



## **Report 6<sup>th</sup> Meeting - Gender-Sensitive Judging in International Criminal Courts (ICC)**

On December 7, 2021, during the 20<sup>th</sup> Session of the Assembly of States Parties (ASP) to the International Criminal Court (ICC), Africa Legal Aid (AFLA) convened a Side Event entitled *Gender-Sensitive Judging in International Criminal Courts*. The meeting was held within the context of AFLA's gender mentoring training programme for judges of international courts and tribunals, and was co-sponsored by Australia, the Netherlands, Uganda and Africa Legal Aid.

The webinar was extremely well attended by over ninety participants including judges and other officials of international courts and tribunals, ambassadors, and other diplomatic representatives of states parties to the ICC, representatives of inter-governmental and international organisations, gender justice advocates, civil societies and legal fraternities from around the world.

The event was chaired by **Evelyn A. Ankumah**, Coordinator of the Gender Mentoring Training Programme for Judges; Executive Director of AFLA and included presentations from five international Judges along with the Co-Coordinator of the Gender Mentoring Training Programme, Gabrielle McIntyre.

The presenters and topics presented were as follows:

**Judge María del Socorro Flores Liera**, Judge of the ICC.  
*Impact of Crimes from a Gender Perspective*

**Judge Janet Nosworthy**, Judge of the STL; Former Judge of the ICTY.  
*Interpreting Crimes*

**Judge Florence Mumba**, Judge of the Supreme Court Chamber of the ECCC; Former Judge and Vice President of the ICTY; Former Judge of the Appeals Chamber of the ICTY and ICTR; Former Judge of the Supreme Court of Zambia.  
*Gender in the Context of Assessing the Credibility of Evidence*

**Judge Althea Violet Alexis-Windsor**, Judge of the ICC.  
*Acknowledging Gender-Based Targeting in Post-Conflict International Criminal Law*

**Judge Fatoumata Dembélé Diarra**, Former Judge and First Vice President of the ICC; Former Judge of the ICTY.  
*The Principle of Complementarity from a Gender Perspective*

**Gabrielle Louise McIntyre**, Co-Coordinator of the Gender Mentoring Training Programme for Judges; Chairperson of the Truth, Reconciliation and National Unity Commission of the Seychelles; Former Chef de Cabinet and Principle Legal Advisor to the President of IRMCT and four successive Presidents of the ICTY.

*Final Reflections and Conclusions*

As the Chair of the Event, **Evelyn A. Ankumah**, AFLA's Executive Director and Coordinator of the Gender Mentoring Training Programme for Judges, opened by welcoming all participants and acknowledging the presence of the distinguished panellists. She then thanked the governments of Australia, The Netherlands and Uganda for co-sponsoring the event. Ankumah made three general observations in her opening statement relevant to the panel discussion:

- First, gender dynamics and the socio-cultural power relationships that define them are present in communities, societies, and within institutions, and international courts and tribunals are not an exception.
- Second, any attempt to address the challenges facing the judiciary at international courts and tribunals must be done with a gender-sensitive lens, that promotes awareness of gender biases, not only by men, but also by women.
- Third, improved gender dynamics and gender-sensitive adjudication in international criminal courts will advance full and equal participation of women including, female Judges, female Counsels, female Witnesses, and female Victims, in the international justice process, thereby ensuring a more inclusive and impartial international justice system.

Without further ado **Ankumah** gave the floor to **Judge María del Socorro Flores Liera**, who spoke about the *Impact of Crimes from a Gender Perspective*. She thanked her fellow distinguished panellists for their participation and acknowledged the commitment of the co-sponsors to make gender impacts part of comprehensive efforts to deliver justice for victims of atrocities.

In her presentation Judge del Socorro Flores Liera observed that:

- Achieving accountability for perpetrators of heinous crimes to deter justice requires a comprehensive approach to justice. An approach that takes into account gendered power relationships at all stages of the judicial process.
- It is necessary to have a system that understands victims and informs accurately what victims can expect during judicial proceedings *vis-à-vis* the rights of the accused, avoids re-victimisation and reduces the stigma on victims. This is not easy to achieve and requires deep attitudinal changes from all stakeholders at national and international levels, including prosecutors, practitioners, organisations, judges, and states.
- Gender-sensitivity on the bench is required. All judges, no matter their gender or background must be aware and sensitised to the impacts that gender may have on crimes, and incorporate them in interpreting the law, receiving testimonies, calculating sentences, and ordering reparations.

- Gender-based violence can affect any person(s) including men, women, boys, girls, LGBTQI, and the impacts in the different situations must be borne in mind.
- Women and girls are disproportionately affected by international crimes and violence against women and girls is often used as a tactic of war. Women and girls continuously face structural discrimination during their lives and such structural discrimination also affects how justice is delivered.

Judge María del Socorro Flores Liera concluded her presentation by emphasising the importance of gender-sensitive training for all judges as they also, regardless of their gender, are not immune from stereotypes and patriarchal attitudes, noting that strengthening gender-sensitive judgement goes beyond the judiciary and requires commitment from all stakeholders.

**Judge Janet Nosworthy** spoke about the *Interpretation of Crimes* emphasising that:

- The role of judges in interpretation of legislation is relevant not only for the right to a fair trial of the accused, but also for the rights and interests of the victims, underlining that it is important to put a human face, a gender face on the law to achieve justice with the eye firmly placed on the long-term objective of world peace.
- Judges of international courts and tribunals should engage in dialogue on new methodologies that improve the judicial process and provide better interpretative solutions for contemporary times.
- Gender-sensitivity can be achieved at the ICC and other international criminal courts and tribunals. As men and women approach issues differently, a female contribution impacts judicial determination and the outcome. Therefore, judges should look to and learn from the gender-sensitivity movement to improve the process of justice.

Next, **Judge Florence Mumba** gave a presentation on *Gender in the Context of Assessing the Credibility of the Evidence*. She contended that:

- A judge's duty to assess the credibility of evidence may be impacted by gender stereotypes. In order to be objective, evidence may be considered holistically, as given by each witness and content must be critically examined to avoid bias and revictimization of the victims.
- Cultural background present important differences in the way male and female witnesses give evidence in court. For example, a witness looking down when they give their evidence may be a mark of respect for seniors or those in authority, yet without understanding the cultural background of the witness this way of presenting their evidence may be interpreted as impacting the credibility of the witness, especially in sexual assault cases.
- While credibility focuses on truthfulness, reliability focuses on the witness's situational circumstances during the event in question. Therefore, content must be the first and primary focus when assessing the credibility of the evidence.

The floor was then given to **Judge Althea Violet Alexis-Windsor** who presented on the importance of *Acknowledging Gender-Based Targeting in Post-Conflict International Criminal Law*. Judge Althea Violet Alexis-Windsor made the following submissions:

- Gender-based targeting has long been a feature of national criminal law as well as international criminal law. Both men and women are targeted because of their gender. One of the many challenges is to have gender-based targeting specifically acknowledged and not subsumed into the general background of the offence.
- Oftentimes, there is evidence of gender-based targeting at the investigations level of a case but which has not been called gender-based targeting and which then becomes part of the evidential context of offences which ostensibly have nothing to do with gender-based targeting. This is a challenge which affects domestic prosecutions but becomes writ large in the presentation of cases in both international armed conflict and internal armed conflict.
- The challenges have directly affected the face of the presentation of cases so that on a perusal of such cases, it may appear that gender-based targeting was incidental and opportunistic. However, history has shown that gender-based targeting, even in, or especially in times of conflict can be purposeful and specific.

Judge Alexis-Windsor then traced how international criminal law in post-conflict and post-national unrest, notably by the ICTY, ICTR and within the Rome Statute system, has come to acknowledge gender-based targeting.

**Judge Fatoumata Dembélé Diarra** presented on *The Principle of Complementarity from a Gender Perspective*. Judge Diarra explained that the Rome Statute is a system built on the principle of complementarity in which states bear the primary responsibility for the investigation and prosecution of crimes regardless of the outcome of any particular proceedings before the ICC.

Judge Diarra observed that:

- Article 17 of the Rome Statute does not take into account the prospect of failure of the Court to do its job properly, like when it fails to prosecute and convict the real culprits, with the result that victims - in many situations women and girls - continue to live with the consequences of the atrocities suffered.
- The provisions of Article 17 should be reviewed to include provisions that take into account the errors committed in identifying and prosecuting suspected perpetrators of international crimes.
- It is imperative to include in the Rome Statute a provision, in the event that the Court is unable to establish the responsibility of a suspected perpetrator, to account for women who have suffered sexual violence at the hands of perpetrators.
- The efforts of the ICC Trust Fund for Victims to support victims even in the event of acquittals should be commended. However, it has hardly impacted in the quest for justice and the need for moral rehabilitation of widows, orphans, mutilated persons, women, and

girls infected with sexually transmitted diseases or who have become pregnant as a result of rape.

Last, but not least, **Gabrielle Louise McIntyre** provided the *Final Reflections and Conclusions* by making the following observations:

- Historically, international laws and the procedures for their enforcement were predominantly crafted by men to meet men's needs and reflect men's experiences. Prevailing adversarial approaches to justice, building upon domestic models, have been designed without attention to important gendered behaviours or deeply entrenched discriminatory attitudes towards women. Traditionally women have not only been invisible in international justice processes, but they have also been silenced by them.
- Following on from the work of the ad hoc Tribunals, the Rome Statute represented a seismic shift in international justice processes. For the first time in international criminal law, the Rome Statute defined gender and accepted its socially constructed nature (art 7(3)). It also included a ground-breaking array of crimes specific to women's experiences, rendering women visible in international criminal law.
- However, none of the provisions of the ICC's regulatory framework guarantee that the Court will ensure justice with regard to crimes of wartime sexual violence. This fact has been borne out by initial failures on the part of the ICC Prosecutor to include charges when evidence of sexual and gender-based violence was present. Moreover, some of the ICC's judicial rulings have propelled outmoded understandings of sexual and gender-based crimes, resulting in the perpetuation of stereotypes about sexual violence. These judicial shortcomings are underpinned by failures to approach the evidence objectively as emphasized by Judge Mumba, or to assess the law and facts through the lens of gender awareness, as emphasized by Judges' Nosworthy, Flores, Diarra and Alexis-Windsor. Such decisions have been rendered at the ICC despite relative gender balance on the bench, underscoring that the solution is not simply adding more women to the mix – **gender consciousness is required.**
- It is this need for mainstreaming that motivated Evelyn, as Executive Director of Africa Legal Aid, to develop a gender-sensitive judging series in which all our presenters are participants. Indeed, if today's presenters are representatives of the judicial arm at the Court, the cultural shift required to ensure the proper treatment of crimes of sexual and gender-based violence by the judiciary appears well underway.

Following the presentations, Evelyn Ankumah opened the floor for discussion.

### **Discussion**

**The first question was about training and what it will encompass in practice.** Judge Flores Liera responded by highlighting that gender-sensitivity training of judges should be aimed at understanding the different power relationships and incorporating them into the way judges deliver justice. In addition, she emphasised that, as **Judge Alexis-Windsor** mentioned, international law

does not need to be changed as the international instruments are there. However, judges simply have to incorporate gender-sensitive awareness.

**A question was asked how men can be more easily recognised as victims of gender-based crimes.**

**Judge Mumba** responded by explaining that men are also victims of sexual violence. However, they are more reluctant to come forward when they have been sexually assaulted. She affirmed that investigating officers and prosecutors are explicitly trained for this when recording evidence, and most importantly, the international community should encourage and support victims of sexual assault (regardless of gender) to come forward.

**An anonymous question was asked whether such gender-based approaches also take into account non-binary individuals, who do not identify themselves with the male or female gender.**

**Judge Mumba** responded that gender includes all persons regardless. What matters is evidence. If the prosecution charges properly and perpetrators tried accordingly, they can be convicted.

**Judge Samba** of the ICC then took the floor to talk about the reluctance of victims to participate in the proceedings. She acknowledged that cultural differences play a big role in the reluctance of victims of sexual assault to come forward.

**Judge Alexis-Windsor** added that judges cannot eradicate societal taboos. Therefore, all sections of society must work together to ensure that victims are not revictimized upon return to their community after having testified as a witness. **Judge Mumba** stated that civil society organisations are able to support judicial systems to deal with the cultural differences and the deep psychological impact.

**Judge Nosworthy** noted that judges come from different social, cultural, and religious backgrounds and training is essential to overcome these issues. **Judge Flores Liera** agreed that training for all actors on all levels of society is crucial, both for the protection of victims of gender-based violence and for gender-sensitisation in adjudication.

On that note, Evelyn Ankumah thanked the esteemed presenters for their rich presentations, and all participants for their attendance and input, and then declared the meeting duly closed.