

**Report of Conference on Africa and the International Criminal
Court: Lessons Learned and Synergies Ahead**

*Convened by Africa Legal Aid (AFLA) in cooperation with the Kenya Section
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Executive Summary

The conference is part of AFLA's on-going dialogue on the International Criminal Court (ICC) and Africa, exploring challenges and synergies that could benefit the ICC in achieving its mandate; as well as improve cooperation between the ICC and Africa. The conference was divided into Nine (9) thematic sessions with a diverse range of speakers from the ICC and UN bodies, the African Union (AU), officials of State parties to the ICC including Ghana, Uganda, South Africa, Zambia, Estonia, Finland, The Netherlands, Norway, and non State Parties such as Libya. The list includes African Civil Society Organizations (CSOs), International NGO's, Legal Practitioners, Scholars, and Opinion Leaders. The galaxy of speakers included: Honourable Mogoeng Mogoeng, Chief Justice and President of the Constitutional Court of South Africa; H.E.. Navanethem Pillay, Immediate Past United Nations High Commissioner for Human Rights; Judge Sang-Hyun Song, President of the ICC; Ambassador Tiina Intelmann, President of the Assembly of State Parties (ASP), to the ICC; ICC Prosecutor Fatou Bensouda; Judge Florence Mumba, Former Vice President of the International Criminal Tribunal for the Former Yugoslavia (ICTY); Honourable Joe Ghartey, Minority Speaker of the Parliament of Ghana and Former Attorney-General and Minister of Justice of Ghana; Honourable Elizabeth Rehn, Former Minister of Defence of Finland and Member of the Board of the ICC Trust Fund for Victims; Ambassador Jan Lucas van Hoorn, Netherlands Ambassador for the ICC and OPCW; Ambassador Anniken Krutnes, Ambassador of Norway to The Netherlands, and Facilitator of The Hague Working Group on Cooperation; Dr. Ahmed El Gehani, Libya Focal Point for ICC Requests, and Professor Shadrack Gutto of the AFLA Governing Council.

The conference themes were:

- Clarification of the mandates of various international judicial organs,
- Africa and the ICC: One Decade On,
- Complementarity in Practice,
- Intensifying ICC Cooperation in Africa,
- Ending impunity for Massive Crimes,
- Implementation of the Rome Statute,
- Accountability for international Crimes and Senior State Officials with particular focus on Africa,
- The Gender Dimension,
- A Holistic Approach to International Criminal Justice

Experts and resource persons drawn from various spheres of international criminal justice discussed and made presentation on the various thematic themes in groups. The qualities of presentations were of high standard and consequently elicited strong debates in all sessions with suggestions, criticisms and unanswered questions.

The discussions reflect the desire to strengthen the ICC, and seek equal opportunities that will reflect fairness of the functions of the courts. The role of the UN Security Council, Good Governance by African leaders and gender empowerment were all agreed by the participants to have pivotal roles in achieving the mandate of ending international crimes.

Clarifying the Mandates of Courts, Tribunals, and Legal Institutions in The Hague

H.E. Navanethem Pillay, the immediate past UN High Commissioner for human rights, chaired the session. She refreshed the knowledge of the participants on the mandate of various institutions in The Hague. The need for this was advanced by the Chair to remind people that each of the institutions, though all creations of international law, had its respective objectives and goals. She underscored the often misconception of the jurisdictions and mandates of the various institutions by the public and even practitioners. After her introductory remarks, brief presentation on the various Hague Institutions commenced.

H.E. Judge Sang-Hyun Song, President of the ICC, spoke on the jurisdiction and mandate of the Court, making highlights of its limited jurisdiction. Judge Sang-Hyun Song reiterated that crimes under the jurisdiction of the court were strictly only those provided in the Rome Statute and must meet the strict demands as provided in articles 5-8 of the Statute. In addition, he urged a continued understanding of the crimes which fall within the jurisdiction of the ICC, pointing out that this would help reduce the criticism levelled against the ICC for partiality.

Speaking on the mandate of the International Court of Justice (ICJ), H.E.. Judge Abdulqawi Ahmed Yusuf informed the audience that despite the fact that the ICJ is not saddled with criminal jurisdiction, its jurisprudence has helped in developing and assisting other institutions to achieve their respective mandates. He made reference

to the *Bosnia V Serbia* Case.¹ Judge Abdulqawi underscored that the jurisdiction of the ICJ was between states and not individual complaints.

H.E. Judge Bakone Moloto traced the circumstances surrounding the establishment of the International Criminal Tribunal for the Former Yugoslavia (ICTY) and International Criminal Tribunal for Rwanda (ICTR). He reminded the participants that the two tribunals were set up to investigate and prosecute crimes committed in the former Yugoslavia and Rwanda. In addition, the essence of the two tribunals as *ad hoc* meant they had life span.

This necessitated the need to develop completion plans; which led to the 2002 development of the completion strategy.² Core achievements and output of the completion plan includes the full determination of about 161 cases, transfer of cases to national jurisdictions, capacity building for national courts and preparedness to handle appeals that might arise. Judge Moloto, however, stressed that the UN Residual Mechanism for International Tribunals³ still remains very relevant as they have duties to, among other things ensure:

- i. Enforcement of Sentences
- ii. Victim protection
- iii. Handle matters of contempt and false testimonies
- iv. Conduct trial for three outstanding fugitives and
- v. Hear any appeals that might arise from the decisions of the ICTY and ICTR.

¹For further information, see, Application of the Convention on the Prevention and Punishment of the Crime of Genocide (*Bosnia and Herzegovina v. Serbia and Montenegro*) available at <http://www.icj-cij.org/docket/index.php?p1=3&p2=3&case=91&code=bhy&p3=4>

² See <http://www.icty.org/sid/10016>.

³<http://unmict.org/>

Speaking on the mandate of the Permanent Court of Arbitration (PCA), H.E. Hugo Hans Siblesz reminded participants of the role of Czar Nicolas II in establishing the PCA in 1899 with about 26 founding states.⁴ The PCA deals majorly with Administrative matters, commercial arbitrations between private individuals, Political conflict and boundary matters, interstate agreements. Notable success of the PCA mentioned includes the Abyei Arbitration, Eritrea-Ethiopia Boundary and Claims Commission.⁵ Since inception, 44 registry cases involving African States have been recorded with 9 agreements signed, with the South Africa-Mauritius agreement being very prominent. He consequently reiterated that the mandate of the PCA therefore exclude international criminal justice.

The mandate of the Hague Conference on Private International Law (Hcch)⁶ in the development of international law was also an important discuss. H.E. Dr. Christophe Bernasconi reiterated that the Hcch major mandate was to develop legal norms, conventions and undertake legislative responsibilities. Primarily, the Hcch does not deal with Public International Law and criminal law issues. Since inception in 1893, the Hcch has developed about 38 laws covering fields like child law, family law, commercial cross boarder laws, access to justice. Presently, it is comprised of about 77 member states with only 6 African states.⁷ The major achievement of the Hcch is that of providing legal certainty and ensuring international standards in private international law.

Participants expressed opinions that the need for continued clarification of the mandate of all Hague institutions was important as 'lack of clarity of mandates of the

⁴http://www.pca-cpa.org/showpage.asp?pag_id=363.

⁵http://www.pca-cpa.org/showpage.asp?pag_id=1150

⁶http://www.hcch.net/index_en.php.

⁷ The African states are South Africa, Morocco, Egypt, Mauritius, Burkina Faso and Zambia.

institution can lead to unrealistic expectation and, when not met, failure is envisaged’.

Africa and the ICC: One Decade On

Professor Shadrack Gutto of the Centre for African Renaissance Studies, University of South Africa, and Chair of Africa Legal Aid (AFLA) Governing Council, chaired this session. Prof Gutto praised AFLA for its commitment to keep this dialogue of ICC and Africa alive, noting that it was necessary to aid the fight against impunity. He said AFLA's Dialogues help increase knowledge on the ICC, and support for the ICC.

Evelyn Ankumah, Executive Director of AFLA, set the tone of what ensured a vibrant session making pertinent observations and asking questions to examine the impact of the ICC in Africa. She observed that Africa dominates debates on the ICC; all cases before the Court are African cases and one sometimes gets the impression that we are dealing with the International Criminal Court for Africa (ICCA); When the ICC Statute was adopted in Rome 15 years ago, we could have already predicted that many cases before the Court would be African cases; Russia, China, and the U.S.A. decided not to join the ICC but nonetheless managed to give a prominent role in ICC matters to that specific body of which they are permanent members: the UN Security Council. Evelyn Ankumah decried the recent decision of the African Union (AU) to secure immunity for Heads of State and senior government officials. She contended that such clauses would reduce a criminal chamber of the African Court of Human Rights and Justice to "a paper tiger that does not bite". She called on Africans to help make use of the ICC to achieve criminal justice. Evelyn Ankumah's statement can be found [here](#).

Responding to Evelyn Ankumah's decry of the AU decision, Gutto described the immunity clauses introduced by the African Union as "a license to kill and enthrone impunity in Africa".

Amb. Tiina Intelmann, President of the Assembly of State Parties (ASP) to the International Criminal Court addressed the conference. She called for sustained fight against impunity by citing the famous quote of Nelson Mandela "it always seems impossible until it is done". She expressed that after the creation of the *ad hoc* sister Tribunals, the International Criminal Tribunal for the Former Yugoslavia (ICTY), and the International Criminal Tribunal for Rwanda (ICTY) impunity no longer seemed an option, and the permanent International Criminal Court (ICC) was subsequently established. She highlighted the important role played by African States in creation of the ICC. Referring to conflicts in Middle Europe and parts of Africa (as well as Ebola in West Africa), she opined that a more peaceful world has not been achieved. She stressed the need to dispel misconceptions about the ICC and increase understanding about its work in order to increase the Court's legitimacy. Read President Intelmann's full statement [here](#).

In her statement, H.E. Fatou Bensouda, Prosecutor of the ICC said her office, the OTP has, and will continue to vigorously pursue those who commit mass crimes that shock the conscience of humankind, without fear or favour, but guided only by the law and evidence, devoid of any political considerations, and always subject to scrutiny by independent judges.

She stressed the importance of the relationship between the ICC and the African Union (AU), and how the Court tries to engage with the AU to provide information and clarify misunderstanding. She informed participants that the ICC has opened

liaison offices in Brussels to foster cooperation with the European Union (EU); an office in New York to engage the United Nations and that, a formal request for the approval and establishment of a liaison office in Addis Ababa is still pending before the African Union.

She highlighted the complementarity role of the ICC as a court of last resort, but warned that the OTP will not hesitate to assume its responsibility if those alleged to have committed mass crimes, irrespective of their status or affiliations are not brought to face genuine and real justice.

The ICC Prosecutor concluded her address with these sentiments: "As a proud African, let me state that it is an undeniable fact that accountability for mass crimes and the rule of law are vital to the stability, security, and prosperity of the continent. This recognition was very much alive when Africa played a prominent role in the establishment of the ICC, and it is this truism that needs to be fully embraced again. The sacrifice of our past, the great suffering of African victims and their hopes - indeed, our collective hope - for a more promising future demand a robust commitment to international criminal justice". Read the full statement of the ICC Prosecutor [here](#).

The Chief Justice and President of the Constitutional Court of South Africa Honourable Mogoeng Mogoeng in his Opening Address stated at the outset that he would ordinarily take participants through the key provisions of the Rome Statute, express views on their meaning, and how to translate them into practical reality. However, he is prevented from doing so as a result of a case pending before his Court.

Reflecting on the significance of the ICC, he quoted Nelson Mandela: "Our own continent has suffered enough horrors emanating from the inhumanity of human beings towards human beings. Who knows, many of this might not have occurred, or at least been minimized had there been an effective functioning ICC".

He reflected on the troubled relationship between the ICC and Africa noting that since its inception more than a decade ago, almost all of the ICC's investigations, and indeed all of its prosecutions have concerned alleged violations in Africa, given rise to concerns about selective justice. The Chief Justice said if these concerns, fuelled by the fact that gross human rights violations continue to take place in other parts of the world (without ICC intervention), are not addressed, it would undermine effectiveness of the ICC. Impunity of leaders and other perpetrators would continue, as they take refuge in the perceived impartiality of the ICC.

He concluded with these observations of former United Nations Secretary-General Kofi Annan: "On a continent that has experienced deadly conflict, gross violation of human rights, even genocide, I am surprised to hear critics ask whether the pursuit of justice might obstruct the search for peace. We must be ambitious enough to pursue both". And indeed, said the Chief Justice and President of the Constitutional Court of South Africa: "Africa and the world need the ICC yesterday, today, and forever".

Read the full statement of the Chief Justice [here](#).

H.E. Navanethem Pillay, Immediate Past United Nations High Commissioner for Human Rights, Former Judge of the International Criminal Court (ICC), and former Judge and President of the International Criminal Tribunal for Rwanda (ICTR) gave the Keynote Address.

She noted at the outset that, despite the fact that the UN Security Council referred cases to the ICC, the Prosecutor could not proceed with preliminary investigations without approval by independent ICC judges. She referred to the Preamble of the African Charter on Human and Peoples' Rights, which stresses: "freedom, equality, justice and dignity are essential objectives for the achievement of the legitimate aspirations of the African people". She further highlighted the importance of accountability under Article 4 of the Constitutive Act of the African Union, which abhors Impunity and stipulates that Victims must have Access to Justice.

Ms. Pillay informed participants that the struggle against impunity for massive human rights violations and grave crimes is necessary for many reasons but above all to bring justice to victims, which in turn is crucial for achieving reconciliation and sustainable peace. She noted that the ICC, the world's first permanent international criminal court has been able to further the work of its predecessors, the ICTY and the ICTR, which have contributed greatly to advancement of International Justice, and she is proud to have been directly involved in these endeavours.

She highlighted the important role that Africa played in the Court's establishment, and the role Africans continue to play in the Court's operations. Yet, the relationship between the ICC and the African Union is marked by controversies, and African leaders have expressed concerns about "the politicisation and misuse of indictments against African leaders". She informed participants about the Prosecutor's announcement in April that her Office will open preliminary examinations in Ukraine.

The Former U.N. Rights Commissioner expressed concern about the recent AU decision that sitting heads of state and other senior state officials are immune from prosecutions during their tenure of office. She said the notion that political power can

be a safe haven for impunity would create a double standard for accountability, and it is at odds with international law. As well, it would be contrary to the commitment made by African States that so strongly championed the Constitutive Act of the African Union, and the African Charter on Human and Peoples' Rights.

Read High Commissioner Pillay's Keynote Address [here](#).

Complementarity in Practice

The session on Complementarity proceeded with the Chair, Justice Florence Mumba, former Vice President of the International Criminal Tribunal for the Former Yugoslavia (ICTY), noting at the outset that the continuous reaction to the mandate of the ICC speaks volumes to the viability and effectiveness of the Court. She highlighted the importance of Complementarity, stressing the need to encourage and empower national courts.

Justice Moses Mukiibi, Head of the International Crimes Division of the High Court of Uganda, spoke on the work of his Division. He informed participants about Uganda's attempts to bolster its national jurisdiction in the fight against impunity. His presentation addressed: 1) Background to Impunity in the conflict between the Lord's Resistance Army (LRA) and the Government Forces in Northern Uganda; 2) Ratification and Implementation of the ICC Statute by Uganda; 3) Uganda's ICC Implementing Legislation: the International Criminal Court Act, 2010⁸; 4) Complementarity; and 5) challenges posed for effective implementation of Act 2010. He called on the Prosecutor of the ICC to engage with the Ugandan Parliament and

^{8 8} Available at http://www.issafrica.org/anici/uploads/Uganda_ICC_Act_2010.pdf

other stakeholders to improve the advocacy and outreach program of the International Crimes Division of the High Court of Uganda.

In his presentation on the Hissène Habré case as an example of challenges to prosecution of international crimes in Africa, Reed Brody, Spokesperson for Human Rights Watch presented the background as well as challenges to prosecuting the former Chadian dictator. He identified the challenges to prosecution to include: 1) Inexperience of national lawyers; 2) Lack of Targeted Prosecution Strategy; 3) Budgetary Constraints; and 4) Lack of Cooperation by Chad. Mr. Brody lauded Belgium and more recently, the African Union (AU) for their role in bringing Habre to justice. The Hissène Habré Trial is scheduled to take place in Senegal from May 2015.

Dr. Ahemd El Gehani, Libya Focal Point for ICC Requests, presented the Libya Experience on Complementarity. He posited strongly that ICC's Complementarity mandate is well entrenched in the Statute. He highlighted that, once Libya showed its willingness and ability to prosecute international crimes, the ICC conceded to Libya's position that it is able to prosecute ICC suspects on its territory.

During the floor discussion, Xavier-Jean Keita, Principal Counsel of the ICC Office of Public Counsel for Defence, queried the position of Libya. He informed participants that the decision Dr. El Gehani referred to regards the case of Abdulla al-Senussi, and not a blanket approval by the Court that Libya can prosecute all ICC suspects on its territory. He said there is a Ruling by the ICC that Libya should surrender Saif Gaddafi, and wanted to know why Libya had not complied with the Court's Ruling. Another issue that agitated the minds of participants was the AU's sudden positive response and cooperation for the trial of Hissène Habré

Intensifying ICC Cooperation in Africa

This Session was chaired by Ambassador Anniken Ramberg Krutnes, Ambassador of Norway to The Netherlands; Facilitator of The Hague Working Group on Cooperation. She introduced the theme of the Session and speakers.

George Kegoro, Executive Director of the Kenya Section of the International Commission of Jurists (ICJ Kenya) presented on National Laws as an Enabler or Impediment to Cooperation. He argued that the case of Kenya shows that despite viability of national laws, lack of political will remains a major challenge. He said Kenya is the first country in which the OTP is not enjoying Cooperation thereby undermining Investigation; Complementarity; and Capacity of Victims and other Witnesses to Participate. Further exposing this point, he decried government interference with national laws robust enough to assist the ICC in achieving its mandate. As well, he decried the AU for watering down the impact of national laws with its decision to grant immunity to sitting Heads of state and other senior state officials. This, he said represents a major clog in the fight against impunity. George Kegoro called on the ASP to propose a model on how to carryout prosecutions in politically hostile situations.

Ambassador Elisabeth Rehn, Board member of the ICC Trust Fund for Victims, and former Minister of Defence of Finland, spoke on the ICC Trust Fund for Victims. She noted at the outset that the focus on Victims is an extraordinary feature of the Rome Statute and highlighted some of achievements of the Trust Fund including integration of over 1,500 children back in school, the support of 110,000 victims in the DRC and Northern Uganda, and plans to expand the Trust Fund's activities to other ICC situation countries based on availability of resources and security permitting. She

informed participants that the Trust Fund has been forced to suspend its Program in the Central African Republic (CAR) due to the deteriorating security situation.

Read Ambassador Rehn's Presentation [here](#).

Roland Amoussouga, Head of Office and Coordinator of the UN International Commission of Inquiry on Central African Republic (CAR) and Former Chief of Strategic Planning and External Relations of the International Criminal Tribunal for Rwanda (ICTR) emphasised the daunting task of Victims and Witness Protection in Africa. He opined that many African cultures do not have the character of shielding victims and witnesses. He informed participants that the African experience on protection of victims and witnesses started at the ICTR and continued at the Special Court for Sierra Leone (SCSL). He said the examples of the ICTR and SCSL are excellent tools for ensuring fair, transparent, and equitable justice to victims and accused persons. He expressed the view that an important way forward for the ICC is to design a product that is well adaptable to Africa and its countries. He made this suggestion noting that, a Hague designed approach would be unacceptable for Africa.

Read Roland Amoussouga's Presentation [here](#).

Xavier-Jean Keita, Principal Counsel, Office of Public Counsel for Defence, spoke on Defence Perspectives. He informed participants about a positive development on State Cooperation: the first Agreement signed on Provisional Release of ICC Suspects, and praised Belgium for being the first country to have signed the Memorandum of Understanding concerning interim release of detainees. He referred to the case of Jean-Pierre Bemba who after being detained in July 2008 was actually granted provisional release by the Court on 14th August 2009, but remained in

detention because there was no state willing to host him. He further cited the cases of Bosco Ntaganda and Laurent Gbagbo in which unavailability of a host state was one of a number of considerations in denying interim release. Bosco Ntaganda made a request for interim release after he voluntarily surrendered himself to the Court in March 2013. Laurent Gbagbo, the former Ivorian President has made repeated applications for provisional release, including on medical grounds, all of which have been denied.

The ICC Principal Counsel for Defence further informed participants about the case of Mathieu Ngodjolo Chui, who upon his acquittal by ICC judges in December 2012, was nonetheless placed by Dutch authorities in Asylum Seekers custody for almost five months, in violation of the principles of fair trial, including the presumption of innocence. Xavier-Jean Keïta also touched on lack of state cooperation and inequality of arms in cases of investigation by defence involving the cases of Kenyatta, Katanga, and Banda.

Click [here](#) to read the presentation of the Principal Counsel of Public Counsel of Defence of the ICC.

During the floor discussion, responding to a question posed by a participant on the seeming intimidation of the Office of Public Counsel for Defence by the Office of the Prosecutor, Keïta responded that his Office is independent and not poised to supplant the status quo of the OTP. He remained unsupportive of plans to make his Office accountable to the Registrar. Participants expressed surprise that, the Office of Defence even existed and a call was made to promote the independent functioning of the ICC Office of the Public Counsel for Defence.

The session concluded with calls by participants that the advocacy mandate of the Court needs to be enhanced in Africa, to ensure greater knowledge and impact of the ICC. The responsibility of the ASP was also brought to the fore with a need to encourage States, especially African States, to play their roles in ensuring the realisation to promote accountability and end impunity.

Ending Impunity for Massive Crimes/ International Leadership

Platform

In a bid to broaden the reach of the conference, this session was held at the University of Johannesburg in cooperation with its Division of Internationalization. The basis of this was to ensure that, students have knowledge on the workings of the ICC.

Speakers for this interaction included ICC Prosecutor, Fatou Bensouda, Dr. Cheickh Bangoura, Policy Coordinator of the Office of the ICTR Prosecutor, speaking on behalf of Prosecutor Hassan Jallow of MICT, and Ambassador Anniken Krutnes of Norway.

Taking the stage, the Prosecutor educated the students on the new strategies of the OTP in realising its mandate, namely:

- i. Constructive process that will include internal and external consultations;
 - ii. Reflective strategy;
 - iii. Policy and Procedure strategy which will seek positive complementarity;
- and
- iv. Sequence Approach to preliminary investigations

The ICC Prosecutor stressed that, the emerging challenge of relying on victim testimonies informs the OTP resolve to seek the use of forensic and ICT testimonies. She cited the Bemba and Ruto cases as clear examples of interference with witnesses.

Another innovative development espoused was the development of a code of conduct for prosecutors and sexual and gender based crimes policy in the OTP.

Speaking after the Prosecutor, Dr. Bangoura hinted that the UN Mechanism on International Tribunals (MICT) has bolstered the realisation of international criminal justice by helping to reduce impunity. He highlighted that the contributions include:

- i. The protection and care of witnesses;
- ii. Management of judicial records and enhancing the jurisprudence of international criminal justice;
- iii. Improving and establishing best practices that will aid the establishment of international customary law.

Ambassador Krutnes informed the students and audience that, the ICC must be seen as a 12 year old that deserves and requires guidance and nurturing and not just criticisms. The support as advocated must be channelled towards funding, support for execution of warrants and enforcement of sentences.

An array of questions followed bordering majorly on the perceived biased nature of the ICC. These included: why the ICC continues to hide under the political clog of the United Nations Security Council (UNSC)? Whether the OTP takes the emotional and psychological state of children, women and victims into consideration? Whether justice could be achieved through injustice?

In response, the Prosecutor reiterated that the OTP is bound to follow the provisions of the Rome Statute, as it is from it that the office derives its operational powers. The Prosecutor said continued engagement of experts on child psychology and other professionals to avoid double trauma remain a core focus and resolve of the OTP. The prosecutor emphasised that the ICC does not engage in any injustice in its resolve to ensure justice and encouraged all support the work of her office by sending relevant information based on Article 13 of the Rome Statute when available.

Click [here](#) to read Prosecutor Bensouda's address.

Implementing the Rome Statute in Africa

Chaired by Ambassador Jan Lucas Van Hoorn, Netherlands Ambassador for ICC and OPCW, the session examined efforts by African states to implement the Rome statute and ensure the eradication of impunity within national jurisdictions. Minority Speaker of the Parliament of Ghana, and Former Attorney General and Minister of Justice, Honourable Joe Ghartey, spoke on the challenges of domesticating the ICC Statute in Africa. He informed participants that by virtue of article 75 of the Ghanaian Constitution⁹, no challenge exists in the implementation of the Rome Statute in Ghana. However, he called for a higher input from the ICC on advocacy, and to banish all forms of misconception against the mandate and workings of the court.

⁹(1) The President may execute or cause to be executed treaties, agreements or conventions in the name of Ghana.

(2) A treaty, agreement or convention executed by or under the authority of the President shall be subject to ratification by-

(a) Act of Parliament; or

(b) a resolution of Parliament supported by the votes of more than on-half of all the members of Parliament.

Hon. Salih Mahmoud Osman, former member of the National Parliament of Sudan, and a human rights advocate using Sudan as a case study, expressed the confusion and worries of many victims in Sudan, for the non-execution of the arrest warrant on President Al Bashir. He further called for cooperation from both states and NGO's in pushing cooperation for execution of the arrest warrant and resolve the faith of victims in the court.

Highlighting South Africa's domestic implementation of the Rome Statute, Yolande Dwarika, Principal State International Law Advisor, stressed South Africa's ability and willingness to prosecute all forms of international crimes within its national jurisdiction. She said endorsement of the ICC arrest warrant by the South African judiciary was a clear case in point. She ended her contribution emphasizing South Africa's resolve to try persons suspected of international crimes found within South African jurisdiction.

Wafa Ben Haj Omar, Director of International Programs, Al Kawabiki Democracy Transition Centre in Tunisia decried the interference of the Tunisian government and the Islamist party to give effect to the implementation of the Rome Statute. She called on the ICC Prosecutor to look into claims that some Tunisia citizens are involved in the Syria government acts of impunity which could mean that the Prosecutor can at its own initiative commence preliminary investigations in Syria. She called for greater and sustained advocacy to ensure that both political and religious groups support the implementation and realisation of the mandate of the ICC in Tunisia.

Makhumbo Raymond Munthali of the Centre for Human Rights and Rehabilitation spoke on Malawi's Way Forward. Elaborating the role of Civil Society in Malawi to

push for enforcement of the ICC arrest warrant against Sudanese President Omar al-Bashir, he informed participants that civil society efforts have led to a recent national stakeholder's conference on domestic implementation of the Rome Statute.

Stella Ndirangu of ICJ Kenya spoke on Efforts by civil societies in Kenya in ensuring realisation of the mandate of the ICC. Among other achievements, she highlighted the important role CSO's in Kenya played in driving the signing and adoption of the International Crimes Act of Kenya, which became operative in January 2009.

During the floor discussion, the issue of selective prosecution of the ICC remained a core basis of raising suspicions on the Court's operations. Others queried South Africa's refusal to ratify the Optional Protocol on Torture, among other concerns.

In addition, possible alternatives to prosecution were advocated, citing the positive impact with the Truth and Reconciliation style mechanisms used in South Africa and Ghana as examples. The viability of investigating lower officers and not sitting Heads of State was canvassed, premised on the fact that it could reduce the present challenge faced by the ICC in the Kenyan and Sudan situations. The ICC Prosecutor responded that her office is mandated to operate under the provisions of the ICC Statute.

Accountability for International Crimes and High Level State Officials: African Perspectives

The Chair of the Session, Professor Shadrack Gutto, set out the centrality of accountability to drive good governance and also ensure the eradication of all forms of impunity.

Tiseke Kasambala, Southern Africa Director of Human Rights Watch presented perspectives from civil society, insisting that, the history of international crimes in Africa from Rwanda to Sudan and Kenya, among many other situations necessitates that African leaders must be held accountable for international crimes while in office. She said the immunity clause proposed by the AU for inclusion in the Protocol of the African Court of Justice and Human would only aid the entrenchment of impunity in African states. She criticised this move of the African Union as a major setback to the gains of the fight against impunity. She further called on African Heads of State to make a turn around on the position to grant immunity to serving Heads of State and other senior state officials.¹⁰

The AU Legal Counsel and Director of Legal Affairs, Prof. Vincent Nmehielle insisted that the perceived withdrawal of support for the ICC by the African Union was fuelled by the insensitivity of the UN Security Council to the demands of the African Union to defer the arrest warrant of President Bashir. Prof. Nmehielle further noted that the refusal to allow the AU to explore alternatives in the Sudan case sent a wrong signal to the AU.

He sought to clarify that the wrong perception regarding the AU immunity clause is at the basis of the foul cry. He raised the reliance on article 98 of the Rome Statute as support for further action by the AU.¹¹ He issues on the importance and preference of a United States Soldier over an African Head of State, the non-trial of Nicholas Sarkozy while in office and the neglect of corporate criminal responsibility. The

¹⁰ The amendment reads thus “No charges shall be commenced or continued before the Court against any serving African Union Head of State or Government, or anybody acting or entitled to act in such capacity, or other senior state officials based on their functions, during their tenure of office.

¹¹ Cooperation with respect to waiver of immunity and consent to surrender.

position of the AU on Laurent Gbagbo, former Ivorian head of state, he claimed should vindicate the AU from the ill perception of supporting immunity.

Joseph Akwenyu of the Uganda Victims Foundation, speaking from the Victim's Perspective stressed that, the attitude of the AU towards the ICC raises a strong sense of conspiracy among African leaders, making the victims feel that their plight is of no meaning. He said bringing the leaders to justice would assist their healing process as truth in itself can heal them from the gruesome experience.

The questions from the participants traversed the question of political will, the real effect of immunity clause in the Protocol to the African Court of Justice and Human Rights, the challenge of resources to the proper running of the Court. A participant inquired from the AU Legal Counsel why African leaders keep hiding on the clog of comparison and the non-ratification of the Rome Statute by the United States and allow its citizens to keep suffering from poor governance and impunity.

In response, Prof. Nmehielle maintained that the immunity clause of the AU has a leeway of the citizens demanding accountability from leaders. Specific reference was made to the social contract theory. Another participant suggested the need to allow the ICC take full responsibility to initiate or not to undertake preliminary investigations.

Participants reiterated the importance of the ICC as it serves the purposes of deterring African leaders from entrenching impunity and demanding accountability. A former Libyan ambassador queried the question of sovereignty, the practice of lifetime presidency by African Heads of State and suggested that the AU reconsiders its position. On a final note, the AU Legal Counsel urged the ICC and NGO's to

engage the AU on its position rather than attack it, and educate Africans on not being negligent about pursuing their rights.

The Gender Dimension

Dr. Pinkie Mekgwe, Executive Director, Division of Internationalization, University of Johannesburg chaired this session. Standing on the previous disclosure by the Prosecutor on the gender focus of the OTP, Dr Mekgwe suggested to AFLA to consider a book on a gender perspective to international criminal justice. Dr. Mekgwe's suggestion was welcomed with applause of participants. Dr Mekgwe spoke of different perspective of gender as bedrock for the need to have a specific consideration of international criminal justice from a gender perspective.

Professor Mia Swart, Professor of International Law at the University of Johannesburg, examining whether Prosecutions for Gender Crimes are Having Impact at the Domestic Level hailed the impact of the landmark Akayesu judgement of the ICTR.¹² However, she stressed that national jurisdictions, instead of merely citing the case in most circumstances, should seek to develop the reasoning, to expand and develop the jurisprudence more. She argued that the emergence of military courts in the DRC to try perpetrators of various sexual related offences has a positive effect on prosecution of gender crimes. Furthermore, she called on sub-regional Courts in Africa, and the African regional human rights system to contribute to development of gender jurisprudence.

Caritas Niyonzima, a legal practitioner in Burundi and an expert on Gender and Development presented on A Holistic Approach to Gender based Violence. She

¹²Case No. ICTR-96-4-T available at <http://www.unict.org/Portals/0/Case/English/Akayesu/judgement/akay001.pdf>

reminded the audience of the UN Resolutions 1325 of 2000¹³ and 1820 of 2008¹⁴ that seek to end sexual violence. She celebrated the fact that the Rome Statute remains the prime instrument against sexual violence. She stressed the need for people to know that the effect of sexual violence long out-live post war situations. She recalled a cliché of the effect on women, when they told her “If they win, they celebrate on our bodies, if they fail, they revenge on our bodies”.

Caritas Niyonzima decried the continued perpetuation of sexual acts against women noting that it extends beyond conflict situation and remains a source of worry. She stressed that most women in Burundi and the great lakes region still lack support emotionally and medically with exacerbating effects of sexually transmitted infections. Another area that needs to be enhanced in her view is that of access to justice and legal support of victims of sexual violence.

On this paradigm, Marie Henriette Patricia Elonga, Gender and Sexual Violence Focal Point of MONUSCO (UN Mission in the DRC) advocated for the elimination of emotional and post conflict trauma. She opined that women should be integrated into preliminary investigation processes, and be interviewed by other women, and also ensure a high level of confidentiality. She lauded the review of the law in DRC to bring the age of maturity of girls from 14 to 18 years and also prescribe a 30 years’ imprisonment for persons convicted for sexual offences.

Elonga highlighted the need to engage in the educational empowerment of women. Elonga suggested training of boys and men to respect the integrity of women as a very important focal point to aid the elimination of sexual violence.

¹³<http://www.un.org/womenwatch/osagi/wps/>

¹⁴<http://www.securitycouncilreport.org/atf/cf/%7B65BF9B-6D27-4E9C-8CD3-CF6E4FF96FF9%7D/CAC%20S%20RES%201820.pdf>.

The session elicited a number of talking points ranging from participants seeking clarification on the issue of sexual violence in conflict and non-conflict situation, the role of men and boys in the lived realities of survivors, the silent culture of African women to prosecution strategies, and the attitude of International Criminal Justice practice on the product of rapes during conflict situation.

In response, Elonga elucidated that the need to engage boys and men in the fight against sexual violence remains an important strategy to be pursued. The influence of religion and culture was also identified to be a strong basis of ensuring a positive sexual related violence.

Prof. Swart hinted that the continued education of national sectors to use the various human rights tools like the Maputo Protocol and IHL to effectively challenge sexual violence would aid develop the gender jurisprudence. The position of Uganda Amnesty Act on perpetrators of rape was however a sour observation in the general discussion, with the need to enhance gender budgeting in national plans advocated.

A Holistic Approach to International Criminal Justice

The final session chaired by Moray Hathorn, Pro Bono Partner at Webber Wentzel approached the question of international criminal justice from multidisciplinary dimensions.

Angela Mudukuti, International Criminal Justice Project Lawyer with the Southern Africa Litigation (SALC) speaking on Aspects Universality argued the need to advance realistic forms of universality by developing national jurisdictions to be able to play their complementary role. She said the absence of cases before the ICC would show that the ICC is achieving its mandate and not otherwise. She expressed

the view that lack of political will by South Africa in cooperating in the Zimbabwe torture case remains a sour point in the seeming positive disposition of the South African government to the fight against impunity.

Professor Kamari Clarke of the University of Pennsylvania, speaking on the Limitations of International Criminal Justice, argued for the need to reanalyse the question of superior command and the continued struggle for legitimacy in matters that concern international criminal justice. Prof Clarke opined that not taking cognisance of the impunity gap limits the gains of international criminal justice.

She said international criminal justice must take into consideration the African peculiarity of history.

Don Ferencz, Convenor of the Global Institute for the Prevention of Aggression and Visiting Professor at Middlesex University School of Law, recapped the vibrant presentations, by tracing from the Hammurabi code¹⁵ that advocated the protection of the poor from the powerful. He made reference to the 1922 Pact of Paris that abhorred crimes and actions against the peace of mankind.

In analysing the position of states on the adoption of the Crime of Aggression, Ferencz, expressed concerns that, the grand design of the political bottle necks was aimed at ensuring that the inclusion of the Crime of Aggression does not come to light. He regretted the use of reservations by the permanent members of the UNSC stating that “we are facing the challenge of the crime of leadership more than anything else”.

During the Floor Discussion, participants noted that the powerful states have used the doctrine of universal jurisdiction against weaker states. In a swift contribution, the

¹⁵<http://www.commonlaw.com/Hammurabi.html>.

AU Legal Counsel called on the UN and ICC to borrow a leaf from the AU in its position on the Crime of Aggression. However, the challenges of political implication and diplomatic bottlenecks were all identified as major setbacks. A majority of participants advanced that the present power play goes beyond the law and only a strong resolve by the political class will assist the extinction of international crimes.

Conclusion and Closing Remarks

In his closing remarks, Professor Shadrack Gutto, Chair of the Governing Council of AFLA recapped the benefits of the two-day conference. He highlighted the need for continued advocacy by the ICC of its mandate in Africa and elsewhere. He called on Africans everywhere to stand up for their collective rights in order to promote accountability and end impunity for grave crimes.