the evidence collected, some women, who were captured at Bogoro and spared by hiding their ethnicity, were taken to FNI and FRPI camps, after being undressed or raped upon their capture. Once there, they were given as a "wife" to their captors or kept in the camp's prison. The women detained in these prisons were repeatedly raped by soldiers and commanders alike.

The decision of the OTP to open an investigation into the situation in the Central African Republic represented the first time for the international criminal justice system to deal with a situation where allegations of sexual crimes far outnumbered alleged killings. The evidence collected shows that the accused Jean-Pierre Bemba sent his soldiers to intervene in the CAR to maintain power in the hands of the then President Patassé, which resulted in widespread acts of rape and other acts of sexual violence. The trial against Bemba started on 22 November last year and is currently ongoing with the prosecution's 31st witness on the stand. This case is likely to have a huge impact, since the charges are confirmed in Bemba's capacity as commander, therewith giving a strong signal worldwide to commanders controlling their subordinates.

Other cases before the ICC include the arrest warrants issued against Joseph Kony and other leaders of the Lord's Resistance Army who systematically abducted girls for sexual enslavement and rape – and the arrest warrants against President Al Bashir, for Genocide, considering that thousands of civilian women, belonging primarily to the Fur, Masalit and Zaghawa groups, were subjected to acts of rape by forces of the Government of Sudan.

The Confirmation of Charges hearing in the case against Callixte Mbarushimana started on Friday, 16 September and concluded on 21 September, 2011. During the hearing the OTP requested the confirmation of charges including two counts of sexual violence (rape as CAH & WC) against him. Also in the Confirmation of Charges Hearing against Francis Kirimi Muthaura, Uhuru Muigai Kenyatta and Mohammed Hussein Ali, the OTP requested the confirmation of charges including a count of rape.

The body of the ICC's first cases, however, signals the determination of the Office of the Prosecutor to end impunity for gender crimes. This determination is supported by the statement of the Special Representative of the Secretary General Wallstrom when she said referring to the case of the *Prosecutor v Jean Pierre Bemba* that, "*Rule by rape will no longer lead to the corridors of power; it will lead to the cells of a prison. Positions of military and political leadership are positions of responsibility, not immunity*"

The Rome Statute has also created a framework for gender-sensitive strategies to ensure the comfort, safety, and dignity of the rape victims participating in the entire process as victims or witnesses.

Article 54 of the Rome Statute of the ICC specifically provides that in order to ensure the effective investigation and prosecution of the crimes under the jurisdiction of the Court, the Prosecutor shall "*take into account the nature of the crime, in particular where it involves sexual violence, gender violence or violence against children*". Article 68 (1) of the same Statute imposes an obligation on the Court with particular reference to the Prosecutor to take appropriate measures to protect the safety, physical and psychological well-being, dignity and privacy of victims and witnesses in particular when the crime involves "gender" violence. Rule 16 of the Rules of Procedure and Evidence assigns the responsibility to take gender-sensitive measures to facilitate the participation of victims of sexual violence at all stages of the proceedings.

The Victims and Witnesses Unit (VWU) in the Registry is the implementing entity in the Court and has the responsibility to provide victims and witnesses who appear before the Court and others who are at risk on account of their testimony, adequate protective and security measures and assist them in obtaining medical, psychological and other appropriate assistance. However, on its own or in coordination with the VWU, the OTP through its Protection Strategies Unit or Gender and Children's Unit, takes appropriate measures to fulfil its obligations under the Statute.

Failure to pursue gender justice means that accountability and justice would be sacrificed, entrenching impunity and building an unstable peace that can collapse. This is so because of

the build up of anger and resentment by victims and local communities who feel the need for justice as their grievances and suffering have been ignored, which in turn can re-ignite conflict and hostilities. It is very clear that both peace and justice are very important to the process of nation building, neither is more important than the other. Foregoing one for the other would lead to neither in the long run. It is only through the firm establishment of the Rule of Law, a process of accountability and Human Rights that a solid foundation for sustainable peace, security and development can be built. Accountability for violations that have been committed is critical to restoring public confidence and trust. Without just peace, there will be no peace at all.

Presenter: Laura Nyirinkindi, President, FIDA Uganda

Implementing Gender Justice at the National Level

Women as a vulnerable group are often targeted by all sides to conflicts, including armed groups, militia groups and national armed forces. The most common crimes suffered are GBV in addition to the harm that the general community suffers.

However, it is recognised that men too are victims of sexual violence, and the RLP in Uganda has conducted studies in Northern Uganda to show very vividly how the combatants on both sides targeted male civilians for sexual violence.

UNSCR 1820 notes that women and girls are particularly targeted by the use of sexual violence, including as a tactic of war to *humiliate, dominate, instil fear in, disperse and/or forcibly relocate* civilian members of a community or ethnic group. *Resolution 1820 calls upon* Member States to comply with their obligations for prosecuting persons responsible for such acts and to ensure that all victims of sexual violence, particularly women and girls, have equal protection under the law and equal access to justice.

Access to justice for women involves a number of factors

- Making gender specific provisions in laws and court procedures as well as traditional justice mechanisms to recognise the special needs of women and their experiences
- Equal access to legal services (lawyers and legal aid) and courts, and involvement in traditional justice mechanisms.
- Rule of Law, whereby government abides by court judgments, and also puts in place measures for meaningful remedies for victims.

Barriers to Justice

When we talk about barriers to justice we refer to the exclusion of women from mainstream justice mechanisms as a result of structural barriers; these include the attitudinal, cultural, or technical.

1. Lack of political will: Oftentimes, governments and affected populations are reluctant to actively pursue transitional justice in the interests of peace building and reconciliation, and sometimes even amnesties are granted that deny women protection under the law to appropriate remedies e.g. in Uganda where the Amnesty law is still running. Traditional justice mechanisms waive cleansing rituals in instances of rape, de-emphasising the gravity of SGBV.
 - A study by Human Rights Watch (HRW) indicates that despite the inordinately high number of rape victims in Rwanda only a few convictions have been registered.
 - The War Crimes Chamber of the State Court of Bosnia and Herzegovina was created in 2005, to investigate and prosecute crimes that could not be prosecuted by the ICTY. However, up to September 2009, only 12 men have been convicted for crimes of sexual violence despite the mass rapes that occurred.
 - According to a HRW July 2009 report, *Soldiers Who Rape, Commanders Who Condone*, of the 14,200 rape cases that were registered in South Kivu in the DRC between 2005 and 2007, only 287, or 2 percent of the cases, were taken to court.
 - Most of the prosecutions for rape as a war crime e.g. in DRC undertaken by the military justice system continued to be lower-ranking officers or soldiers; rarely are mid-level or senior-level officers investigated for having committed acts of sexual violence. When convicted, sentences are rarely carried out.
 - In Sudan, soldiers and police officers commit a significant portion of the gender-based violence but are immune from prosecution under several Sudanese laws, unless their supervisors waive the immunity which they rarely do. In addition, a presidential decree issued in 2005 protects soldiers and officials from being prosecuted for crimes carried out “during the execution of [their] duties.” Therefore, officials have been able to avoid prosecution for rape by claiming that the sexual assaults were committed while carrying out their duties.

A result of this is fear and under-reporting in the women victims

2. Lack of meaningful remedies: Meaningful remedies like reparations and compensations for SGBV is lacking in several countries. E.g. a law in the DRC requires victims of sexual violence to pay into the public treasury 15 percent of the amount of damages sought in advance of any judgment. Even in the rare instances in which reparations are awarded, defendants bribe judges, resulting in "lost" case files,

effectively preventing the payment of reparations to victims. While multiple courts have ordered Government to pay compensation to a number of women raped by state security agents; none of the rape survivors had received compensation by 2009.

3. Gender dynamics: Studies note that most women, whether victims or witnesses of sexual violence, are reluctant to participate in a male dominated trial system, and communities have not been adequately prepared to address issues of rape in public.
4. Legal illiteracy: The complexities of the laws as well as court processes and procedures tend to disproportionately alienate women court users since they form the larger part of illiterate community members.
5. Justice Administration: Some justice mechanism lack aspects of adequate victim and witness protection that may discourage women from identifying alleged suspects still at large e.g. *Gacaca*. The public conduct of cases in the *Gacaca* courts has been viewed as a deterrent to women victims of sexual violence, particularly when the alleged perpetrators are still at large or have been pardoned.
6. Technicalities: The evidential requirements of cases of rape serve to deter many victims and witnesses from participating in trial processes, particularly when trauma, stigma and taboo are present. In the infamous *Kunerac* case in the ICTY, a woman was queried as to whether she had consented to her rape that occurred with unimaginable frequency, and this caused a general reluctance among women to participate.

Progress made

Enabling environments:

- Traditional and informal justice systems in Africa have witnessed some improvements. In the *Gacaca* courts of Rwanda, the laws have been modified to be gender sensitive e.g. now victims of rape have options for giving evidence in private and accused persons are not allowed to give evidence in public to protect the identity of victims of rape.
- The bench in the CAR trial constitutes three female Judges and it remains to be seen whether this had an effect on the proceedings and the involvement of women.

Towards Solutions

Integrating gender issues into transitional justice and formal and informal justice mechanisms is important in enabling women to attain access justice;

- There must be critical analysis of laws of crimes and trial procedures from a gender perspective to determine whether they meet the concerns and rights of women.
- To this end, the participation women in post conflict peace building and accountability initiatives is vital as recommended by UN SC Resolution 1325
- Judges in informal and formal justice systems should be trained on gender based violence in order to eliminate discrimination on the bench. Recruitment processes of law enforcement agents should include women.
- Legal literacy for women on rights and remedies should be made available to build a demand for justice
- Court procedures should be simplified for women, and courts and police should be women friendly
- Proper assistance' for victims must include guarantees of economic and social rights-reparations and compensation policies should be established
- The exclusion of sexual violence crimes from amnesty provisions should be strictly forbidden.

Discussant: Agneta Johansson, Deputy Director, International Legal Assistance Consortium (ILAC)

The two presenters outlined the problem that we are facing really well that throughout the world, violence against women is pervasive, widespread and of course it is unacceptable. However, it continues in time of conflict, post conflict and peace time.

Barriers such as structural barriers still exist to this day. Gender justice is necessary for sustainable peace as well as for the individual victims.

With regard to conflict and post conflict situations, sexual gender-based crimes are persistent. There is a lack of gender justice.

There has been the development of international justice mechanisms such as the ICTY and the ICTR, establishment of the ICC. International law is very much a mix of politics and law. The Security Council Resolution 1325 was the first time when issues of gender justice were brought up on the agenda as a security issue. This all took lots of work and time before gender justice was brought to the fore. We have known for so many years about the problem. So many people have been dealing with this problem and the measures to prevent gender-based violence. In many cases such measures are effective. However, this takes time and must take time because justice takes time internationally and nationally especially for states emerging from conflict.

Will we get there? Are we doing the right things? Are we providing the right measures? How do we end impunity? Do we actually believe too much in justice? Do we make the victims believe too much in gender justice? What kind of justice?

We need to have a more realistic discussion about gender-justice. As an international community we are too ambitious in what we actually want and think we can provide. Our agendas need to get more realistic.

In Liberia for instance, there is a lot of enthusiasm and high expectations. However, the justice system cannot deliver and it will take time to deliver. This is the same in other nations.

SESSION IV

SPECIAL SESSION ON ICC IMPLEMENTING LEGISLATION (In cooperation with the Institute for Security Studies (ISS))

Chair: Max du Plessis, *Senior Research Associate, International Crimes in Africa Programme (ICAP), Institute of Security Studies (ISS), Pretoria, South Africa*

Hon. Githu Muigai, Attorney- General of Kenya

ICC Implementing Legislation: The Kenyan Experience

Kenya was part of the preparatory process of implementing the Rome Statute. Kenya was one of the few countries to signal their intention to be bound by the Rome Statute. On the 15th of March 2005, Kenya placed her Instruments of Ratification at the UN. Kenya has been a State party to the ICC since 2005. This has been done willingly and knowingly.

Kenya was not and has not been a country at war. It has not had a civil war. It is not a failed State. Kenya has some of the best functioning institutions in the continent. Indeed Kenya was approached many times by States such as USA to sign non-surrender agreements but it refused. This was because it did not wish to weaken the mechanism of the court.

Kenya has domesticated the Rome Statute. Since 2008, it has had the International Crimes Act, which domesticates the Rome Statute. The post election violence of 2008 was the work of individuals who ought to be punished. The Kenyan government has never accepted that this level of violence is of the nature that was ever contemplated by the Rome Statute and within the jurisdiction of the ICC. Therefore, Kenya has reserved and continues to reserve the right to dispute the admissibility of these specific cases in the jurisdiction of the ICC in the context of the facts disclosed by the prosecutor. In taking that position, sometimes, it seems that Kenya does not wish justice to occur. But nothing can be further from the truth. Alternatively, the argument could be that, unless there is some process external to Kenya, there can be no justice. Yet another argument is, unless Kenya is used as an example, whether the case fits the description or not, then there will be a danger that other governments will run into similar problems. This case is therefore a unique case in the Kenyan context.

It is worth noting that what is alleged to be the evidence available to the prosecutor of the ICC was generated by a domestic tribunal appointed by the Kenyan government itself. It was out of domestically inspired investigatory processes. When the prosecutor filed a request to seek authorization into an investigation into the post-election violence, Kenya gave maximum cooperation. The same can be said for issuance of summonses as the prosecutor received maximum cooperation.

When the prosecutor was finalising the preparation of his case, he requested the government of Kenya to facilitate while he took evidence in Nairobi. The government appointed a distinguished High Court Judge, provided for an independent court and invited the prosecutor to have evidence taken down for him by the Director of Public Prosecutions (DPP). This is very far from a country that is trying to subvert the course of justice.

Thus arising out of the Kenyan experience as a terrible experience that should not be repeated and not condoned, constitutional and legal changes were instituted. Reforms ranging from election changes were instituted. These were made by the government, which has a duty to be responsible and react to the nightmare that took place in Kenya.

The problems that precipitated the crisis that took place in Kenya have a long history. There are deep problems going back to colonial times. They go back to question of how political power was negotiated in the handover of independence, after independence, the structure of the Kenyan Constitution and so forth. These problems are deeply political, social, economic and cultural. Therefore, the fault lines around which this violence erupted have been fed by over one hundred years of this very difficult process.

Kenya continues to be concerned that the community is reconciled and that justice be found. Regarding the notion that the Kenyan government has no interest in the victims of post-election violence, nothing could be further from the truth. Billions of Kenyan shillings have gone into resettlement of victims of post-election violence.

It is important to understand the internal dynamics of a society. In Kenya, the fault lines around land ownership in the rift valley have over the years been surrounded by conflict. The number of people who moved into the rift valley around and after independence, were poor landless peasants. The question of land can go as far back as the Mau Mau rebellion. Violence was generated around the question of land. Abstracted from their historical context, these issues appear to be superficial and the answers appear to be capable of superficial application.

Kenya has gone to the court on a record of five times and said to the court, *'we reserve our right to challenge jurisdiction. We reserve our right to challenge admissibility and that right is not negotiable. It is a treaty right. We are a state party. We are exercising a right within the treaty and we resent the innuendo that to exercise that right is to go against justice as defined by a particular organ of the court or the court itself.'*

In addition, Kenya has gone to the court several times and said, ‘look, we have facilitated you at every possible instance so that we may work together. In the true spirit of the treaty, we may complement each other. Now please help us. May we sit in and listen and take down the evidence.’ The court refused and Kenya respected that.

Furthermore, the Kenyan Government has gone to the ICC wishing to share evidence given to the suspects but the court has still refused. Kenya has complemented the court at every instance but is still waiting to be complemented. Kenyan Government believes that, ‘we are not a rogue state.’ The gGvernment of the Republic of Kenya has the greatest interest in the safety of its citizens. Kenyan government is competent enough to take evidence for the court and therefore competent enough to do other things with the court. That is the Kenyan experience with the court and complementarity.

The proper jurisdiction of the ICC is not an academic question. That question is going to be decided in a very historic manner in the Kenyan situation. Kenya always as and always will support the court. It will comply with any order issued by the court including orders that Kenya might disagree with due to interpretation of the law.

If the Kenyan case were to become the defining case of when and how the ICC ought to intervene in nascent democracies that have violent electoral disputes in which people lose their lives, then a precedent will be set which we need to come to terms with if we all agree that that is what we want. Then that is what the jurisprudence will become.

The proper jurisdiction of the court and the threshold that ought to trigger the jurisdiction of the court is an issue that many states in Africa particularly will consider a ‘do or die’ moment. This can be reserved for the gravest of cases that are clear cut cases, that demonstrate in very clear evidential terms, the intentions of individuals or groups working together to carry out the sort of crimes defined in the Rome Statute *ab initio*. Alternatively, we could deal with marginal cases and if this is done, the credibility of the court would be affected. Whether the Kenyan case is a marginal case or not, I do not venture an opinion.

Amb. Kwesi Quartey, Ghana Mission to Addis Ababa

Challenges to adopting ICC Implementing Legislation: The Ghana Experience

The ICC has been in the news quite a bit lately, and not always for the best reasons. For instance, if you are Laurent Gbagbo, or president Bashir, your attitude might not be the same as victims of Kenya’s post election violence. That credit or blame, whichever way you look at it, is due mainly to the singular dedication and intensity of Mr. Luis Moreno Ocampo, I salute him. I have been tasked to speak today on the challenges to adopting ICC Implementing Legislation; the Ghana Experience. I shall endeavour to stick to that topic, however, I hope you forgive me if I stray a little from the straight and narrow path.

I tend to situate our discussions within a certain theoretical framework of International Law so as to allow me some space for manoeuvre. I might also raise issues on the perceptions of the ICC within the African Union to place the issues in context. I might say a word or two about the style of the prosecutor. I do hope we can still remain friends after that.

ICC Law is reflected in the convergence of two disciplines, to wit, the penal aspects of Public International Law, as well as the International aspects of Municipal Criminal Law. International Criminal Law, therefore, is something of a hybrid component of the Law of Nations drawing upon both International Human Rights and Humanitarian Law and national Criminal Law. International Crimes currently addressed by Customary International Law include War Crimes, Crimes against Humanity, Genocide, Aggression, as well as Torture and Transnational Terrorism. International Criminal Law is a body of international rules designed both to prescribe International Crimes and to impose upon States, the obligation to prosecute and punish or extradite. It also regulates international proceedings for prosecuting and trying persons accused of such crimes.

International Criminal Law is therefore a branch of Public International Law. The rules making up this body of law are International Law, in that they emanate from sources on International Law, e.g. treaties, custom etc. hence they are subject to principles of interpretation and construction peculiarly proper to International Law. A principal feature of International Criminal Law concerns its two fold relationship with Public International Law, that is to say, natural subsidiary or support.

Most of the offences that International Criminal Law prescribes, and the individual perpetrator of which it seeks to punish are also regarded by International Law as particularly serious violations of International Law by States.

They are international delinquencies entailing the “aggravated responsibility” of the State on whose behalf the perpetrators may have acted. This holds true not only of Genocide, Crimes against Humanity, or Terrorism, but also for War Crimes.

Thus when one of these crimes is committed by an individual not acting in his private capacity, two forms of responsibility arise i.e. the criminal liability of the individual, falling under International Criminal Law, and the State responsibility regulated by international rules on the matter.

The second relationship between International Criminal Law and Public International Law is more complex. Two rather conflicting philosophies underlie each area of law. Substantive Criminal Law seeks to protect society from the most serious breaches of legal standards of behavior by punishing those individuals responsible irrespective of whether they are agents of the state or acting in a private capacity. However, the pervasive influence of human rights doctrines means that International Criminal Law is also concerned to safeguard the right of suspects or accused persons from arbitrary prosecution and punishment.

Public International Law seeks to reconcile as far as possible the conflicting interests of sovereign States, without, however neglecting the interest of individuals and Non-state entities. Modern International Law tries to achieve this by positioning three grand ideas-i.e. peace, human rights, and self-determination as overarching standards of conduct. However, it remains more focused upon regulating and facilitating peaceful international intercourse between States, than calling on States to account for breaches of law.

The inherent requirement underlying International Criminal Law may therefore collide with traditional features of Public International Law which still relies to a large extent on custom. Courts have been hitherto clothed with jurisdiction to deal with grave International Crimes, but they have been generally ad hoc. Instances that come to mind range Nuremburg after the Second World War, The UNCTR, UNCTY as well as the Special court on Sierra Leone. What was needed was a permanent court.

The question of creating an International Criminal Court had been considered within the UN since early 1950s. In 1986, in a Special Session concerning drug trafficking, the General Assembly took up the suggestion by Trinidad and Tobago to set up an International Court to deal with drug trafficking and requested the International Law Commission to “*address the question of establishing an International Criminal Court.*”

The International Law Commission, the ICC produced a comprehensive draft in 1993. In 1996 the General Assembly established a Preparatory Committee. In July 1998 the Preparatory Committee submitted a draft to the Diplomatic Conference in Rome. In both the Preparatory Committee and Rome three rough groupings emerged. These were:

1. The like minded States led by Canada, and Australia, which favoured a fairly strong court with broad and “automatic jurisdiction,” an independent prosecutor empowered to initiate proceedings and a sweeping definition of War Crimes committed in internal armed conflict. Ghana was in this group and that is how our long association with the ICC really began.
2. A second group comprised members of the P5 (except the UK), which aligned itself with the likeminded United States of America and France. The remaining P5 members, especially the US were opposed to “automatic jurisdiction” and to the prosecutor being granted the power to initiate proceedings. With the benefit of hindsight, it is fair to say that they were farsighted. But nobody then could have predicted the energy or the mercurial nature of our distinguished Chief Independent Prosecutor, Mr. Luis Moreno-Ocampo.

They were eager that the Security Council should have an extensive role by having the power to refer matters to the court and to prevent cases from being brought before the court. Consider now the situation of the AU *vis a vis* President Bashir and the Security Council. In addition, these States opposed giving the court jurisdiction over the Crime of Aggression. Aggression was finally defined, if I recall correctly at the Kampala Session.

3. Yet a third group emerged which embraced the NAM position, pressing for jurisdiction over the Crime of Aggression. Some of them e.g. Barbados, Jamaica, Dominica, and Trinidad and Tobago, pressed for the inclusion of drug trafficking, whereas India, Sri Lanka and Turkey supported the inclusions of terrorism.

Ghana signed the Rome Statute on 18 July 1998 when it was opened for signature and deposited the Instrument of Ratification in 20 December 1999. We have a Judge on the court. The bill to implement into local legislation was prepared about 10 years ago. I have been away from home and tried to obtain precise information, but to no avail. Nonetheless, our legal system and constitution implicitly accept the full jurisdiction of the ICC and we always cooperate fully, albeit quietly with the court, even though we may have some misgivings about the style and sometimes the judgement of Mr. Ocampo. But that will be for another day, and perhaps another place.

Judge Elizabeth Nahamya, Vice President, War Crimes Division (WCD) of the High Court of Uganda

Complementarity in Practice and ICC Implementing Legislation: Lessons from Uganda

In Catherine A. Marshall's article on 'Prevention and Complementarity in the ICC,' she stated that, *'complementarity presents a way by which the ICC can increase its potential, positive impact on both domestic and international criminal justice and in the long term, prevention. By proactively engaging with and assisting domestic legal institutions, the ICC will be able to strengthen the rule of law in nations suffering from violent conflicts and instability. In addition, she stated that, 'a society that has on the other hand strong legal institutions, and a strong sense of the rule of law may be less likely to come to the brink of war and conflict, which created an environment in which crimes such as Genocide are likely to be committed with impunity.'*

Uganda has had its share of wars and strengthening of the national courts in order to deal with perpetration of War crimes and Crimes against Humanity, is long overdue. From the beginning, the idea of complementarity was meant to balance the competing interests of a court with universal jurisdiction and a priority of state sovereignty.

International Crimes Division (formerly known as the War Crimes Division), had its genesis in the Northern Uganda conflict where the Kony rebellion occurred. This creation in 2008, therefore, fulfilled the ICC requirements both as a competent court under article 17 and Uganda's commitment to the actualization of the Juba Agreement on Accountability and Reconciliation of 29 June 2007. The Juba Agreement provided for the establishment of a special court for those who committed serious crimes and human rights violations as per clause 4 annexure 3 of the aforementioned agreement.

The law to be applied by the International Crimes Division (ICD) include: the ICC Act of 2010, Geneva Convention Act, Penal Code Act 120 and others discussed later. Other types of International Crimes are dealt with in addition to War Crimes.

The ICC Act was incorporated into Ugandan law by the Ugandan parliament on 25th of May 2010. Thus, the Rome Statute was incorporated into Ugandan law. Prior to the incorporation of the ICC Statute the principle of complementarity was discussed under the theme of 'Taking stock of the principle of complementarity.' Various issues emerged such as the need to strengthen capacities of States to implement their own obligations under article 17 of the Rome Statute in order to be able to prosecute and investigate crimes within the jurisdiction of the ICC.

The purpose of the Act was to give force of law in Uganda to the ICC Statute and to implement obligations on Uganda under the ICC Statute. Uganda became a signatory of the ICC Statute on 7th of March 1999, ratified the Rome Statute on 14th June 2002. Because it is a dualist nation, it cannot apply International Law directly hence the promulgation of the ICC Act. Nonetheless, Uganda is still grappling with Customary International Law due to its dualist nature.

The ICC Act raised some issues. There was no time to debate retroactivity, hence Article 28(7) of the Ugandan Constitution, which prohibits retroactivity was retained. Therefore no retroactivity is permitted in the Act.

One of the misnomers in the act ,the exclusion of jurisdiction of persons under the age of 18, was also dealt with. In Uganda, the age of criminal responsibility is 12 years. The Geneva Conventions do not preclude prosecutions of persons under 18 years

Yet another misnomer is Article 98(4), which grants the President immunity so he cannot appear before the court. The maximum sentence in the ICC Act is life imprisonment whereas the maximum sentence in Ugandan legislation is death penalty. There is therefore a conflict in the legislation. This list is not exhaustive

Operation of the ICD

Many aspects of the ICD are not in place despite its existence. This is because many argue that the ICD is just a division of the High Court like any other division thus not an international court hence no jumping of queues or priorities either budgetary or logistical.

However, the debate on whether it is a court or not overlooks the objectives and goals of the ICD. Although the ICD is a division, its function, form, laws and jurisdiction among others show that it is a domestic court applying both National and International Law. It is therefore ready to prosecute War Crimes, war criminals and perpetrators of Crimes against humanity.

The ICD faces procedural and evidential challenges because the ICD does not have its own rules of procedure and evidence that enable it to carry out its function. In order to fill the vacuum, the High Court has invoked the principle of complementarity and guided the ICD on the applicable law through a legal notice. According to such notice, the ICD applies the rules of procedure applicable in criminal trials in Uganda. Where no express provision is made the court will consider a procedure justifiable and appropriate in all the circumstances taking into consideration the Trial on Indictment Act, Adjudicature Act, and rights and views of the parties. Furthermore, subject to any law for the time being in force, the ICD may from time to time adopt practice directions for better management of the cases to ensure order and timely management of cases. ICD may therefore utilise national as well as international laws and cases. In practice, emphasis is on best practices and not on wholesale application of those laws.

There are no formal witness protection law, so each judge has discretion regarding witness protection. The solution is usually to balance the rights of the accused with those of the victim. Best practices are also used regarding witness protection. In addition, there is no victim participation in the ICD system. There are also issues regarding where the witness protection office should be.

Fátima da Camara e Silva, Member of Amnesty International's Working Group on International Justice

Civil Society Perspective

The Rome Statute contains two important principles: the Principle of Complementarity and the Principle of Cooperation. According to the Principle of Complementarity, in paragraph 10 of the preamble and articles 1 and 17 of the Rome Statute, jurisdiction of the Court will be exercised only when State parties are able and willing to prosecute a crime defined in the Rome Statute. State parties that have ratified the Rome Statute recognise that they have the primary responsibility to prosecute individuals responsible for Genocide, Crimes against Humanity and War Crimes. For State parties to fulfil these obligations, they have to enact and enforce effective national legislation providing that the crimes under the Rome Statute are also crimes under national law so as to ensure that states can fulfil that primary duty to investigate and prosecute.

Effective implementing legislation should include definitions of crimes including rape, trafficking of women and children, forced prostitution, sexual slavery, forced pregnancy and other forms of sexual violence. It should also include principles of criminal responsibility and offences, which are consistent with the strictest requirements of International Law. It should exclude immunity of officials from prosecution according to article 27 of the Rome Statute.

With regard to Principles of Criminal Responsibility with regard to civilian superiors in article 28(b) of the Rome Statute are not as strict as in Customary International Law or the conventional International Law such as protocol 1 of the Geneva Convention which holds civilian superiors to the same standards as military commanders. Amnesty International is

convinced of such an extent of criminal responsibility for both military commanders and civilian superiors. We also recommend that offences in national legislation for crimes under International law be consistent with Customary International Law.

Crimes under national law for persons suspected of crimes under International Law must be consistent with international trial standards such as articles 9, 14 and 15 of the International Covenant on Civil and Political Rights; articles 55 and 62 to 68 of the Rome Statute.

Amnesty International also recommends non-application of the death penalty. The Rome Statute does not include this penalty for crimes within the jurisdiction of the ICC in the list of penalties in article 77.

In addition to these complementarity obligations, State parties should cooperate fully with the Court in investigation and prosecution of crimes. As the ICC proceeds with its investigations and trials, it is becoming increasingly important that States enact effective legislation regarding cooperation. Cooperation is essential to ensure that the ICC can effectively investigate and prosecute crimes. To fulfil this cooperation obligation, States will have to make provisions facilitating and assisting in investigations by the ICC, assistance relating to victims and witnesses including providing them with the necessary protection, arrest and surrender of persons requested by the court, ensure effective reparations to victims and enforcement of judgements and sentences.

It is also important that State parties authorise the court to sit in the State and recognise its legal personality. According to Article 48 of the Rome Statute, the State party should fully respect the privileges the court, its personal consult, experts witnesses, and other persons whose presence is required including victims and witnesses.

Amnesty also suggests that national implementing legislation provides for the punishment of offences against administration of justice by the court. Article 71 of the Rome Statute provides that the Court has jurisdiction against the series of offences committed against its administration of justice. According to article 74, State parties are required to extend their criminal legislation penalising offences against prosecutions to the offences in Article 70 committed in their territory.

Finally, Amnesty International recommends that national implementing legislation provides for the enforcement of Court sentences in accordance with International Law standards,

The adoption of the Rome Statute is a landmark in International Law both in terms of the substantive law that the court will enforce and the procedures it will use. However, its impact is likely to be greatest at the national level as states correspond their substantive and procedural law to ensure that they can implement their obligations under the Rome Statute.

Ratification and implementation of the Rome Statute presents an opportunity to modernise criminal and procedure.

It is essential that civil society participates at every stage of the process to ensure that the concerns of the organisations including women's, children's and victim's groups are included in enacting legislation.

One of the challenges regarding implementing legislation is lack of technical expertise and need of assistance in this field. Civil society organisations can help initiate the process by identifying gaps or areas that need to be worked out. Civil society organisations can also draft and implement legislation identifying areas that need to be improved, for instance if crimes are not properly defined.

Civil society organisations can also produce materials such as manuals, assisting with translations of materials available etc.

It is important to identify who is in charge of the implementation process. It is also important to understand the adoption process in parliament.

INTERNATIONAL JUSTICE AND CONFLICT PREVENTION IN AFRICA

Chair: Dr. Edward Kwakwa, *Member of AFLA Governing Council, Legal Counsel, World Intellectual Property Organization*

Rodger Chongwe, Former Minister of Justice of Zambia, Africa Representative, International legal Assistance Consortium (ILAC)

The Interface between Criminal Justice and Conflict Prevention in Africa

The Post-world war II Nuremberg and Tokyo tribunals to prosecute Nazi and Japanese leaders for Crimes against Peace, War Crimes and Crimes against Humanity established precedent for other *ad hoc* international courts and tribunals, such as the International Criminal Tribunals for the former Yugoslavia and Rwanda.

In addition, the United Nations authorised the creation of a Special Court for Sierra Leone to prosecute those with the greatest responsibility for serious violations of International Humanitarian Law and domestic law committed in the territory of Sierra Leone since November 30, 1996.

These courts and tribunals are distinct from the International Criminal Court. Established by the United Nations Security Council to address allegations of Crimes against Humanity in various countries, these tribunals were case specific, limited in jurisdiction and temporary. The International Criminal Court was established by multilateral treaty and is a permanent international tribunal. It is not a United Nations body.

The international criminal court

On the 17th July 1998 representatives from 120 nations meeting in Rome, Italy adopted a Statute creating the International Criminal Court.

The Rome Statute, as it became known received its requisite ratifications of 60 members in record time (4 years from the date of its adoption) on the 11th April 2002 and its jurisdiction came into effect on the 1st July 2002.

The Statute's preamble emphasises that the Court being established, shall be complementary to national criminal courts. This was to silence those who might raise objection to the creation of a court which would take away the criminal jurisdiction of their municipal courts. After all, criminal justice jurisdiction has always been the preserve of municipal courts.

But now, for the first time, a criminal court with Universal International Jurisdiction was being created. For human rights activists the creation of a court to punish human rights violations was a high point that they had fought for. These activists, were led by Amnesty International and Human Rights Watch at the Rome conference.

Salient articles of the court

Part 3 of the Rome Statute adopts basic criminal liability principles to be found in most of the advanced legal systems. The prosecution must prove that the criminal acts are committed with *mens rea* (that is intentionally, and with knowledge of the likely consequences). Defendants are liable for crimes committed jointly or with a common purpose, for acts of assistance and for ordering, soliciting and inducing crimes and for attempting to commit a crime by taking a substantial step towards its completion.

The Statute in Article 27 applies to Heads of State, elected representatives and all others who have acted in an official capacity. The criminal responsibility provisions (Article 25) spell out that guilt of Genocide includes the public incitement of others to commit it.

Jurisdiction is confined to natural persons - men and women, to the exclusion of Governments or Corporations or Political parties. [6] The question here is why should multinational chemical corporations not be prosecuted (as well as their Directors) for supplying poison gas in the knowledge that it will be used for a Crime against Humanity? Why is it that a company if convicted should not be ordered to pay reparations to survivors and victims?

Persons under the age 18 years are excluded from the jurisdiction of the court.[7] This provision has been questioned as some appalling atrocities have been committed by "boy soldiers" whose age it is argued should mitigate the penalty rather than excuse their crime. However, the fact that these children are often victims themselves whose childhoods have been squandered by adults in pursuit of their own ends needs to be taken into account. The damage done to the developing human brains of children by brutality against themselves and against others in their presence has never been dealt with adequately in so far as they have inflicted suffering on others.

Article 29 provides that the Court's jurisdiction must not be affected by any time bar of Statute of Limitations. This will ensure that complementarity cannot be invoked on behalf of persons suspected of crimes which fall outside time limits for prosecutions involved and imposed by national systems. Crimes against humanity are of such seriousness that they should be amenable to prosecution for as long as their perpetrators remain alive.

However many national legal systems do provide their courts with power to abort long delayed prosecutions, particularly where the defendant has not been responsible for the delay by evading capture. The International Criminal Court has no equivalent power to rule a case inadmissible if there has been unconscionable and prejudicial delay by the prosecuting authorities in preparing it. It is likely that the court will decide that it has inherent jurisdiction to dismiss the case in such circumstances.

Article 64(2) mandates the Court to ensure that a trial is fair and expeditious and is conducted with full respect for the rights of the accused, one of which is under Article 67 (c) to be tried without undue delay. Where the delay is both unjustified and has arisen from prosecutorial incompetence, a trial division will be tempted to throw out the case.

Commencement of prosecution

How the power to investigate a committed crime is triggered?

The direct mechanism for triggering the power to investigate and try International Crimes is provided under Article 13 (b), whereby a 'situation' is referred to the Prosecutor by the Security Council acting pursuant to Chapter VII of the UN Charter.

This was the method under which the International Criminal Tribunal for Yugoslavia and the International Criminal Tribunal for Rwanda were established, by resolutions which asserted that the 'situations' in former Yugoslavia and in Rwanda constituted a threat to world peace.

As of October 2011, 119 States Parties have ratified and acceded to the Statute creating the International Criminal Court. 33 of these are African States becoming the largest number in comparison to any other groupings. The Statute will enter into force for its 117th State Party, the Philippines, on the 1st November 2011, its 118th, the Maldives on the 1st December 2011 and its 119th Cape Verde, on the 1st January 2012. This indicates the expansion of membership of the International Criminal Court and not its reduction.

Qualifications for status of Complementarity

The Rome Statute obliges State Parties to cooperate with the Court in the investigation and prosecution of crimes, including the arrest and surrender of suspects. Part 9 of the Statute requires all States Parties to "ensure that there are procedures available under their national law for all of the forms of cooperation which are specified under this Part".

Under the Rome Statute's principle, the Court only has jurisdiction over cases where the relevant State does not want to investigate and, if appropriate, prosecute the case itself.

Therefore many State Parties have implemented national legislation to provide for the investigation and prosecution of crimes that fall under the jurisdiction of the Court.

In fact as of April 2006, the following states had enacted or drafted implementing legislation:

Countries	Complementarity legislation	Co-operation legislation
Australia, Belgium, Bosnia and Herzegovina, Bulgaria, Canada, Croatia, Denmark, Estonia, Finland, Georgia, Germany, Iceland, Liechtenstein, Lithuania, Malta, Netherlands, New Zealand, Slovakia, South Africa, Spain, Trinidad and Tobago, United Kingdom	Enacted	Enacted
Colombia, Congo, Serbia, Montenegro	Enacted	Draft
Burundi, Costa Rica, Mali, Niger, Portugal	Enacted	None
France, Norway, Peru, Poland, Slovenia, Sweden, Switzerland	Draft	Enacted
Austria, Japan, Latvia, Romania	None	Enacted
Argentina, Benin, Bolivia, Botswana, Brazil, Central African Republic, Democratic Republic of Congo, Dominica, Gabon, Ghana, Greece, Ireland, Italy, Kenya, Lesotho, Luxembourg, Nigeria, Samoa, Senegal, Uganda, Uruguay, Zambia	Draft	Draft
Dominican Republic, Ecuador, Honduras, Hungary, Jordan, Panama, Venezuela	Draft	None
Mexico	None	Draft
Afghanistan, Albania, Andorra, Antigua and Barbuda, Barbados, Belize, Burkina Faso, Cambodia, Cyprus, Djibouti, Fiji, Gambia, Guinea, Guyana, Liberia, Malawi, Marshall Islands, Mauritius, Mongolia, Namibia, Nauru, Paraguay, Saint Vincent and the Grenadines, San Marino, Sierra Leone, The Former Yugoslav Republic of Macedonia, Tajikistan, Timor-Leste, United Republic of Tanzania	None	None

Article 16 of the court

It is important to note Article 16 which provides that;

“No investigation or prosecution may be commenced..... for a period of twelve months after the Security Council, in a resolution adopted under Chapter VII of the UN Charter, has requested the Court to that effect, that request may be renewed by the Council under the same conditions.”

Here the Security Council Resolution is mandatory – it stops an investigation or trial dead in its tracks. The order will operate initially for one year, but may be renewed on an annual basis until the evidence is dissipated, the crime forgotten or the Prosecutor loses interest. The effect of Article 16 is to give the Security Council ultimate control over the Court, through its power to order a deferral of any particular investigation or prosecution. In other words, the Court operates either by a reference from the Council or (in the event of a reference from a State party or on investigation *proprio motu*) subject to the Council’s power to freeze any proceedings it does not like by passing an Article 16 resolution.

The accused in the Kenya indictment had sought the Security Council resolution under Article 16 to wit; for the Security Council to halt the prosecution of the accused Kenyans for one year under Chapter VII of the UN Charter. This request was refused by the Security Council.

The African Union has a bone to pick with the ICC

Kenya. Controversy within the African Union has erupted over the International Criminal Court’s attempts to prosecute senior Kenyan officials in connection with that country’s post election violence of 2007-2008. Although Kenya is State party to the Court and initially supported the International Criminal Court engagement, some fear the prosecutions could be destabilising. The Kenyan Government had initially agreed with the Court that it would set up its own tribunal to try those involved in the post election violence. However, the Government of Kenya failed to enact legislation to provide for the trial by a local tribunal for that purpose leaving the Prosecutor with no option but to issue summonses for those accused to face trial before the Court at The Hague.

Omaral-Bashir. One of the individuals sought by the International Criminal Court is Sudan’s President Omar al-Bashir, who is accused of War crimes, Crimes against Humanity, and Genocide in Darfur. This prosecution is the first attempt by the Court to pursue a sitting president (Head of State). The case has drawn praise from advocates but inspired a backlash among leaders in African States, which were previously supportive of the Court. Like Libya, Sudan is not a State party to the International Criminal Court and jurisdiction was granted by a United Nations Security Council resolution and Article 27 of the Rome Statute.. Under Article 27 of the Rome Statute the President of the Sudan enjoys no immunity from prosecution.

Libya. On the 15th February 2011 the United Nations Security Council resolution 1970 referred the ‘situation’ in Libya to the International Criminal Court. This action provides the International Criminal Court with jurisdiction over War Crimes, Crimes against Humanity and Genocide occurring in Libya since that date, even though Libya is not a member of the International Criminal Court.

On the 3rd March 2011 the International Criminal Court Prosecutor announced he was initiating a formal investigation. The Prosecutor indicated that he would focus on the role of the Government and security forces in the ongoing violence, but warned that members of the armed opposition group could also be held criminally liable for abuse.

An African Union backlash against the International Criminal Court has continued, although African countries make up a sizable block of State parties to the Court. At an AU summit in January 2011, the A.U. Assembly endorsed Kenya’s request for a deferral of its prosecution there (which could only be enacted through action by ICC Judges or at the United Nations Security Council). The AU Commission Chairman accused the International Criminal Court prosecutor of relying on “double standards” with regard to Africa.

The above examples could however be regarded as mere aberrations because if one looks at reports of earlier meetings by African Heads of States held in Addis Ababa on the 8th to the 9th June 2009 a different picture is presented: [11]

African States parties to the Rome Statute met in Addis Ababa (Ethiopia) on 8-9 June 2009, to discuss the work of the ICC with regard to Africa and the ICC’s recent warrant issued against Sudanese President Omar Al-Bashir. While there were concerns that the meeting would result in the withdrawal of African States from the ICC, African State parties to the ICC instead reaffirmed the commitment to the Rome Statute and to fight impunity. It was reported however that countries at the meeting reaffirmed the importance of the UNSC applying Article 16 to postpone the case against Al-Bashir in order to avoid compromising peace efforts in Darfur

Are African States ready to abandon the ICC?

With the 33 African ratifications of the Rome Statute since the Statute was opened for ratification, there is no evidence that any African member State to the treaty has withdrawn its membership.

With regard to the death penalty, there are very real differences when it comes to the question of the abolition of capital punishment with a number of the African States preferring the death penalty. There is however a significant movement towards abolition. For example; the following countries have either abolished the death penalty or the death sentence has never been imposed since the country gained independence; Rwanda in 2007, South Africa in 1995, Sahrawi Arab Democratic Republic, Sao Tome and Principe, Senegal, Seychelles, Namibia,

Mozambique, Niger, Mauritius, Mali, Madagascar, Lesotho, Guinea Bissau, Eritrea, Djibouti, Cote d'Ivoire, Congo, Cape Verde, Angola, Burundi, Togo and Gabon.

Article 77 provides that for the worst offences a term of life imprisonment which means 'life' is appropriate. In other cases, sentences may have a length of up to thirty years, and sentences imposed consecutively for multiple crimes may not exceed this maximum.

Convicts may additionally be fined; and have property or assets which represent profits from their crimes forfeited. Article 109 requires State parties to cooperate in freezing and seizing assets within their jurisdiction, so whether these financial penalties have any purpose will very much depend on whether countries which accept in their banks the 'dirty money' become parties to the treaty.

A great defect in the Rome Statute, which reflects a deficiency in International law, is the exclusion of any jurisdiction over corporations, so only the assets of individuals suspected may be attached.

Concluding remarks

One of the biggest problems confronted by the use of the court in Africa is the fact that even those national leaders who are to all intents and purposes not serious and/or intentional violators of the rights of their people, appear to feel that they need to defend those who clearly are. An examination of this excessive collegiality could be worthwhile as issues such as desire for regional stability and economic considerations probably play a large part. Plain prejudice in favour of power over powerlessness may also be involved. In addition at this stage leaders in other regional countries face no little or voter backlash when they support violators of rights in neighbouring States even though in many cases ethnicity flows between nations in much of Africa. This is particularly possible where media is far from disinterested or may be State controlled meaning it can take a long time for truth about excesses to seep throughout regions. This any way is against the backdrop of too many countries having flawed electoral processes including unfair, un-free and or rigged elections that leave them without check from their purported electorates.

The Preamble to the Rome Statute throws a lifeline to those leaders of this world that are inclined to violate the human rights of their people even in contempt of the provisions of the Statute. The following is what I refer to:

“Emphasizing in this connection that nothing in this Statute shall be taken as authorising any State Party to intervene in an armed conflict or *in the internal affairs of any State*.

The underlining is my own. Some of us would recall that the Charter creating the Organisation of African Unity in 1963 had a similar wording which was central to the Charter. We also recall that this gave a lifeline to our leaders of the time to do whatever to their own people including gross violation of their rights and there was nothing member

States of the Organisation of African Unity could do to protect the people in those countries against their leaders' tyrannical behaviour.

Leaders like President Idi Amin Dada of Uganda, the excesses of President Bokassa of the Central African Republic who in the style of Napoleon Bonaparte, crowned himself Emperor and the atrocities of President Marcias Nguema committed against his own people under the umbrage of internal affairs of the State went unabated. When President Nyerere of Tanzania intervened to put a stop to the murderous activities of Idi Amin, Nyerere was accused of interfering in the internal affairs of a neighbouring State party to the OAU Charter.

Is this the path that the authors of the Rome Statute seriously wanted us to follow? It is unfortunate but it explains the outrage with which the African Union greeted the European intervention in Libya aimed at serving the loss of innocent lives of the civilians there.

Tiseke Kasambala, Senior Researcher and Advocate, Human Rights Watch,

Positive Complementarity and an African Criminal Court: Human Rights Perspectives

The AU has expressed interest in expanding the Court in order to deal with crimes such as Genocide, War Crimes and Crimes against Humanity.

Some support the establishment of an African Criminal Court and the arguments in support of it consist of the following:

advancing the enforcement of human rights on the continent,

aiding and strengthening that enforcement,

reducing the burden of the ICC and helping ease Governments unease about the perceived targeting at the ICC,

enabling the notion of African solutions for African problems

The above arguments are pretty valid. Increasing avenues for accountability on the continent is a positive thing in principle. However, many civil society organisations particularly on the continent have some concerns regarding the proposed expansion of the court. Given the range of challenges that the African Court in its current existence already faces, expansion of jurisdiction will cause additional challenges.

With regard to positive complementarity, African Court expansion does not seem oriented to play a major role in this regard. This is because African expansion is focused on enhancing regional capacity and not national capacity.

Positive complementarity by its definition refers to the strengthening of national courts to prosecute serious crimes. This could be an important role for the African Union to consider in terms of how better the AU can ensure that national courts are able and willing to prosecute the worst crimes.

Given that it is generally agreed that national courts are the preferred option, they should be used whenever possible especially due to the fact that they have better resonance locally. It is an area that merits greater attention in Africa.

In terms of the expansion of the African Court to prosecute serious crimes, there are a number of questions and concerns from a human rights perspective. The new court, whose protocol can only enter into force once 15 States ratify it, comprises two chambers, one of which deals with human rights matters. However, currently less than 5 States have ratified the protocol. In addition, States should submit declarations to enable individuals and organisations to submit claims directly to the African Court. Only a handful of States have made such submissions.

It is also important to note the notable lack of ratification of most AU human rights instruments amongst African States. This additionally hinders the universality of the Court and its rulings. This can be coupled with the lack of enforcement mechanisms amongst key African institutions such as the African Commission on Human and Peoples' Rights and the African Court of Human and Peoples' Rights.

There are also questions about whether the African Court having a criminal jurisdiction is the best fit. It is currently limited to cases that relate to the responsibility of States *vis-a-vis* human rights violations and to the interpretation of treaties.

Expanding the court's jurisdiction to prosecutions of individuals of serious crimes would put enormous challenges on the court to address what is, a large and very distinct area. For instance, prosecution of individuals would require criminal investigations, which often span many different locations and relate to multiple actors and incidents. They also require expertise in examining witnesses and victims with due regard to their protection while ensuring the rights of the accused. In addition they require resources, infrastructure and human resource capacity and finances.

Most legal institutions of the AU have been plagued by a lack of resources. It remains unclear how the AU would come up with the relevant resources for a major new area to ensure an effective and efficient criminal court.

There is also the question of how the criminal court would function within the AU with the African Court and its human rights system. The protocol to the African Charter on Human and Peoples' Rights establishing the African Court of Human and Peoples' Rights states that, the main function of the Court is to complement the protective mandate of the African Commission of Human and Peoples' Rights. It further provides that the rules of procedure of the Court shall lay down the detailed conditions under which the Court shall consider cases brought before it bearing in mind the complementarity of the commission on the Court.

There is still very little clarity and understanding of what it means for the relationship between the African Court and other existing mechanisms within the African Commission and other AU judicial and human rights organs.

Relationship between the African Court and the ICC

There is more uncertainty as to how a proposed African criminal court would function in relation to the ICC and other criminal justice bodies at both national and regional levels.

The Rome Statute's notion of complementarity is premised on the ICC only intervening when national courts are unable or unwilling to prosecute. The Statute does not refer to the role of the ICC *vis-a-vis* regional courts. On the other hand, the spirit behind the ICC and the notion of complementarity is that the ICC should function as a court of last resort. Thus one could imagine an interpretation by the ICC judges that cases which are being fairly effectively pursued by regional criminal courts would not be admissible by the ICC as is the case by Statute where there are fair effective national prosecutions. This would be a matter for the ICC judges to decide and not other entities.

If the AU is serious about promoting accountability through the African Court, it should be seeking to structure the expansion in a way that promotes more accountability not less. Partly, this can be done through clarity around an expanded African Court and the ICC, which recognises the ICC's ultimate role in determining which cases come under its authority. It can also be done through provisions of expansion that ensure and explain that the Court will not frustrate the ICC's role as official Court of last resort where accountability for serious crimes is not otherwise possible.

This is consistent with the AU's rejection of impunity in Article 4 of its Constitutive Act and ensures that proposed criminal jurisdiction does not diminish African States' commitment to the ICC.

In addition to the African Court, Africa already has courts at sub-regional level although not with criminal jurisdiction. These include the Southern African Development Community, ECOWAS and the East African Community Court of Justice. While some of these courts have contributed to the protection of human rights and the strengthening of the rule of law, many of them have been plagued by significant problems.

African States on many occasions have sought to undermine the effectiveness of the above courts when Judges have made independent judgements. This lack of willingness to strengthen the courts or enforce decisions raises very worrying questions about the efficacy of a proposed criminal jurisdiction.

Whilst in principle a criminal court for Africa is an attractive prospect for enhancement of accountability on the continent, it can only function if the political commitment to expand the African court's jurisdiction is matched by adherence to international standards and practices regarding prosecutions of serious crimes in violation of International Law including but not limited to judiciary and prosecutorial independence, right of the accused and victim and witness protection. This commitment must be matched by other resources to enable practices in accordance with international standards and best practices.

There should be lessons learnt from Africa's existing regional courts and human rights institutions. These should be applied to the criminal jurisdiction to the African Court.

With regard to the ICC, if the African Court is indeed expanded to cover serious crimes, the African Court's revised Statute should provide for provisions that respect the ICC's role especially given that majority of the African States are part of the ICC.

Finally, there is a need for wide consultation with civil society including Bar associations, victims groups, officials of the existing Court and African Commission of Human and Peoples' Rights. These discussions should be held with regard to the expansion of the Court's jurisdiction and its relationship with the ICC. These groups have raised concern about the Court's expansion as a way to frustrate the ICC's work and undermine as opposed to promote accountability. The input should be obtained to establish the credibility of an expanded African Court under a successful relationship with the ICC.

SESSION II

PEACE AND INTERNATIONAL CRIMINAL JUSTICE IN AFRICA: MAKING THE LINK

Chair: Dr. Teodosio Uate, *Head of Legal Counsel, SADC Secretariat*

Tom Nyanduga, *Former Member of the African Commission on Human and Peoples' Rights*

Perspectives from the African Human Rights System

Throughout the fifty years of Africa's post independent period, since Sudan (1956) and Ghana (1957) became independent States, Africa has witnessed a confluence of armed conflict, liberation wars, political crises, dictatorships, Genocide, grave violations of human and peoples' rights, and also peace-making and peace building efforts with varying degree of success. While it can be argued that peace building efforts have consolidated in the past two decades following democratic reforms of the 1990s, it also true that recurrent conflicts, political crises and violation of human rights have remained a feature of life in many African countries.

One cannot claim that Africa ever experienced peace at least a single day throughout the 50 years. The Sudan has experienced the longest conflict in African history. In spite of the peace agreement, the CPA there is still conflict in Darfur, Abyei and South Kordofan. The list of countries which experienced conflicts during this period need not be repeated here, but let me mention a few recent conflicts in Somalia, which has lived a 20 year period of anarchy, the recent Cote d'Ivoire post election civil war, the Arab spring in Tunisia, Egypt and Libya.

These conflicts have in the past posed, and continue to pose grave challenges to the African Human Rights System relative to the need to establish sustainable peace and democracy, and hence institutionalise accountability for grave violations of human and peoples' rights in Africa. The absence of both peace and democracy account for the prevalence of grave

violations in many conflict situations. The adoption of regional and International Human Rights instruments and establishment of political, judicial or quasi judicial institutions at the regional, sub-regional and national level have been part of a strategy for the African search for permanent peace and democracy across the four corners of the continent, which appears elusive.

As a result of failure to institutionalise democratic governance, a need has arisen to look at extra continental approaches to at least establish accountability on the continent. It is in that context that such bodies and organs such as the United Nations Security Council and the International Criminal Court have taken a leading role in securing peace and accountability in Africa, thus laid bare the much maligned principle of Africa solution to African problems.

Whither the African Solution to African problems principle.

The ineffectiveness of the OAU during its time, through inaction to address conflicts and human rights violations lead the OAU to transform into the AU. Notwithstanding its failures, the OAU had created a human rights system centred around the African Charter on Human and Peoples Rights which entered into force in 1986. Thereafter the African Commission on Human and Peoples' Rights was established to promote and protect human rights on the continent. The efficacy of the African Commission to carry out its mandate depends on two things, namely its independence, and the support given to it by the member States. In both respect there have been limitations, some inherent within the African Charter, others being the lack of capacity of the Commission itself, as well as the role of member States to adhere to their obligations under the African Charter.

During the last 30 years of its existence, the African Commission has experienced challenges, such as, the inadequacy in human and material resources, the non enforceability of its decisions and recommendations, and failure by some member States to implement those recommendations. To remedy some of these challenges the OAU adopted the Protocol to the African Charter establishing the African Court on Human and Peoples' Rights to complement the protective mandate of the African Commission, in particular through adopting binding decision on cases through the interpretation and applications of the African Charter and any other human rights instruments to which a member State is a party.

At the political level the transformation of the OAU into the AU brought new institutions and principles, in what is known as the new African Human Rights architecture. Key in this transformation was the abandonment of passive indifference to human rights violations and adoption of a new approach of engagement to address human rights violations. It is therefore not coincidental, that the creation of the AU in 2001 in Durban, South Africa, was inspired by various political imperatives and realities on the continent, such as the post Berlin wall, democratic reforms in many countries across Africa, the emergency of a democratic post apartheid South Africa, the shame of inaction by the international community and Africa during the Rwanda Genocide, as well the philosophies such as the African Renaissance. It also around this time that we witness Africa adopting a progressive position in regional and international fora.

It is within this context that Africa entered the Rome Statute negotiations and subsequent ratifications. Africa is the biggest bloc of States in the ICC framework.

The Constitutive Act of the African Union introduced new concepts, through its fundamental objectives and principles, as well as new institutions such as the Peace and Security Council. While the OAU had predicated its basic philosophy on the territorial integrity and non interference in internal affairs principle, the AU philosophy is centred on the collective intervention based on Assembly decision principle, when it concludes that a situation of grave and massive violation of human and peoples' rights is occurring in a member State.

In the judicial arena, the AU decided to merge the African Court on Human and Peoples' Rights with the Court of Justice of the African Union, into one, The African Court of Justice and Human Rights. The merger Protocol establishing the African Court on Human and Peoples' Rights is yet to come into force, the prospect of extending the jurisdiction of the Court to cover International Crimes.

The Link between Peace and Criminal Justice in Africa

The African Human Rights system is a key feature for the promotion of peace and democracy, which are key components for ensuring respect for human rights and accountability in Africa. It is the absence of these four principles, peace, democracy, respect for human rights and accountability, among others, i.e mismanagement of national resources, etc; that accounts for the prevalence of International Crimes in Africa.

The African Human rights system through the African Charter had envisaged a process of accountability, however modest in respect to massive and grave violations of human and peoples' rights. Besides the challenges mentioned earlier, Article 58 of the African Charter requires the African Commission once it determines the existence of series or massive violations of human and peoples' rights, to draw the attention of the Assembly which may request the Commission to do a study thereof and present a report and recommendations. The Commission may also, in an emergency inform the Chairman of the Assembly who may also request an in depth study. In the past the Commission has through that provision conducted investigations in Zimbabwe, Cote d' Ivoire and the Darfur, and presented the requisite recommendations to the Assembly for their adoption and implementation.

While exercising its mandate under the Communication procedure, the African Commission has entertained communications addressing peace, security, and grave and massive violations of human rights. The African Charter, however, it must be said, does not cover the International Crimes of Genocide, War Crimes and Crimes against Humanity. Nor does it provide a mechanism for punishing perpetrators of International Crimes. It merely addresses violations of fundamental rights and freedoms enshrined therein.

The African Commission has however been confronted with situations of massive violations of the magnitude of International Crimes. In the *Communication 227/99, The Democratic*

*Republic of the Congo vs Burundi, Rwanda and Uganda,*³ the Democratic Republic of Congo claimed, among other things, that the armed aggression perpetrated by Burundi, Rwanda and Uganda, violated International Law in particular the UN Charter, the OAU Charter the African Charter on Human and Peoples' Rights, the International Covenant on Civil and Political Rights, the Geneva Conventions of 12 August 1949 and of the Additional Protocol on the Protection of Victims of International Armed Conflicts (Protocol I) of 8 June 1977."

The DRC thus requested the Commission *inter alia* to:

"a. Declare that [t]he violations of the human rights of the civilian population of the eastern provinces of the Democratic Republic of Congo by Rwanda, Uganda and Burundi are in contravention of the relevant provisions of the African Charter on Human and Peoples' Rights cited above; and

b. Examine the communication diligently, especially in the light of Article 58 (1) & (3) of the Charter with a view to producing a detailed, objective and impartial report on the grave and massive violations of human rights committed in the war-affected eastern provinces and to submit it to the Assembly of Heads of State and Government of the Organisation of African Unity."

.....
"The Democratic Republic of Congo also requested the Commission to:

f. Indicate the appropriate measures to punish the authors of the War Crimes or Crimes against Humanity, as the case may be, and the creation of an ad hoc tribunal to try the crimes committed against the Democratic Republic of Congo. The ad hoc tribunal may be created in collaboration with the United Nations"(emphasis is added).

In its decision the African Commission while invoking Article 60 and 61 of the African Charter to draw inspiration from international instruments, stated the following in that regard;

"78.the Commission holds that the Four Geneva Conventions and the two Additional Protocols covering armed conflicts, fall on all fours with the category of special international conventions, laying down rules recognised by Member States of the Organisation of African Unity and also constitute part of the general principles recognised by African States, and to take same into consideration in the determination of this case.

79. The Commission finds the killings, massacres, rapes, mutilations and other grave human rights abuses committed while the Respondent States' armed forces were still in effective occupation of the eastern provinces of the Complainant State reprehensible and also inconsistent with their obligations under Part III of the Geneva Convention Relative to the

³ http://www.achpr.org/english/Decison_Communication/Uganda/Comm.227-99.pdf

Protection of Civilian Persons in Time of War of 1949 and Protocol 1 of the Geneva Convention.

89. Part III of the Geneva Convention Relative to the Protection of Civilian Persons in Time of War 1949, particularly in Article 27 provides for the humane treatment of protected persons at all times and for protection against all acts of violence or threats and against insults and public curiosity. Further, it provides for the protection of women against any attack on their honour, in particular against rape, enforced prostitution, or any form of indecent assault. Article 4 of

The Convention defines a protected person as “*those who, at a given moment and in any manner whatsoever, find themselves, in case of a conflict or occupation, in the hands of a Party to the conflict or Occupying Power of which they are not nationals.*”

In terms of the remedy and recommendations made, cognisant of its limitation regarding grave crimes, African Commission ended up recommending for payment of compensation by the aggressors. At the time of the decision the armed forces of the three States had already withdrawn as a result of peace efforts deployed in the context of the Great Lakes Initiative. While peace had been achieved, criminal justice had not. The consequences were a further conflict involving insurgents and armed groups that continued to fight proxy wars. The rape of women and use of child soldiers among other war crimes and Crimes against Humanity resulted into the indictment by the International Criminal Court of a number of Congolese Warlords such as Thomas Lubanga Dyilo, Germain Katanga, and Mathiue Ngudjolo Chui.⁴

Whereas the African Commission was not able due to its limited mandate to offer remedy to the victims in the DRC, it is my conviction that the trials at the ICC will do. Indeed as presently constituted, the African Court on Human and Peoples Rights cannot address these crimes, since its mandate is purely aimed at complementing the Africa Commission in respect of violation to the African Charter and other regional and international human rights instruments, and not international crimes.

As and when the African Court is conferred with jurisdiction to entertain International Crimes of my concern, my views, which have been expressed previously in other fora⁵ are as follows;

“...While the conferment of international criminal jurisdiction to the African Court is feasible, and is a welcome development in the long term, it is in my view constrained in the short term for a number of reasons, the main one being the apparent lack of political will required to make such institutions of accountability effective. The African Union expressed

⁴ <http://www.icc-cpi.int/Menus/ICC/Situations+and+Cases/Situations/Situation+ICC+0104/>

⁵ See paper presented to the CONSULTATIVE CONFERENCE ON INTERNATIONAL CRIMINAL JUSTICE: SESSION 5: REGIONAL COURTS AND COMMISSIONS; 9 -11 SEPTEMBER 2009, at UN Headquarters New York.: Reflections and Perspectives of the African Commission on Human and Peoples’ Rights, By Hon. Commissioner Bahame Tom Nyanduga, Acting Chairperson, African Commission on Human and Peoples’ Rights, pages 4 to 7.

concern about the ICC indictment of President Bashir, while underscoring its commitment to fight impunity and condemnation of violations of human rights in Darfur being empowered to try International Crimes such as Genocide, Crimes against Humanity, and War Crimes and report thereon to the Assembly in 2010.”

It would appear that very few African States, if any, would be prepared to engage in “throwing stones from a glass house.” A Swahili proverb goes, “*Which mouse will tie the bell around the cat’s neck!!*” Which African State would be prepared to support the indictment of an African leader, in an African Court while similar situations might occur in its own backyard, any time in future, due to the fragility of political systems on the continent, and the trend towards suppression of dissent? Further to that, it is unlikely that an African State will enforce the arrest warrant against a sitting Head of State, for political or diplomatic reasons.

Perhaps the only possibility is a Charles Taylor scenario, of indicting an ex leader and trying him or her outside the continent. The trial of Charles Taylor had to be moved to The Hague instead of Freetown, due to security concerns in the two neighbouring countries. The trial of Hissene Habre remains a hostage of lack of resources, notwithstanding the waiting by Chadian victims for justice, in spite of a decision by the African Union that Senegal prosecutes him instead of extraditing him to Belgium.

Resource constraints affecting regional human rights organs, is a major impediment, which is likely to hamper the viability and operations of the African Court exercising international Criminal Jurisdiction. The sophisticated infrastructure and procedures required for and by such a court, such as investigators, holding detention facilities, prosecution and defence teams, witness protection programmes, which are not part of the African Court as currently established. The importance of the political will necessary to ensure that the court effectively exercises International Criminal Jurisdiction, cannot be over emphasized. This is a prerequisite for such a decision to be implemented. Anything less than that would be tantamount to a masquerade of International Criminal Jurisdiction.

African states’ commitment to fight impunity must be seen to be a reality and not merely rhetoric. In order for the extension of International Criminal Jurisdiction to succeed the prevalence of a culture disrespecting human rights, intolerance and bad governance must cease. Democratic institutions must be respected, elections and political succession must be conducted transparently and democratically, economic, social and cultural rights must be realised. The extension of International Criminal Jurisdiction to the African Court must be a genuine framework for addressing impunity, fostering political accountability, and providing a different layer of a regional complement to the international criminal justice system. It should not be a ruse for shielding perpetrators of grave crimes against International Criminal Justice.”

In February 2009, the AU Assembly adopted, **Decision on the Hissene Habre case, ref Assembly/AU/Dec. 240(XII)** which inter alia, “[c]alls on all Member States of the African Union, the European Union and partner countries and institutions to make their contributions to the budget of the case by paying these contributions directly to the African Union Commission.”

To date the prosecution of Hissene Habre remains a judicial quagmire because Senegal cannot try him due to lack of resources, and the AU and EU have not come up with an arrangement for such resources to be made available for the trial to commence. At some point there was talk of Senegal extraditing Hissene Habre back to Chad. I shudder to consider the prospect of an African Court conferred with International Criminal Jurisdiction having to be operated by funds contributed by the same countries which are accused of singling out African countries selectively for ICC prosecutions.

Role of Civil Society

Civil society constitutes a significant constituency in the African Human Rights system. They are now part of the AU political organs, and they have over the years been key players in strengthening the African Commission protection framework through filing communications and the Protocol establishing the African Human Rights Court has recognised this fact. NGOs can bring cases to the Court. Civil society has continued to play a significant role in the advocacy for International Criminal Justice in Africa. African civil society took an active part during the negotiations and ratification process of the Rome Statute. Our very own AFLA is very much engaged with the ICC in The Hague to ensure that the ICC is an effective tool for ensuring accountability by those who violate the Rome Statute.

Civil society has been at the forefront of advocacy against visits undertaken by President Bashir to Rome Statute Member States. President Bashir went to Kenya to witness the adoption of the New Constitution in August 2010, and Malawi barely a week ago to attend a COMESA Summit amidst protests by civil society in those countries. The civil society did not keep quiet towards their Governments' complicity to welcome him. We were told that he was not welcome in South Africa because of efforts and threats by civil society. The same applied when he intended to go to Uganda recently.

Conclusions: Which way Africa

At stake, are choices which Africa has to make, whether it will support International Justice and the concerns of victims, or the political and diplomatic expedience. The selectivity arguments branded out by African leaders and the AU is not consonant with the obligations of African member States to the Rome Statute, nor the Constitutive Act of the African Union principle of collective action against massive violations of human rights and grave crimes. It is interesting that the same States have withheld cooperation from the ICC while they still take part in the Assembly of State Parties under the framework of the Rome Statute.

If the concern is the failure by the Security Council or the Prosecutor to respectively refer or investigate cases in Israel, Iraq, Colombia and Burma to mention but a few, let that work be done by the people and civil society in those countries. Let Africa concentrate to ensure that the 5,000,000 million victims in the DRC, the 2,000,000 displaced and more than 500,000 killed in the Darfur and victims of other conflict situations get International Justice, which they have not been to get in their countries. The AU position, in my mind retraces the old

African collegiate leadership deference to their fellow leaders, where in the past the OAU failed to condemn perpetrators of mass atrocities like Iddi Amin Dada, Nguema and Bokassa.

Recently, while addressing the SADC Lawyers Association, in Maputo Mozambique, the President of the ICC, Judge Song stated that Africa should embrace the ICC because in reality the ICC is an African Court. He stated that African States constitute the single biggest bloc of Member States. It is my submission that support by African States, rather than withholding cooperation will send a strong message to African dictators, and Warlords alike that their ways of brutalising African people with impunity are over. To continue denigrating the ICC sends a wrong message. It has dire consequences when the people decide to take the law into their own hands. The pictures of disgraced former powerful strongmen like Mubarak in a cage, or the summary execution, of Colonel Gaddafi, which itself must be condemned, and the failure by the AU to confront these failures because of the “Glass house” phenomenon.

It is my submission therefore that the quest for peace, and justice in Africa will not succeed unless Africa adopts a steadfast position to condemn and oppose impunity by establishing credible national legal framework for punishing International Crimes and where need be, support the international mechanism for dealing with grave crimes.

Presenter: H.E. Fatou Bensouda, Deputy Prosecutor, International Criminal Court

Perspectives from the OTP of International Criminal Court

In Rome in 1998, civil society from States with different legal backgrounds and traditions liberated the creation of the Rome Statute. They debated it from different perspective. Everyone involved in that debate shared the same view that the conference was not just an exercise of putting ideas to paper. They knew that the new legal design is going to profoundly affect and impact the way international relations are governed.

We opted that accountability and the rule of law would be the framework to protect not only individuals but also protect nations from massive atrocities and to manage conflicts.

The drafters of the Rome Statute establishing the ICC recognised the intrinsic link between peace and justice. This is reflected in the preamble of the Rome Statute. By putting an end to impunity for the perpetrators of the most serious crimes, the court can and will contribute to the prevention of such crimes. This is what gives the court its deterrent effect. We see that under the Rome Statute, for the first time, the prosecutor of the ICC is actually given the mandate to select cases and open investigations into situations, as opposed to the Nuremburg courts, Tokyo, ICTY and ICTR. It was the states in the latter courts that would select the situations to investigate.

The prosecutor of the ICC must establish whether there is a reasonable basis to initiate investigations and this would be based on legal criteria. This criteria is precisely laid out in

the Rome Statute and applies irrespective of the manner in which the investigation is triggered.

Neither State party referral nor a UN Security Council referral will bind the prosecutor in opening investigations. The prosecutor has to make an assessment and this assessment has to be objective, impartial and independent. The criteria the ICC uses are jurisdiction, admissibility as well as the interests of justice.

With regard to jurisdiction, the ICC office will assess: whether the alleged crimes have been committed on the territory of a State party or whether it was committed by a national of a State party; whether the crimes were committed after the entry of the Rome Statute in 2002 or later; whether the crimes fall under the subject matter of the jurisdiction of the ICC such as War Crimes, Crimes against Humanity or Genocide.

The above jurisdictional limitations are the main reason why the ICC cannot investigate crimes in Non-State parties such as Somalia, Syria and Bahrain. That situation can only be repaired by a referral from the UN Security Council as has been done in the case of Darfur and Libya. Naturally a State can decide to join the Rome Statute, which would give the ICC jurisdiction.

With regard to admissibility, the ICC office has a duty not to investigate when there are genuine national investigations or prosecutions. This is pursuant to the principles of complementarity which gives national States the primary responsibility to investigate and to prosecute and prevent crimes when perpetrated within their own jurisdiction. The ICC is a court of last resort and not a court of first instance.

Within the ICC, the Prosecutor brings evidence before the Judges who then determine whether the Prosecutor can be authorised in the first instance to open investigations or not. The same goes for confirmation of charges. He is not authorised to make such a determination. The independent Judges determine confirmation of a charge depending in evidence presented by the Prosecutor. Thus determination does not lie with the Prosecutor. If the Prosecutor sees that he has a reasonable basis to proceed, he will do so but subject to the final determination by the Judges.

The Rome Statute also requires that the crimes reach a threshold of gravity. For instance, the ICC office conducted a preliminary examination of alleged crimes committed in Iraq by nationals of 25 State parties involved in the military operations in Iraq. There were cases of wilful killings and torture. It was evident that they were not committed as part of a plan, policy or large scale commission. However, an investigation could not be opened because the requirement of the threshold of gravity as per the Rome Statute was not reached. In addition, States concerned were conducting their own investigations and prosecutions. Again, this is the Principle of Complementarity. Unless the above investigations and prosecutions are not genuine, the ICC would not interfere.

Finally, in accordance with the Rome Statute, the Prosecutor should not proceed with an investigation or prosecution if it is not in the interests of justice. It would obviously be exceptional to decide that the investigation would not be in the interest of justice and victims.

This should not be confused with the interests of peace. This does not fall within the mandate of the Rome Statute. The office of the prosecutor is not involved in political considerations. The legal limits are scrupulously respected. The process of peace negotiations is not a factor that forms part of the ICC determination on the interests of justice. The Office of the Prosecutor have used the above legal criteria to open investigations in the Democratic Republic of Congo (DRC), Uganda Central African Republic, Darfur, Kenya, Libya and most recently in Cote d'Ivoire.

When the legal criteria under the Rome Statute are met, the Office will open investigations. Factors such as geographical or regional balance are not relevant criteria for the determination that a situation warrants investigations under the Rome Statute.

Following the investigations, the main challenge is the effective implementation of the Court's decisions in particular performing arrests and surrender of individuals who are sought by the court. The outstanding arrest warrants against President Bashir, Joseph Kony among others, shows the importance of cooperation of the court and the need for engagement of a broad array of actors.

While general cooperation is forthcoming, there are still difficulties relating to arresting individuals especially individuals that are protected by active militia, as in the case of Joseph Kony, or when they use State apparatus to commit massive crimes as in the case of Omar Al Bashir. This is the main challenge. The strength of the Rome Statute system lies in the possibility for shared responsibility. There is a need for a consistent approach. Massive crimes require a careful plan.

All international leaders such as political leaders, peace negotiators have a role to play. Ignoring justice will not help peace efforts. For instance in the case of Joseph Kony and the Lord's Resistance Army (LRA), issuance of arrest warrants led to an agreement between the Prosecutor's office and the Government of Sudan. This was a contribution to force Joseph Kony to leave his safe haven in Southern Sudan and establish a camp in Garamba park in the DRC. The Juba talks ended the massive violence in Northern Uganda but it allowed Joseph Kony to regroup, re-arm and collect money from the International Community and. This is continuing today.

During the crisis in Cote d'Ivoire, President Gbagbo reportedly used the efforts of the AU to negotiate an exit to solidify his position and it was to allegedly distribute weapons between the local population and to fuel the armed conflict.

It is not justice that blocks the way to peace. It is the lack of enforcement of the court's decisions, which is the real threat to enduring peace. When the perpetrators are allowed to remain at large, then they will continue to pose a threat to the victims who took tremendous efforts to tell their stories at the ICC. If we allow these criminals to remain at large in the

name of peace negotiations, they will ask for immunity under one form or another as a condition for stopping the violence. We need to recognise that this is blackmail by the criminals.

Eventually implementing the arrest warrants will be the most effective way to protect civilians under attack. International justice, national justice, search for truth, peace negotiations can and must work together. They are not alternative ways to achieve a goal. They can be integrated into a comprehensive solution. They have to be pursued hand in hand.