Africa and the ICC: Achieving justice for victims and ending impunity across the continent

(Being the Keynote Address delivered by Femi Falana SAN at the Meeting convened by the African Network on International Criminal Justice held at Dakar, Senegal from July 30-31, 2019)

The Rome Statute of the International Criminal Court (ICC) recognizes "that during this century millions of children, women and men have been victims of unimaginable atrocities that deeply shock the conscience of humanity" owing to armed conflicts. These "grave crimes threaten the peace, security and well-being of the world".' Africa has had its fair share of the problem. As such, various efforts to pursue, make and keep the peace have been intensified over the past half a century.

The pursuit of international criminal justice in Africa through the International Criminal Court (ICC) platform has not been without hitches. There is a growing rift between the African Union (AU), as a continental body, and the ICC owing to the AU's perception that the ICC is pursuing selective justice and the AU's misgivings about the ICC's indictment /trial of some sitting heads of states in Africa.

The claim of selective justice undermines the very essence of global justice. On the face of it, the ICC Statute could apply to any situation, because even if the state is not a party to the Rome Statute, the Security Council could refer a situation in a non-state party to the ICC and the ICC would exercise jurisdiction over such a matter. Legally and conceptually, no state is immune from the ICC's jurisdiction. However, experience over the years would seem to suggest that the ICC jurisdiction applies only to weaker states and not powerful states.

At the annual summit of the Heads of State and Governments of the AU held in Addis Ababa two years ago, the leaders

and representatives of the member states voted to adopt a strategy to collectively withdraw from the ICC. However, Nigeria and Senegal did Africa proud by refusing to vote for the planned exit from the ICC. As the vote for impunity was defeated, South Africa, Burundi and The Gambia announced plans to withdraw from the ICC. Even though both Burundi and The Gambia withdrew from the ICC the latter has since returned to the ICC while South Africa has dropped the plan to quit the global criminal court.

The vote to quit the ICC by African leaders was based on the allegation that the ICC has exclusively focused attention on African leaders by only investigating and prosecuting cases of genocide, war crimes, and crimes against humanity allegedly committed by African leaders. To justify the decision of African States to quit the ICC, the AU announced that the mandate of the African Court on Human and Peoples Rights would be amended to include criminal jurisdiction. Nothing was however said by the AU on the urgent need by member States to strengthen their criminal justice system and accountability mechanisms.

In accusing the ICC of "selective justice" it has not been denied that there was basis to have opened investigation into the war crimes in Uganda, Democratic Republic of the Congo, Kenya, Central Africa Republic, Sudan, Mali, Libya, Sierra Leone and Cote d'Ivoire. It is on record that while the Security Council referred the cases of Darfur and Libya to the ICC the transition government in Libya decided to try the suspects in Tripoli. Even though the cases of Kenya and Cote d'Ivoire were referred to the ICC by the Special Prosecutor in exercise of his proprio motu powers the governments of both States accepted the jurisdiction of the court. However, the cases from Uganda, the Central Africa Republic, Cote D'ivoire, the Democratic Republic of Congo and Mali were referred to the ICC by the governments themselves of those countries.

With respect to the convicted ex- President Hasne Habre of Chad it was the African Union which mandated Senegal to set up a special tribunal for his trial in Dakar while it was the Government of Sierra Leone which requested the Security Council of the United Nations to set up the Special Court for Sierra Leone which tried ex-Liberian President Charles Taylor. In combating impunity in other parts of Africa, the International Criminal Tribunal for Rwanda sat for 21 years; the Central Africa Republic plans to set up a Special Criminal Court while South Sudan has decided to establish a hybrid tribunal. The newly installed government in The Gambia set up a Truth and Reconciliation Commission which is currently taking evidence from the victims of gross human rights abuse which characterized the Yahya Jammeh regime.

From the foregoing it is indisputably clear that even though the ICC has tried a number of political leaders in Africa, majority of the cases were referred to the court by African States. In other instances, it was either the United Nations Security Council or the African Union which ensured that brutal dictators were made to stand trial and account for the atrocities perpetrated by them while in office. In all the cases in which the ICC intervened it was confirmed that the States were either unable or unwilling to prosecute the suspects who were involved in genocide, war crimes and crimes against humanity.

To the extent that the ICC has failed to try the heads of governments of some powerful states responsible for the unprecendented crimes against humanity and genocide committed in Iraq, Afghanistan, Libya and Syria the allegation of selective prosecution of African leaders cannot be dismissed lightly. But the failure of the ICC to prosecute such well known highly placed criminal suspects should not be a justification for preventing the arrest and trial of other perpetrators of crimes against humanity and genocide.

As far as Africa is concerned the ICC cannot be absolved of the allegations of selective prosecution. In fact, the case of former

President Laurent Gbagbo has gone from selective prosecution to selective persecution.Whereas he was discharged and acquitted in February 2019 the ICC has ordered him to be incarcerated in Belgium pending when the Prosecutor would file a fresh charge against him. But since the ICC has no power to order a defendant that has been tried, dischrged and acquitted it ought to quashed the detention of Mr. Gbagbo forthwith.

In as much as AU is opposed to the indictment and prosecution of African leaders not much has been done to promote to accountability and defend human rights. In fact, in order not to be held to account only nine States (Algeria, Benin, Burkina Faso, Cote d'Ivoire, Ghana, Mali and Tanzania and The Gambia) have made a Declaration to allow victims of human rights abuse to seek redress in the African Court on Human and Peoples Rights. However, the AU will be deceiving itself if it believes that the planned mass withdrawal of African states from the ICC will shield African leaders who engage in genocidal acts from prosecution and humiliation. As long as the governments in Africa continue to pay lip service to the fight against impunity, the victims of egregious human rights infringements will not hesitate to seek redress in available human rights mechanisms with a view to bringing perpetrators to book.

If the ICC wants to be relevant in Africa it cannot continue to pick and choose the cases to investigate and prosecute. For instance, the Prosecutor of the ICC issued warnings and threatened to prosecute politicians linked with political violence during the 2015 general election in Nigeria. But no such warning was ever issued when former President Yahya Jammeh annulled a credible presidential election held in The Gambia in 2016. Happily, the Economic Community of West African States intervened decisively and prevented the break out of a civil war in the country. As the ICC cannot continue to turn a blind eye to atrocities committed by the regime of former president Yahya Jammeh of Gambia the Prosecutor should open an investigation into them under the Rome Statute without any further delay.

If the AU does not want Africans accused of violations of international law to be tried outside the continent and outside domestic jurisdictions, it has to show strong political will to combat impunity and ensure justice for victims. Refusal to comply with court orders admitting criminal suspects to bail or ordering the release of detainees is an invitation to anarchy. The manipulation of constitutions for tenure elongation is also an invitation to political instability. The AU has to adopt measures to prevent the manipulation of national constitutions to legitimise tenure elongation by ruling parties, harrassment of opposition figures and civil society activists, killing of political opponents, proscription of civil groups, closure of media houses and ban on freedom of expression and association.

The inevitable collision between the sovereignty of states over their criminal justice systems and supranational criminal adjudication is addressed by the Rome Statute of the ICC through recognition of the primacy of the domestic legal system. Under articles 1 and 17 of the Rome Statute, complementarity enables states to retain jurisdiction over crimes committed in their territories and by their nationals. The purpose of the Court is to complement national jurisdictions that are unable or unwilling to prosecute international crimes. By affirming the principle of complementarity, the parties to the Rome Statute demonstrate that they do not intend the ICC to actively step into the shoes of national criminal justice systems.

Indeed, the primary responsibility to protect African people and residents from violations of human rights rests squarely with individual AU member states, in recognition of the sovereign responsibilities and duties of states. Referring a handful of cases and situations to the ICC cannot and will not satisfactorily end the culture of impunity for human rights violations and abuses across the continent and will not give effective remedies, justice and reparations to African victims.

To best address accountability and combat impunity across the continent, African leaders should strengthen and improve domestic

criminal justice systems and the regional and sub-regional human rights courts and mechanisms. In particular, the Summit of Heads of State or Government of the Southern African Development Community (SADC) should reaffirm its commitment to improve respect for human rights among its member states, consistent with the SADC treaty, which commits them to act in accordance with the principles of "human rights, democracy and the rule of law."

The Summit of Heads of State or Government should without further delay restore the SADC Tribunal's human rights mandate and comply fully with the orders of regional tribunals and municipal courts. It should be noted that SADC leaders in August 2014 stripped the tribunal of its mandate to receive human rights complaints from individuals and organizations, leaving it only to adjudicate disputes between member countries. This drastically limits the tribunal's human rights protection mandate.

The AU should immediately rescind its 2018 outrageous decision [Decision EX.CL/Dec.1015(XXIII)] to limit the autonomy and human rights mandate of the African Commission on Human and Peoples' Rights. This illegal decision is entirely inconsistent and incompatible with the human rights provisions of the AU Constitutive Act, and it is retrogressive to say the least. It should be noted that the AU Executive Council in June 2018 stated in its decision that the African Commission only had "independence of a functional nature, and not independence from the same organs that created the body." The AU Executive Council also decided to authorize the AU policy organs to revise the criteria for the commission to grant observer status to NGOs, taking into account overtly broad considerations of "African values and traditions."

The African Commission on Human and Peoples' Rights itself has to wake up and be counted on the side of human rights, be more assertive in the exercise of its human rights mandate and to robustly challenge any attack on its foundational instrument—the African Charter on Human and Peoples' Rights—by the AU or any other

institutions for that matter. The African Commission has to restate its historical leading role across the continent in promoting and protecting human and peoples' rights, including in Nigeria when it delivered groundbreaking decisions during the period of military dictatorship in the country.

The Malabo Protocol, that is, the Protocol 'on the African Court of Justice and Human Rights', [and the Statute of the African Court of Justice and Human Rights, Annex, Malabo Protocol], with jurisdiction on international crimes, corruption and "illicit exploitation of natural resources," contained in Article 28A, should be amended to remove Article 46A which provides immunity for sitting leaders, to the effect that: "No charges shall be commenced or continued 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."

The AU should stop prioritizing 'political settlement' of egregious human rights abuses at the expense of accountability, access to justice and effective remedies for African victims of violations and abuses. Accountability and justice must never be sacrificed to promote the interests of those in power. African victims of human rights violations and abuses cannot have faith and confidence in domestic criminal justice systems and regional and sub-regional human rights courts if the AU continues to fail or refuse to address the challenges confronting these institutions of justice and to consistently obey and enforce court judgments.

The African human rights community should coordinate and organize victims of crimes against humanity and genocide to seek reliefs within the criminal justice system. Victims of human rights abuse should be encouraged and supported to seek redress in domestic courts and regional tribunals and institutions.

The human rights must realise that repression is imposed on African countries for the sole purpose of implementing the anti peoples'

policies dictated by the International Monetary Fund and other imperialist institutions that have continued to control the economy of African countries. This Network must not rely on Western governments and fundibg agencies if it wants to achieve the objective of promoting accountability in Africa.

The AU and its member states and African leaders in general must sort out the procedural obstacles that continue to impede the effective enforcement of judgments of regional courts in domestic nation states.

The AU should stop engaging in confrontation with the ICC and instead show genuine commitment to prosecute those accused within member states' domestic courts, develop the capacity to prosecute crimes under international law within national courts, and improve access to justice for victims nationally and regionally.

The African Union should adequately fund the African Court on Human and Peoples' Rights and encourage its member states that have not yet done so to ratify the protocol to the African Charter on Human and Peoples' Rights establishing the African Court on Human and Peoples' Rights, and make declarations that would allow individuals and NGOs direct access to the court.

As noted, the AU should politically empower the court and ensure enforcement of all its rulings and judgments if it is ever going to effectively fulfil its human rights objectives, as contained in its Constitutive Act and ensure justice for victims of human rights violations and abuses across the continent.

The need for prosecution at the ICC will remain as long as African leaders continue to fail or refuse to address entrenched impunity and gross injustices on the continent. African solution to the problem of African impunity should mean accountability for perpetrators and justice and effective remedies for victims. Owing to the inability of the criminal justice system to bring the violatord of human rights abuse in many countries the ICC is a very popular institution in Africa. Hence, it has continued to receive complaints alleging contraventions of the Rome Statute by many pubic figures in Africa. In fact, the office of the

Special Prosecutor recently disclosed that it has so far received 131 petitions from Nigeria alone.

Apart from the ICC the victims of gross abuse of human rights in Africa will continue will continue to seek redress in countries whose courts are clothed with universal jurisdiction in the area of human rights. Because of the refusal of some governments to prosecute public officers who sponsor electoral offence the United States government has imposed visa ban on them.

In fighting impunity the human rights community must stop relying on reports compiled by Amnesty International, Human Rights Watch and other foreign NGOs. The Network on International Criminal Justice should speak authoritatively in defence of human rights in Africa. As a matter of urgency, the human rights cimmunity should pressurise the AU to end the illegal occupation of the territory of Western Sahara by the Kingdom of Morocco in line with the provisions of articles 13 and 20 of the African Charter on Human and Peoples Rights.

Finally, it is pertinent to remind the representatives of the NGOs in this meeting that the people of Africa were united in tbe struggle against colonialism, apartheid and military dictatorship. The struggle succeeded because the people were organised. Once again, the people have to be mobilised and organised to end impunity in Africa. It cannot be done by NGOs alone but by the people who are the actual victims of political repression and economic exploitation. I therefore challenge the Network to link up with progressive political parties, trade unions, student unions and other youth bodies as well as women groups in the struggle against impunity in Africa