



AFRICA LEGAL AID (AFLA)

***“Africa and the International Criminal Court (ICC)-Lessons Learned
and Synergies Ahead”***

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(By Magoeng Magoeng-Chief Justice of the Republic of South Africa)

Your Excellency Justice Pillay, former United Nations High Commissioner for Human Rights, Excellency Madam Intelmann, President of the Assembly of States to the Rome Statute, Ms Evelyn Ankumah, the Executive Director, Africa Legal Aid, and your partners, distinguished guests, Ladies and Gentlemen, good morning.

I trust that your stay so far has given you reason to come back to South Africa and that you will enjoy the rest of your stay here. Congratulations to Africa Legal Aid in cooperation with the International Commission of Jurists - Kenya and the Centre for Internationalisation at the University of Johannesburg, on a well organised conference under the theme "*Africa and the International Criminal Court: Lessons Learned and Synergies Ahead*".

Thank you for the invitation to address this historic gathering which focuses on the important role played by the International Criminal Court in an endeavour to make life better for all of us in this great continent of Africa. The timing of this conference is apposite, having regard to the perceptions and the debates that have been going on about the role of the ICC in the African continent.

The Creation of the International Criminal Court

It was on 1 July 2002, following a series of negotiations amongst representatives of 161 States, that the Rome Statute came into operation thus giving birth to the International Criminal Court. The vision was to create an independent institution, to bring an end to the impunity hitherto apparently

enjoyed by the perpetrators of heinous crimes like genocide, crimes against humanity, war crimes and the crime of aggression. The reasons for the establishment of the ICC are aptly captured in the Preamble to the Rome Statute of the International Court as follows:

“Affirming that the most serious crimes of concern to the international community as a whole must not go unpunished and that their effective prosecution must be ensured by taking measures at the national level and by enhancing international cooperation”

The International Criminal Court was thus established to give practical expression to the ideals espoused in the preamble and to serve as a court of last resort for victims and survivors of atrocious crimes who cannot find justice in their own country. It is intended to deter leaders who apparently have little to fear from domestic prosecution, from perpetrating gross human rights abuses.

The Rome Statute requires that:

“The Judges of the Court shall be independent in the performance of their functions and they shall not engage in any activity which is likely to interfere with their judicial functions or to affect confidence in their independence”.

Additionally, the Statute demands that:

“The Office of the Prosecutor shall act independently as a separate organ of the Court. It shall be responsible for receiving referrals and any substantiated information on

crimes within the jurisdiction of the Court, for examining them and for conducting investigations and prosecutions before the Court. A member of the Office shall not seek or act on instructions from any external source.¹

For these reasons, when perceptions be they founded or unfounded, emerge that the Court lacks independence or the prosecuting authority is compromised or manipulated, steps must, so far as possible, be taken to immediately dispel these potentially toxic perceptions. The Court shall only intervene where the signatory State is unwilling or unable genuinely to carry out the investigation or prosecution or in the event of a Security Council referral.²

The Rome Statute therefore aims to establish a system of international criminal law which empowers domestic jurisdictions that are primarily responsible for and capable of prosecuting core international crimes.³ And it is necessary to highlight these factors because of their relevance to some of the concerns that have been raised about the ICC by some Africans.

The ICC is therefore one of the institutions that plays a crucial role in the promotion and the enforcement of peace, stability and justice worldwide. These factors are in turn essential ingredients for facilitating sustainable economic development and poverty alleviation. Ordinarily, I should be taking you through

¹Articles 40 and 42 of the Rome Statute of the International Criminal Court,

² The Second Report of the Prosecutor of the International Criminal Court, Mr Luis Moreno Ocampo to the Security Council Pursuant to UNSC 1593 (2005), 13 December 2005.

³“Emerging Voices: The Transformative Influence of International Criminal Law in Domestic Perspective”- HJ Van Der Merwe, Public Law Studies Lecturer (UWC), South Africa, August 2013.

some of the key provisions of the Rome Statute and expressing views on their meaning and how to give practical expression to them. Sadly, I am hamstrung by a case that is pending before the Constitutional Court of South Africa, on the meaning and application of the central features of the Roman Statute. What then does this leave me with?

Role of the ICC in Africa

Africa has had a high number of human rights violations. Notwithstanding the waves of democracy that have washed across Africa, a number of countries have continued to witness many incidents of gross human rights violations, including those that could be classified as genocide, war crimes and crimes against humanity.

Underscoring the need to establish the ICC, the former President of the Republic of South Africa, Tata Nelson Mandela said:

“Our own continent has suffered enough horrors emanating from the inhumanity of human beings towards human beings. Who knows, many of these might not have occurred, or at least been minimised, had there been an effectively functioning ICC.”⁴

⁴Address delivered by former President Nelson Mandela at the Conference of African National Institutions for the Promotion and Protection of Human Rights, Durban, 01 July 1998.

As a result of this desire to shed itself of this negative image, to end impunity, to protect its people, and create a climate that is conducive to sustainable economic development and poverty alleviation, Africa most ardently argued for the establishment of the International Criminal Court. To date, of the 122 States that have ratified the Rome Statute, 34 are African States and about eleven more African States have signed the Statute but are yet to ratify it. This is a strong indication of Africa's commitment to the international criminal justice system set up to eradicate impunity.⁵

The troubled relationship between the ICC and Africa

Since its establishment in July 2002, almost all of the ICC's investigations and prosecutions and all matters presently before it concern alleged human right violations committed in Africa. This has resulted in the ICC being criticised by some African states as being selective and of questionable impartiality. Even though there are cases before the ICC that were self-referred by the relevant African countries themselves, a concern persists that the ICC appears to be targeting Africa in pursuit of political expediency.⁶ This perception is fuelled by the reality that gross human rights violations have taken place and continue to take place beyond the borders of Africa and yet, so say the critics of the ICC,

⁵ A further testimony to Africa's commitment to international criminal justice is the number of African States, including South Africa and Kenya which have enacted statutes to give effect to the implementation of the Rome Statute. Article 4 of the African Union's Constitutive Act also affirms the continent's commitment to the protection and promotion of human rights and the rejection of impunity

⁶ See Heinrich Boll Stiftung "A Fractious Relationship: Africa and the International Court. According to the foreword, Rwandan President Mr Paul Kagame said the ICC was made for Africans and poor countries."

there does not seem to be as much enthusiasm to deal with those atrocities as is the case with those committed in the African continent.

If these concerns are not addressed or given the urgent and serious attention they deserve, we stand exposed to the risk that, attitudes could harden, cooperation could be difficult to secure, the effectiveness of the ICC could be undermined and the impunity of leaders who perpetrate international crimes could in the meantime continue, as these leaders take refuge in the alleged partiality of the ICC. Impunity impacts negatively on the political, social and economic development of countries to the detriment of the citizenry. It also hampers their ability to conduct international relations.⁷

It is a matter of public record that the decision to arrest and indict the President of Sudan strained the relationship between the ICC and Africa. This tension was heightened by the subsequent developments around the pending trial of the President and Deputy President of Kenya. The AU resolutions passed in relation to these matters are nothing short of a red flashing bright light which require all of us to do whatever we can, to help mend and strengthen relations between Africa and the ICC. The bold initiative taken by the ICC of visiting Africa to discuss with Africa ICC's role in promoting world peace, stability and justice without fear, favour or prejudice, is highly commendable.

⁷“What Next for the ICC in Africa”-The World Post, Kimberly Brody, Senior Program Associate, Rights & Justice Initiatives, November 2013.

Lessons learned and synergies ahead in the African Continent

Africa's move to comply with international criminal law and to domesticate the relevant legal instruments⁸ was hailed as the "beginning of a new era of accountability for abuse by political leaders in Africa and an important blow against impunity for official misconduct around the world."⁹

Impunity should not be tolerated. It weakens the standing and credibility of African democracies, the African people and their leaders. It denies justice to victims of crimes that defy description and rob citizens of their right to hold their leaders accountable for alleged abuses.¹⁰

It may therefore be necessary that all key players in maintaining world peace and justice, including all parties to the Rome Statute and ICC reflect on, among others, the following:

- (i) The need for a robust and meaningful engagement between the AU, the ICC and the UN Security Council representatives on the perceptions, and realities, around the functioning of the ICC;

⁸ The South African Constitution empowers the Judiciary to recognise and implement the provisions of the international instruments and/or mechanisms. Section 231 of the Constitution provides that "any international agreement becomes law in the Republic of South Africa when it is enacted into law by national legislation; but a self-executing provision of an agreement that has been approved by Parliament is law in the Republic unless it is inconsistent with the Constitution or an Act of Parliament". South Africa signed and ratified the Rome Statute of the International Criminal Court in 1998. In order to give effect to its obligations under the Rome Statute, and as a commitment to fight impunity, South Africa enacted the Implementation of the Rome Statute of International Criminal Court Act 27 of 2002.

⁹ "Africa Ending Impunity for Human Rights Abuses" Michael Fleshman, January 2007, P 2. www.un.org/africarenewal/magazine/january-2007.

¹⁰ "What Next for the ICC in Africa" -The World Post, Kimberly Brody, Senior Program Associate, Rights & Justice Initiatives, November 2013.

- (ii) The need for State Parties to commit to and collaborate with the relevant international structures in the fight against international crimes.¹¹
- (iii) The principles of equality and fairness require that the ICC be seen to be taking its work beyond Africa and tracking down cases of ongoing gross human rights violations. A possible review or at least robust debate on the role of particularly permanent members of the UN Security Council in referring cases to the ICC. This would afford all interested parties the opportunity to deal with the perception that some of the permanent members have rendered themselves and their allies untouchable and that they tend to keep certain cases beyond the reach of the Court.
- (iv) Discussing properly, the role of those permanent members of the UN Security Council who have not ratified the Rome Statute in dealing with matters affecting the functions of the ICC.

The eradication of crimes against humanity

The role of the ICC is, broadly speaking, really to address the symptoms rather than the root cause of the problems that necessitated the creation of the ICC. To achieve lasting peace and stability worldwide, this role must therefore be accompanied by concerted action by the relevant organs of governance in each

¹¹ In the African Continent, a commitment to fight impunity is in line with Article 4(h) of the Constitutive Act of the African Union, 2012.

country, continent and at the UN level to uproot the root causes of strife, wars and large-scale human rights abuses.

Measures that are taken to ensure that the rule of law is observed, human and people's rights are promoted and protected, corruption is kept in check and reduced to a bare minimum and good governance entrenched, are all intended to create peace and stability in our countries, regions, continents and by extension the global village. The limitations imposed on our individual and collective efforts to deal effectively with bloody coup d'états, genocides, wars and all kinds of atrocities that unfettered power and lawlessness allow for, have necessitated the creation of the International Criminal Court.

It bears repetition, that lasting peace and justice is only achievable if the root causes of strife, wars, unconstitutional regime changes, maladministration, wanton disregard for the rule of law, violations of human and people's rights in general, are addressed directly. When impunity is frowned upon and dealt with decisively, regardless of who the alleged perpetrator is and whether he or she is a member of an economically vulnerable government or a super-power, that engenders confidence in the relevant peace enforcement and justice system and secures enduring peace, stability and justice in the global village. What weakens efforts to achieve these noble objectives and structures created for that purpose are concerns about the inconsistencies in the application of principles and instruments meant to help us achieve world peace, stability and justice.

Human and people's rights violations take place in many countries around the world. The credibility of our international peace facilitation and justice delivery mechanisms depend largely on the situation or self-imposed scope and outlines of our operations in addressing these challenges. When these measures are made to apply only to the economically weak, whereas the rich and powerful are left to exempt themselves and their allies from accountability for the atrocities they have committed, then world peace and justice is jeopardized. No country, however rich and powerful, should hypocritically enjoy impunity for gross human rights abuses and yet have the courage to seek to hold smaller countries accountable. That should never be countenanced.

Again I say, enduring peace, stability and justice are inextricably connected to a shared plan to eliminate the root causes of strife, wars and injustice. There must also be the concomitant commitment to implement the plan. More importantly the plan must in fact be implemented.

Since South Africa serves as a model for reconciliation, peace and justice after centuries of oppression and the struggle for freedom, a reflection on what needs to be done to ensure that the 20 years long peace and stability lasts for centuries to come, might just provide the necessary lessons and warnings for Africa and the rest of the world.

To determine what it will take to secure peace, stability and justice for all, we need to remind ourselves of what lay at the heart of the absence of peace and injustice during apartheid South Africa. Why were South Africans fighting one another? Have the fundamental issues that underpinned the struggle for liberation been addressed?

Remember, race determined whether who could vote for government, who could own a farm or prime land and who had a meaningful possibility to have a say or role in the real economic life of this country. Gross inequality was institutionalised. And this is essentially why Black South Africans fought the government of the time to secure equality before the law and the equitable distribution and enjoyment of the wealth of South Africa.

Twenty years down the freedom lane, only one of the three pillars of real freedom has been secured – the right to vote and the attendant possibility of ascension to power through a peaceful and credible electoral process. The other two equally important pillars of real freedom, namely landownership and the equitable distribution of economic opportunities and by extension of South Africa, are far from being achieved. And these two give real meaning to freedom. Many would arguably rather have a fair share of the wealth of their country than have the right to vote, important as it is, if forced to choose. Each one of us must take the blame for not having contributed enough, to the resolution of these gross inequalities.

To achieve this critical equalisation of real opportunities and secure permanent peace, stability and justice both government and those who are in the commanding heights of the economy of this country must work hard to address the outstanding issues. A sober reflection and finding a real solution to these crucial issues together, as opposed to sharpening our spin-doctoring skills, is arguably the only way to avert the lack of peace, the instability and injustices of the past. The status quo is simply unsustainable and is a potential recipe for the kind of undesirable developments that the ICC was established to address. For this reason, the failure by government and the private sector to take appropriate and effective remedial action raises serious concerns to the peace and stability of our country.

All African countries would do well to have the root causes of wars and human rights violations properly identified and addressed. A strong constitutional democracy, the observance of the rule of law, an independent and well-resourced Judiciary and overall good governance are, at times, all that is required to address the root causes of crimes against humanity in a particular country.

Political leaders who rig elections, and oppress the people must also be dealt with in a similar way because all these undemocratic practices are powerful seeds for uprisings, instability and gross human rights abuses. The fight for peace, stability and justice must be embarked upon by the ICC and other institutions without fear, favour or prejudice. Constitutional democracies must be

established and strengthened and guaranteed by fully independent and well resourced Judiciaries.

Elsewhere in Africa and in the Western world, architects and sponsors of unconstitutional regime changes, designed to impose unelected but preferred governments, must be identified, named and shamed, irrespective of who they are. In other words, those identified as responsible for causing massive instability and injustices by engineering rebellions and sponsoring rebel movements whose operatives rape and kill multitudes of people who had been living in peace, must be openly condemned by powerful bodies like the AU, EU the UN as well as you and I.

The least a conference like this can do is to confront these uncomfortable issues head-on rather than sidestep them for fear of unpleasant repercussions. When we are told that all indications are that the alleged perpetrators of gross human and people's rights violations are unlikely, directly or indirectly, to continue with the atrocities they allegedly committed, should prosecutions still be proceeded with even if the alleged perpetrators are serving as either President or Prime Minister? Would the somewhat indefinite postponement of the trial not embolden the alleged perpetrators to continue in a sophisticated way with the benefit of state machinery, to commit crimes against humanity including the elimination of witnesses? What if the alleged perpetrator(s) appear to hold the key to lasting peace and stability in the particular country? In sum, what lessons are to be drawn from the Sudan and Kenyan situations in order to

enhance the relationship of the ICC and Africa and help sharpen the focus of the ICC on its mandate?

Conclusion

Africa and the rest of the world voluntarily created the ICC to combat unimaginable activities in the whole world. We owe it to ourselves and to posterity to criticize the ICC constructively, to support and strengthen the ICC. A properly resourced and supported ICC effectively negates the prospects of another World War II. It presents us with the real possibility of creating, and where this already exists, strengthening, world peace, stability and justice. Dialogue with Africa is crucial to address the strained relationship between Africa and the ICC and allied institutions. It should never matter who is involved and how influential they are.

As former Secretary General of the United Nations, Mr Koffi Annan, observed:

“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.”

Indeed, Africa and the world need the ICC yesterday, today and forever.

I THANK YOU.