



***Renewing the Promise of the International
Criminal Court:
A Critical Review of the Court's Role in
Promoting Accountability in Africa***

**November 12-13, 2014,
Arusha, Tanzania**

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EXECUTIVE SUMMARY

When the Rome Statute of the International Criminal Court (ICC or “the Court”) was adopted in 1998, it was greeted with great fanfare by human rights activists around the world as an important milestone in the progress of the human rights movement. As the Court began to investigate its first cases in 2003-04, many civil society organisations (CSOs) in Africa moved eagerly to work with and support the Court, filled with energy, idealism and the belief that this institution had the power to profoundly change entrenched power dynamics and advance human rights on the African continent.

Surveying the situation now, this idealism had been largely replaced with frustration. In the courtroom, successful prosecutions had proven difficult to mount, and at the time the meeting was held, the case against Uhuru Kenyatta was, as a best case scenario, facing indefinite postponement.¹ At the same time, the Court has come under attack from many African leaders, who accuse it of having a neo-colonial bias, and accordingly, have suggested that African states withdraw *en masse* from the Rome Statute. Although some of this language is clearly self-serving rhetoric, these leaders have deftly exploited legitimate concerns and critiques such that they have become intimately intertwined with the broader and more legitimate critiques of the Court. It is becoming increasingly difficult to untangle genuine concerns from these self-serving postures.

Although a number of CSOs are trying to engage this increasingly tense relationship in an effort to advance accountability, they too are growing more and more disappointed in the Court. The purpose of this dialogue was to first open up an honest and robust debate on, and assessment of the Court’s effectiveness, both internally and through its engagement with external justice mechanisms, and second, to identify methods for CSO engagement that would ensure that the voices of victims, affected communities, and the local activists who are closest to these groups, could be both heard and heeded.

In this context, the objectives of each session were to:

- Examine The Past: reflect critically and constructively, from a multi-disciplinary perspective, on the impact of the ICC’s engagement in Africa to date;
- Evaluate The Present: take stock of current challenges to implementing international justice (IJ) in Africa. Based on the expertise of the convenors and due to its unique situation, Sudan was used as a case study, but the discussion was not limited to Sudan;
- Strategise For The Future: assess the national, regional, and international context for pursuing accountability in Africa, taking into account feasibility and impact. This part of the meeting used the recommendations of the last convening in October 2013², as a starting point for an evaluation of the ICC, and to launch a dialogue on prospects for leveraging different forms of engagement by the Court and the possible scenarios which might unfold. There was a specific focus on the role of the African Union (AU) and prospects for making complementarity a reality through AU and sub-regional processes and mechanisms.

WELCOME REMARKS

The meeting commenced with an introduction by the co-convenors, International Refugee Rights Initiative (IRRI), International Justice Project (IJP), and Pan African Lawyers Union (PALU). The organisers then introduced the objectives of the meeting and provided a brief history of the work that each had done and continue to do in their fight against impunity. Each participant was also given a chance to introduce themselves and provide a summary of their experiences and activities in the area of international criminal justice.

¹ At the time of the conference, the charges against Kenyatta had not yet been withdrawn.

² See “*Promoting accountability for international crimes in Africa: Recommendations*” available at: <http://www.refugee-rights.org/hdocs/Assets/PDFs/2013/Arusha%20Meeting%2011%20October%202013%20Recommendations-FINAL.pdf>

DAY 1

SESSION 1: ENGAGING CONSTITUENCIES TO DATE: HOW HAS THE ICC ENGAGED KEY INTERLOCUTORS?

What has the role of local civil society been to date? What have been the key challenges?

The presenter started by providing a retrospective on the activities of the ICC in relation to CSOs on the ground. When the ICC initially became involved in situation countries, a great amount of faith was placed in the ICC to deliver justice. Some of these CSOs became engaged with the Court, providing important information. Over time, serious concerns have been raised about these relationships, both due to concerns about the appropriateness of CSO engagement and because of increasing attacks on CSOs working on international justice issues. More recently, within the ICC these relationships have become subject to significant criticism, but while the Court has been encouraged not to rely on external partners, the pressures of budgetary constraints of the ICC and the desire for speedy investigations are likely to drive the need for continued local partnerships.

Initially CSOs were filled with faith and energy to put towards ICC efforts, but now they are questioning their involvement and this is detrimental to the cause of IJ. They are not seeing the successful prosecutions they had anticipated and there has been increasing tension in the Lubanga case,³ for instance, regarding the appropriate role of CSOs in the process. As CSOs become more frustrated, it has become evident that the Court needs clear standards on the way it should collaborate with local actors.

There have been a number of attacks on individuals on the ground in situation countries because of their perceived or actual interactions with the Court. Activists in all five situation countries studied by the presenter's organisation have come under attack and there has been a lack of an appropriate response from the Court, resulting in an effort on the part of other CSOs to respond to these security needs. However, this has created a tension between the Court and CSOs, as CSOs do not want to be seen as taking the responsibility for protection away from the ICC or giving it an excuse not to engage.

There has been an attempt to constructively deal with this issue through the *Guidelines governing the Relations between the Court and Intermediaries* ("Guidelines") adopted by the Court in 2014.⁴ The document responds, at least in part, to recommendations made by CSOs. Much more, however, remains to be done. The Guidelines are not well known and appear more focused on limiting exposure for the Court than on protecting intermediaries. In addition, the Guidelines' approach to security appears to be premised around the idea that if there is any chance of a security concern, the Court should not engage with that particular intermediary. While this approach is understandable, it does not fully take into account the reasons why ICC staff engage intermediaries, nor does it satisfactorily address situations in which intermediaries may be self-selected or selected by victims, in which case the Court may have less choice about whether or not to engage.

What has been the experience of CSOs advocating at the international level?

The presenter stated that in general, communications between CSOs based in The Hague and the ICC are effective on a number of issues. The presenter pointed out, however, that there was a disconnect

³ The Prosecutor v. Thomas Lubanga Dyilo: ICC-01/04-01/06 available at: https://www.icc-cpi.int/en_menus/icc/situations%20and%20cases/situations/situation%20icc%200104/related%20cases/icc%200104%200106/Pages/democratic%20republic%20of%20the%20congo.aspx

⁴ See ICC, *Guidelines governing the Relations between the Court and Intermediaries for the Organs and Units of the Court and Counsel working with Intermediaries*, March 2014, available at http://www.icc-cpi.int/en_menus/icc/legal%20texts%20and%20tools/strategies-and-guidelines/Documents/GRCI-Eng.pdf

between CSO advocacy at the Court level and CSOs at a “non-Court” level. The presenter reiterated the importance of the ICC’s engagement with CSOs in enhancing transparency and democratic accountability, and stressed that it should not be disregarded. On a practical level, CSOs have significant, relevant knowledge on situation countries that can aid the Court in its communications, outreach, and understanding of how victims can best communicate with the Court. Accordingly, CSOs can, are and should be a major supporter of the ICC through their information-providing role.

The presenter explained three categories of consultations currently taking place:

- **Formal consultations:** Rule 21 Para 1 of the Rules of Procedure and Evidence for the Court⁵ is the only place where it specifies that legal procedures must be consulted on. Over the years, however, CSOs have been formally consulted on issues related to legal aid and the draft regulations of the Registry. Furthermore, civil society holds formal consultations between the Court and CSOs from around the world, on a regular basis.
- **Semi-formal consultations:** Engagement with the ICC has also been semi-formal at times, with ICC representatives soliciting input from CSOs on various thematic issues, for example through roundtable discussions. Such consultations have provided input on the Office of the Prosecutor’s (OTP’s) policies on gender, outreach, and transitional justice. General good will is the basis for these relations, as well as the acknowledgement, on the part of the Court, of the important role of CSOs.
- **Informal consultations:** Input can also be given informally. This works well in situations in which CSOs have a positive relationship with the Court. The ICC staff members are generally open and welcoming of CSOs. The presenter proposed to explore whether the Court can go further to institutionalise these frequent consultations in order to allow CSOs to provide input on a more formal basis.

The presenter noted, however, that despite this positive engagement there is still a need to improve the relationship between the Court and CSOs. CSOs can become frustrated when they feel that their input is not being taken into account, and this can lead to a questioning of the good faith of the ICC. CSOs should take time to reflect upon ways that they too could help build increased trust with the Court. The fact that the ICC is engaging in a number of fora is an indication that they do, in fact, value the work of CSOs.

However, the presenter noted that there is also pushback from governments, against CSO participation in consultation processes. He provided an example of the Kenyan diplomatic missions working to exclude CSOs, and noted that these challenges needed to be addressed. He also stated that, as civil society, it is important to continue to impress upon the Court the need for engagement.

The experience of external counsel at the Court

The presenter explained that despite agreement that external lawyers have an important role in international justice, and a critical role to fulfil at the Court, they still face many difficulties. They are not valued by the Assembly of States Parties (ASP), the governing body of the Court nor at the ICC, and are often excluded from consultations. He went on to say that some diplomats in the ASP see external counsel as a “decoration,” part of a bureaucratic process to reach criminal justice. Independent lawyers with a rational system for obtaining adequate resources are critical to the justice system. Such a system does not, however, exist at the ICC.

It was noted that the ReVision project taking place within the ICC’s Registry should consider the important role of external counsel, and how imperative it is for CSOs to be and stay engaged in this

⁵ Available at: https://www.icc-cpi.int/en_menus/icc/legal%20texts%20and%20tools/official%20journal/Documents/RulesProcedureEvidenceEng.pdf

process. It was suggested that, for example, PALU could spearhead an effort to ensure that the voices of African lawyers are heard in this process and could serve as a leader and model for other regional attorney organisations in Asia, America, etc.

It was noted that the reception of external lawyers at the Court has been uneven, at best. Although CSOs express frustration with respect to not being taken seriously at the Court, their position is much better. For instance, the Coalition for International Criminal Court (CICC) is a juggernaut of information and muscle. “It feels like there is nothing lower than being a representative of a victim at the ICC. Why is this so? Why does the institution not value external lawyers?”

It was argued that external lawyers at the Court are valuable, but that the Registry does not seem to respect their role. This participant felt the Registry to be rigid and unresponsive to critiques. The speaker reflected on his experience taking part in the review of the Rome Statute in Kampala in 2010 where there was a session held for African lawyers and activists, noting that in that session, the Attorney General of Uganda said that he did not think there should be legal aid for the accused. The participant expressed concern about what this comment revealed in terms of commitment to the underlying justice norms that protect the rights of the defence and victims by ensuring them access to independent counsel. It was argued that the ICC cannot be a credible Court unless it recognises the importance of external counsel.

SESSION 1: QUESTIONS AND REMARKS

- It was suggested that in the future, organisations such as PALU could make a difference with respect to the future of the African human rights system; it could organise lawyers from around the world to help mitigate certain tensions between African and non-African lawyers.
- One participant then questioned where we go from here: Do CSOs need to increase their participation at the ICC? What can we do to formalise consultation with CSOs? How can we improve the plight of counsel?
- It was noted that holding conversations about CSOs and the ICC is a good step, but people are afraid of being identified with what they say. It was argued that there is an intellectual oppression in relation to the ICC, with intense pressure of CSOs not to criticise an institution seen as already vulnerable. Why can we not address this as a problem? It was also noted although CSOs played a critical role in the formation of the Court, that it is an independent institution and needs to operate that way.
- One participant stated that there is an effort to reduce the increasing attacks on local CSOs. However, this often leads to western CSOs speaking for African experiences, resulting in a dilution of the message. We need to allow African voices to speak directly as much as possible.
- In response to many of the concerns voiced, it was stated that each case at the ICC has an international cooperation adviser. The OTP engages with CSOs based in The Hague and elsewhere, through social media or electronically. Its engagement, as stated, is two-fold:
 1. At a policy level as described in the presentations.
 2. Engagement during investigations.

The speaker continued: the OTP has faced challenges engaging CSOs, and these challenges have increased in the past four years. One of the challenges stems from the fact that the OTP is committed to maintaining its independence. The OTP must ensure that while consulting outside sources, it does not give the impression that it is being driven by any of those external forces. An additional constraint to engagement is security. In Kenya, for example, CSOs that assisted, facilitated, or simply participated in consultations with the OTP on their work became subject to severe security repercussions. Those engaging with the ICC are often seen as working with the enemy. As much as the OTP wants to work with CSOs, it does not want to put anyone at additional risk. In addition, in the past five years there has been an evolution of

the disclosure rules. The challenge faced today is that over the course of time, the defence has been litigating Rule 77 of the Rules of Procedure and Evidence.⁶ This litigation has severely constrained the ability of the OTP to keep the identity of informants confidential. Once identities are disclosed, there can be backlash on the ground, so the OTP must make it clear to people that whatever they say is likely to be disclosed to the defence.

- Another participant expressed concern that formalising the intermediary role risked leading to further reliance on these actors in instances where it may be inappropriate because these parties lack the training of an ICC investigator. The participant wondered, in this context, if it was not more dangerous to strengthen this entity called “the intermediary” and whether the focus should instead be on limiting the role of intermediaries. If the role of the intermediary were to be reduced, so too might the accompanying criticism from the defence.
- It was also noted that the ICC has attempted to address many of the protection issues cited, but their capacity to do so is limited by the resources provided by states. They have gone from embassy to embassy, looking for support to protect those vulnerable to attacks, but sadly this support has not always been forthcoming.
- One participant stated that in the process of drafting the Guidelines, members of ICC Counsel were not even consulted. This represented a certain intellectual righteousness. It is as though Court personnel are saying, “we are going to run this Court the way we want and we will not listen”. Under the previous prosecutor, Luis Moreno Ocampo, the OTP was unapproachable in all senses, yet there are indications that this is has changed under Prosecutor Bensouda.
- The following participant noted that every court has must establish its legitimacy. CSOs have a role to play. Yet many of the CSOs that were involved in the formation of the Rome Statute disappeared as though the job was complete. Is this Court not constructed to respond to legitimacy concerns from the society creating and surrounding it?
- It was next noted that accountability must be approached more carefully. “Pursuing accountability is like going into a country and waking up a dragon.” If and when it wakes up, you drive off, and it starts killing those you worked with, then what is your role and responsibility?
- One participant discussed their work as part of the Darfur Consortium (now the Sudan Consortium⁷), and what they previously did to deliver information to the prosecutor from the ground in Darfur. Now those that collaborated are what he calls “international justice refugees”. How is the Court going to address this? Are we all speaking on the same level? Or is the international community structuring the conversation in a paternalistic manner?
- One participant stated their belief that if national courts in Africa were strong enough, no one would even worry about the ICC. A lack of strong institutions in Africa and Asia results in the need to look beyond our borders, and for this reason, the participant believed that the ICC was necessary.
- Another final participant expressed concern regarding the ICC’s pretence of objectivity. To engage properly with the Court, CSOs need to unpack the notion of objectivity and talk about the way in which agendas are actually set.

⁶ Rule 77 states : “The Prosecutor shall, subject to the restrictions on disclosure as provided for in the Statute and in rules 81 and 82, permit the defence to inspect any books, documents, photographs and other tangible objects in the possession or control of the Prosecutor, which are material to the preparation of the defence or are intended for use by the Prosecutor as evidence for the purposes of the confirmation hearing or at trial, as the case may be, or were obtained from or belonged to the person.” Available at: https://www.icc-cpi.int/en_menus/icc/legal%20texts%20and%20tools/official%20journal/Documents/RulesProcedureEvidenceEng.pdf

⁷ See <http://www.sudanconsortium.org/>

SESSION 2: ENGAGING KEY CONSTITUENCIES: THE ROLE OF VICTIMS

Engaging victims without a trial: The Uganda situation⁸

The presenter explained that he is from an organisation that is trying to organise at the community level to ensure that victims are being engaged. He told a personal account of serving as an intermediary in Uganda, at a time when opposition to the ICC was high.⁹ He explained that when his organisation started their work in this area, they were threatened. For example, a description of their car was publicised with suggestions that it should be burned due to their association with the ICC. Working as an intermediary presented many challenges, and these only increased over time as the Uganda situation stalled. Indeed, he bemoaned the fact that the ICC's outreach team had pulled out of the country,¹⁰ leaving the intermediaries further exposed. They are expected to give feedback to the victims, but now cannot rely on contacts with the Court for information. In this context, he questioned: who will build the bridge with the victims and the community? When the victims become frustrated, to whom are they to turn?

He also highlighted the fact that victims often feel that nothing is being done to effect justice. They feel that they are losing while the perpetrators are winning. While the Ugandan government advocates against the ICC, the activist community keeps too quiet. What would happen to international justice mechanisms if victims were not supported? Already, he noted, victims feel that they have waited far too long.

Yet, he saw hope in certain respects, such as in events like the National War Victims Conference organised in 2014. He stated that even when things are not progressing at the ICC, there are still moves being made in the direction of accountability in other fora.

He then raised the following questions for the participants to ponder:

- When we delay responding to atrocity, what happens?
- If we fail to build an accountability system that supports victims' engagement, what happens?

Victim experience in the DRC cases

The next presenter focused on the situation of victims in the Democratic Republic of Congo (DRC) situation. He explained that victims were present (and seen as present) in these cases, and this changed the whole paradigm. In the Lubanga case, victims were part of Lubanga's former soldier group and military camp. This was the first time they were seen as victims, as opposed to mere perpetrators. Many of the victims were children, some had been abducted, while others had been sent to fight by their parents. The conditions they endured in the training camps were horrific. The victims were often subjected to inhumane treatment and sanctions, such as killing their friend or colleagues because of an attempted escape. The girls were systematically raped and used as sex slaves. These, he explained, were examples of the important elements brought forward by victims in the case.

The presenter also discussed what he considered to be negative aspects of the Lubanga case, such as the fact that many of the witnesses who produced evidence were also participating victims in the case. Some of those who asked to be heard as victims were transformed into witnesses at the Court's request, which was catastrophic for them on a personal level, and unprofessional on the part of the

⁸ At the time of the conference Dominic Ongwen had yet to be arrested.

⁹ Although attitudes have calmed somewhat, the initial reaction to the ICC's intervention in Uganda was quite negative. For more information about the dynamics at play, see: IRRI, "A Poisoned Chalice: Local civil society and the International Criminal Court's engagement in Uganda" October 2011. Available at <http://www.refugee-rights.org/Assets/PDFs/2012/PoisonChaliceFINAL.pdf>

¹⁰ Whilst this is still the case, our understanding is that engagement on the ground has been increased again following the arrest of Dominic Ongwen.

Court. Part of this, he asserted, was because the information from the victim/witness would not be properly vetted. For example, if someone said they were abducted from school, this would not be verified by the prosecution with the school or parents. Instead, this work was performed by the defence, and inconsistencies were found, much to the chagrin of the prosecution. Had the OTP done this, the result likely would have been very different.

He explained that for the cases against Katanga and Ngudjolo, the system of legal representation had developed following Lubanga. He then described the victim application process in the Katanga case to the group, as well as his concerns: Once applications were submitted to the Registry, they were then processed by the Victims Participation and Reparation Section (VPRS) – the same section that was to ultimately decide which applications should be accepted or rejected. The underlying philosophy is that the representation of victims should be done internally. The VPRS is receiving instruction from the Court to select “good” and “bad” victims, and ultimately, to present the views and concerns of the victims. The presenter stated that in an ideal situation, however, these would be presented by their own, independent counsel.

The presenter concluded by stating that it should be possible to have a Court that is not only a public prosecution against a perpetrator, but also one where the victim is present. Access to justice for victims, however, can only be upheld if they are properly represented. This, the presenter stated, involves choosing one’s own counsel, rather than receiving a phone call from the Court and being told “I am your representative, so accept it.”

SESSION 2: QUESTIONS AND REMARKS

One participant questioned: who really represents the victim? CSOs often go to the same communities, at times with different messages, and often raise unrealistic expectations. Without progress or change, at the end of the day, victims are often very discouraged by the system in place.

The presenter shared a similar concern, and stated that all that is left for many of these people are their stories. To this, the following set of questions and comments were then raised:

- Who is relaying victim views? Some are raising hopes, while others are diminishing them.
- We can speak and raise the voice of victims, but to what extent?
- We speak of best practice, but for whom? The victim? If so, then then victim should be at the forefront.
- If you ask victims, they tell you that they have told their stories, but nothing has changed. People get PhDs from information they have taken from victims, but victims themselves see no change.

Participants responded with the following comments:

- The Prosecutor often states that victims are the *raison d’etre* of the Court, yet the Court tends to underestimate the role that victims’ representation can play. An example is the role of legal representation in the Kenya situation. While the government of Kenya was arguing that Kenyans want the cases to disappear, having a representative of victims in the courtroom (and the public eye) was a useful reminder that even if some Kenyans did, this was not representative of the whole. It was a reminder that the case is not the ICC vs. Kenyans, and that many of the victims prefer that their case be heard in The Hague – and for good reason.
- It should be noted that access to the Court by victims’ legal counsel is limited by budgetary concerns. Yet, legal representatives of victims have been vital in creating a public understanding of what the Court does.
- We need to flag the importance of legally recognised victims being acknowledged as actors who help bring about international justice.

SESSION 3: THE IMMUNITIES ISSUE: HOW CAN WE SUCCESSFULLY ENGAGE?

An overview of key international law issues in relation to immunities

The presenter began by highlighting the difficulties of speaking about the issue of immunities, given the contentious nature of recent debates on the issue. There are two international legal principles at play in this debate, one is the principle that no one is immune from prosecution for international crimes. The other is that heads of state and other high government officials are immune from prosecution by their peers. Immunities are sometimes spoken of as a stand-alone, but they need to be addressed in connection with discussions about sovereignty.

The presenter then turned to the doctrine of sovereignty, stating that it is usually seen, in activist circles, as an evil – yet it, and its history, remain important. Immunities are a by-product of sovereignty, and to an extent, also necessary. She reminded the audience that states police themselves, and all are equal and sovereign under the law.

She mentioned the two types of sovereignty enjoyed by states:

1. Physical, or *de facto* sovereignty; and
2. Legal, or *de jure* sovereignty

The presenter provided the example of the case against Panamanian General Manuel Noriega, who was arrested and tried in a US court. Although the United States had *de facto* authority over the general, they did not have *de jure* jurisdiction.

Next, she presented on the doctrine of immunity, which she divided into *ratione personae* and *ratione materiae*:

1. *Immunity ratione personae* – This is immunity of the person and applies, for example, to diplomatic staff residing abroad. This covers both actions taken on behalf of the state and personal actions, but ceases when the person ceases to hold the position which conferred that immunity. It has developed through custom. It is a necessary evil and is what prevents states from going to war with each other.
2. *Immunity ratione materiae* – This covers the actions undertaken by the person on behalf of the state, so it is limited in terms of which actions are covered. However, unlike *ratione personae*, it is not time bound, and former officials can continue to invoke it after they have left their positions

These principles were developed in relation to interstate relations. International tribunals are a relatively new phenomenon and these principles are continuing to develop in response. Article 27 of the Rome Statute¹¹ makes it clear that heads of state do not enjoy absolute immunity in the international system. However, this is in tension with the more general principle of international law which holds that heads of state are inviolable. Article 98 of the Rome Statute explicitly provides that cooperation with the Court should be in accordance with other international law. This raises questions

¹¹ Article 27 states: “1. This Statute shall apply equally to all persons without any distinction based on official capacity. In particular, official capacity as a Head of State or Government, a member of a Government or parliament, an elected representative or a government official shall in no case exempt a person from criminal responsibility under this Statute, nor shall it, in and of itself, constitute a ground for reduction of sentence. 2. Immunities or special procedural rules which may attach to the official capacity of a person, whether under national or international law, shall not bar the Court from exercising its jurisdiction over such a person.” Available at: https://www.icc-cpi.int/nr/rdonlyres/ea9aeff7-5752-4f84-be94-0a655eb30e16/0/rome_statute_english.pdf

about the extent to which immunities might apply to national proceedings where a request to arrest is made.

The presenter went on to point out that although rarely discussed, especially in terms of combating impunity, recognition is very important. In the context of sovereignty, it is recognition that *gives* immunity.

Advocating on the issue of immunities, challenges of useful engagement

The next speaker explained that in Africa, difficult things are often dealt with by proverbs. He narrated a proverb of the orphan who begins life desiring to kill the thing that killed his father, and that the orphan soon ends up the way his father did. He stressed that we cannot win the fight against impunity in a day because it has existed for longer than we have. He stated that he has concerns about certain strategies employed by international justice advocates, as there is a tendency to want to end impunity now, instead of focusing on winning small battles, one at a time.

Next, he noted that Article 89(1) of the Rome Statute¹², on the procedure of surrendering a person, recognises domestic law. In that context, the question of head of state immunity in relation to a procedural issue, like arrest, could differ from country to country. Kenya, for instance, has made it clear that a head of state is not granted immunity under domestic law. However, in Nigeria, domestic law makes it is clear that a head of state is in fact immune.

The presenter stressed there was a need to reform the Rome Statute to ensure a more coherent sense of obligations under the statute. Articles 27, 89 and 99 were not, in his opinion, drafted coherently, and this inconsistency creates a problem that goes to the heart of the movement's credibility.

Western organisations have been particularly categorical in their advocacy on certain issues, and this has made those issues appear to promote a western position. So when African accountability advocates attempt to address these issues, they are increasingly facing criticism that they are advocating certain positions merely because they are paid to do so by white people. In the case of immunity, the reality needs to be addressed: while there may not be immunity in law, there is immunity in fact. If you push on the rhetoric when the proper legal structures are not in place, he noted, you can make the situation worse.

The presenter then told a story about a recent death threat he had received, as a result of which he had arranged to leave the country. His colleagues wanted to issue statements, but he explained to them that these would not be helpful, and that he needed to make his own arrangements as he was most familiar with the local conditions and possibilities.

He further stated that those with immunity in law and fact are the most powerful, and antagonising these leaders was something that needed to be done with caution. Unless the necessary political and legal frameworks have been put in place to allow them a reasonable chance of success, they are not fights to become involved in. Immunity, he explained, is not just a legal issue, but is also political. He explained that when dealing with immunity of heads of states, we are dealing with the following factors:

1. *Fight for power, which comes at a huge price;*

¹² Article 89(1) states: "The Court may transmit a request for the arrest and surrender of a person, together with the material supporting the request outlined in article 91, to any State on the territory of which that person may be found and shall request the cooperation of that State in the arrest and surrender of such a person. States Parties shall, in accordance with the provisions of this Part and the procedure under their national law, comply with requests for arrest and surrender." Available at: https://www.icc-cpi.int/nr/rdonlyres/ea9aeff7-5752-4f84-be94-0a655eb30e16/0/rome_statute_english.pdf

2. Fight *against* power, which comes at a huge price; and
3. A regime change imperative.

It was stated that if one is going to engage these battles, it must be recognised that there is a high price to pay. For example, before the speaker's organisation became involved in a research project, he wrote a five-page memo to his boss detailing the risks to those involved in it, but these risks were ignored. Currently, all people who participated in the project are in exile, and one is dead. Thus, we must be aware of the repercussions involved in tackling these issues.

He further stated the international community does not have its priorities straight. For example, when Uganda enacts a homophobic law, the international community is willing to take action against the state and threaten sanctions. Yet, there is no such sanctions are deployed to ensure accountability for Omar Bashir of Sudan. Instead, we enter into agreements with him to assist in fighting terrorism. In such a context, it would appear that homophobia is a larger problem than committing mass atrocities. Similarly, he questioned what kind of message it sends when President Obama takes a "lovely" picture with President Kenyatta at the AU Summit, even though the latter was, at the time, subject to charges by the ICC.

He concluded his presentation by discussing the right and wrong way to handle immunities. The strategy employed with Milosevic was the "right way", with Bashir serving as an example of the "wrong way". We need to better distinguish norms and practical ways of handling this issue.

Finally, the presenter concluded with the following questions before opening it up to the floor:

1. What do we do about immunity issues?
2. Consider how many heads of state were indicted then prosecuted whilst still in office?

SESSION 3: QUESTIONS AND REMARKS:

- The first remark reiterated that the ICC examines crimes committed by individuals, irrespective of a person's title.
- A participant reminded the group of previous litigation in Kenya seeking execution of the arrest warrant for President Bashir, which took place in an environment of political change. In 2010, Bashir attended a ceremony marking the promulgation of the new constitution in Kenya. In light of this visit, CSOs convened an emergency brainstorming session, and ICJ-Kenya put forward a case that prompted Bashir to leave the country earlier than planned. Kenya did not want to set a precedent that someone accused by the ICC could freely enter the country. Ultimately, Justice Nicholas Ombija granted an arrest warrant for Bashir, and he has not entered Kenya since (even though the state is appealing this decision based on immunity of sitting heads of states).¹³
- One participant noted that Belgium had issued an arrest warrant for an incumbent head of state. Under Article 98 of the Rome Statute, a distinction needs to be made between incumbent and former heads of state. National jurisdictions must respect diplomatic rules, which could limit their ability to carry out an arrest, but international courts are not bound or concerned with these rules, which is why they can charge these individuals.
- Another participant questioned: where are the arrest warrants for Benjamin Netanyahu, Tony Blair, and George W Bush?
- There was some discussion about the prosecution of western leaders. Some participants wondered why the international advocacy community has not taken a strong stance on prosecutions of western leaders. Other participants argued that there has, in fact, been a

¹³ The conference took place before the visit of Bashir to South Africa and ensuing court cases

strong efforts to hold western leaders accountable for their actions, such as the cases against Pinochet and Tzipi Livni (former Israeli Foreign Minister) in the UK. However, it needed to be noted that these actions had resulted in a negative impact at the national level that had ultimately curtailed the capacity to bring future cases, as was also the case in Spain.

- Another participant agreed with the previous presenter with respect to a contradiction between Articles 27 and 98 of the Rome Statute. Strictly speaking, it was argued that Article 98 prevents the arrest of heads of state and creates immunity by forbidding a state to act in violation of other international commitments, which includes respecting immunity for visiting heads of state.
- Another participant noted that in the lifetime of those present at this meeting, there had been a movement from the mere concept of international criminal accountability to a detailed discussion of an existing flawed systems of pursuing that goal. We should not forget that this is, in itself, a significant step forward, and a sign that we must continue working on these issues in order to make improvements.
- A participant questioned how much has been done to measure impact of the international tribunals, and advocated that CSOs evaluate this impact.
- Another participant urged the ICC to consider the repercussions for victims and witnesses of attempting to prosecute a head of state.
- Another participant stated that the immunities clause in the Protocol for the African Court was a product, and a reminder, of structural inequalities.
- It was stated that while most people were focusing on immunities, the important concept was impunity. Immunities ought not to be a problem in democratic countries because there should be effective institutions.
- In discussing varying opinions on immunities and the various institutions at play, one speaker brought up the fact that in the past few years, it has become more common to attend meetings with both Africans and non-Africans. He questioned: what are our challenges? How do we innovatively change the scope of the ICC? Africans need to have that conversation with non-Africans who are listening. There is no clear understanding of one another, even within CSOs.
- Another participant lamented that we still witness people who have committed some of the most heinous crimes traveling the world freely. Ten years ago, when Charles Taylor was facing arrest, he went to the military barracks and spent two nights mobilising soldiers. Two days later, the participant's office was closed and he was declared a wanted person. Some of those activists that had been pushing for accountability for Taylor were forced out of Nigeria and were only able to return six months later. In the end, Taylor was pushed out, but it nearly cost the participant his life.
- Lastly, it was mentioned that Milosevic was also charged while he was still in office, revealing that prosecuting heads of states has been done in the past, even though he was not actually surrendered until he had been ousted.

SESSION 4: COMPLEMENTARITY: ENGAGING OTHER MECHANISMS FOR ACCOUNTABILITY

The ICC and the African Court: Can they work effectively together?

The presenter began explaining the AU mechanisms for accountability by noting that 50+ treaties and conventions have been passed by the AU. He explained that these treaties and conventions require ratification by at least 15 out of the 54 states before they can come into effect. Despite the criticism of the AU, he believed that there has ultimately been a trend to move from non-interference to non-indifference. However, he noted, the AU and its member states are aware that they are being accused of robust law-making but weak implementation.

He also pointed out that the AU is working on a broad TJ framework. He described the process from 2009 until 2014, at which time it turned into a validation process.

In addition, he provided insight into the new African Court of Justice and Human Rights (African Court), which will supplement those already in existence. The new court will function similarly to the ICC in that it has no retrospective effect, and will only take effect after the 15th ratification. For this reason, he explained that the International Crimes Protocol for the African Court is not likely to help victims for at least the next four years while the necessary ratifications are being sought.

He also distinguished between the ICC as a standalone body, and the African Court, which exists within a broader regional system, that includes the AU Peace and Security Council (PSC) which can intervene in member states. He stated that even in light of the new protocol giving it criminal jurisdiction, states do not get a chance to review their acceptance of the protocol creating the African Court, rather, their previous ratifications carry forward.

The speaker then discussed cooperation and judicial assistance, and touched upon the controversial immunities clause of the new African Court protocol. He explained that if we examine the text of the immunities provision, it does not preclude one from investigating an incumbent head of state. He stated that though they cannot be charged, there can still be investigations, and their co-perpetrators could still be charged, ultimately building a stronger case for prosecution after the perpetrator has left office.

He also discussed how to finance the court, and finally, touched upon complementarity, questioning: What can the ICC do with the African Court, Commission, Advisory Board on Corruption, ECOSOC Council, and the PSC?

SESSION 4: QUESTIONS AND REMARKS:

- One participant noted that it had been quite difficult to change the law on the national level to ensure conformity with the Rome Statute, a provision that was ultimately critical if complementarity was to be operationalised at the national level. For instance, in the DRC, national laws had been promulgated on the protection of children and sexual violence but that the law on the implementation of the Rome Statute was still stuck in parliament for unknown reasons. This law would give authority to civilian institutions to prosecute international crimes, as the military courts already have the ability to do. He stated that the need for judicial structures that enable Congolese national institutions to prosecute were urgently needed, and it was recommended that the Court work robustly in light of this situation.¹⁴
- The importance of considering victims was also reiterated, and that their legal protection, while difficult to achieve, is the foundation of every case.
- Another participant questioned at what point the AU may determine that a head of state has overstayed his or her welcome and should no longer be recognised.
- It was stated that the AU has a decent record of following its law. For instance, when Morsi was removed from power, Egypt was stripped of its rights as a member of the AU and a similar situation occurred in Madagascar. The question becomes how do we force the AU to do more of the “good”, and less of the “bad”? An example of a “good” can be drawn from the Kenya situation following the 2008 elections, wherein Kofi Annan and Graca Machel sat with Kenyans and encouraged them to sign an agreement.

¹⁴ The Democratic Republic of Congo has since passed the law implementing the Rome Statute.

SESSION 5: DAMNED IF YOU DO, DAMNED IF YOU DON'T: DEFINING PROSECUTORIAL STRATEGY

The troubled Kenyatta case

The presenter began by touching upon the Kenya situation, explaining that it was awkward. She explained that the Kenyan president was facing criminal charges, although she said that the case would most likely be adjourned.¹⁵ This, she explained, would be a setback because if people cannot get justice in the courtroom, then they will look for it with weapons in their hands. She further explained that the OTP is seeking better ways to calibrate prosecutorial policy since this has a profound impact on the continent. The prosecutor, she explained, cannot afford to make mistakes.

Prosecutorial Strategy

The presenter first explained that there are top officials, and there are the foot soldiers. The ICC has a mandate to deal with the top of the iceberg – those most responsible – leaving the other actors to be dealt with through other mechanisms. There is a great deal of discretion on the part of the prosecution, but much of the decision-making depends on what the OTP is able to gather in terms of evidence. She noted that the process is complex, and that the OTP is constantly learning and adjusting – it is not static. Following the Lubanga case, the former prosecutor conducted an internal examination based on critiques, while simultaneously deciding on next steps. As a result, the OTP has radically changed its policies based on lessons learned in Lubanga.

She further explained that proceedings are divided into three stages:

1. Preliminary examination, during which time the OTP decides whether to investigate;
2. Investigation; and
3. Prosecution.

The presenter stated that, under Article 15, each submission of evidence goes through a formal process. The OTP questions whether there is jurisdiction, and whether there is evidence that crimes under the statute have been committed. For example, with respect to concerns over the lack of accountability for Netanyahu, she stated that the ICC has no jurisdiction over Israel. She noted that the outcomes of these types of analyses has led to 22 published reports on the ICC website, with an additional one being still being conducted on Iraq.

The case of Sudan and Bashir

It was stated that with regards to the situation of Darfur, there are two strategies – big fish and small fish. The OTP received a great deal of information from Sudan, but they cannot put anyone before local courts because all persons in positions of authority are provided with immunity. If the extension of immunities continues at the current rate, half of Sudan will ultimately have immunity. In relation to the Bashir arrest warrant, Sudan has reacted by making collaboration with the ICC a crime, and there is an example of a soldier being tried for sending information to the Court.

The participant further stated that the government of Sudan has developed a media strategy and has hired experts to talk to people and persuade them that the ICC has no jurisdiction. At present, Bashir travels to certain welcoming countries, challenging the Court and its collaboration with member states. Even with the Doha and Abuja peace agreements, the speaker lamented that the war is still raging on, and that Bashir will run for president again.¹⁶

¹⁵ This, again, was prior to the withdrawal of the charges against President Kenyatta.

¹⁶ This was prior to the April 2015 re-election of al-Bashir.

The participant noted that for the victims, Bashir's election victory would symbolise the impossibility of achieving justice. Many are frustrated that there does not appear to be any Court action being taken against Bashir. Victims feel that there is a delay of justice, as it has been over seven years since the Court issued Bashir's arrest warrant. The government is attempting to paper over its own unwillingness to prosecute with weak institutions. In recent years, six special prosecutors on Darfur have been appointed and forced to resign for lack of security and being prevented from conducting their work.

SESSION 5: QUESTIONS AND REMARKS:

- One participant stated that after 30 years of working for the defence, he can say that independence, particularly prosecutorial independence, is a myth. Independence is hedged in politics, history and culture. In terms of prosecutorial strategy, there is no safe way of identifying a strategy. Transparency for target selection becomes difficult in conflict situations. If a prosecutor makes a mistake or does not move quickly enough, he or she risks being challenged. It is better not to prosecute than to lose a high profile case, he noted, since you can disturb the situation on the ground. If Kenyatta and Ruto are acquitted, one can imagine what will happen in Kenya.
- The speaker then emphasised the importance of having a good case planned well in advance. We must ask the following questions: Is there a good case? Do we have capacity to manage the victims and witnesses? And in light of the answers to the previous questions, should we move ahead? The credibility of the prosecutor is at play.
- It was noted that mass atrocities are not regular crimes, yet the judicial systems created at the national level are often for regular crimes. It was suggested that new institutions should be debated. Business tribunals can rely on sanctions to enforce decisions, but the ICC cannot do the same. Sovereignty is the biggest shield for dictators.

DAY 2

The morning of day two commenced with the rapporteurs providing a summary of the previous day's discussions.

SESSION 6: TRANSITIONAL JUSTICE: ENGAGING WITH A BROADER JUSTICE AGENDA

How can the ICC link into broader transitional justice mechanisms?

The presenter introduced the following questions:

1. How can the ICC link with other transitional justice (TJ) processes?
2. What are the implications of the relationship of the ICC with other TJ mechanisms?
3. What lessons can be drawn from existing engagements currently underway in Africa?

She stated that the ICC is often misunderstood as a TJ mechanism. She explained that the goal of TJ at the ICC is mitigating the victims' suffering and this is seen as pursued through the ICC's associated Victims' Trust Fund. She further stated that if we define TJ as "[a] set of judicial and non-judicial measures that are implemented in order to redress massive human rights abuses", then the reality is that the ICC was not created with a TJ mission; nor was it set up to adjudicate responsibility for a large numbers of perpetrators.

Rather, she explained, the ICC was established as a judicial institution, concerned with intervening in the pursuit of judicial measures for a small minority of high-ranking commanders through a system of complementarity that gives states primacy to act. Although some people have celebrated it as an

element of TJ, its actions have, at times, appeared contrary to other TJ objectives. Bluntly put, she explained, the ICC is a retributive mechanism, deployed to end impunity through legal accountability of the individuals deemed most criminally responsible for the most heinous crimes. The coming of the Rome Statute, she further explained, was celebrated in international criminal justice at large. However, the desperate and unattended needs of victims in post-violence contexts could not be more severe. She listed some of the sources of the disappointment as:

- Lack of successful prosecutions in Uganda and Sudan, and the general feeling that justice has been delayed.
- The lack of support for victims in the DRC and Kenya.
- The dangers that intermediaries in Sudan and Kenya face.
- The absence of corporate criminal responsibility as a modality for addressing culpability in Sudan and the DRC.
- The growing impatience of large constituencies who saw international criminal justice as their only answer to ending impunity in Africa.

When conducting a reality check, she explained, there is recognition that something has gone wrong. This is partly because we have a young Court with budgetary and structural limitations, but this is part of judicial life. She stated that there are limits to the extent to which international criminal law and judicial institutions can solve deep political and structural problems in Africa. The presenter further postulated that the perception that Africa's violence can be addressed through the work of the ICC's judicial processes alone is central to the problem.

The presenter referred to a quotation: "We ask for justice, and you give us law", to help explain the basis of her presentation, which would also aim to answer the following questions:

1. What really is justice?
2. What does it involve?
3. What are its tenets?
4. Who should define them?

In this context, the presenter focused on the origins of a set of conceptualisations surrounding TJ underway in Africa that offer a new "ecosystem" for domesticating the terms of justice. She then turned to how Africa's TJ momentum provides an opening for redirecting the promise of justice in Africa.

She suggested that we should have more pragmatic and realistic expectations about the potential of the ICC to alleviate the deeply structural roots of African violence. She addressed the roots of African violence as a problem of political and financial inequalities, as well as the displacement of African institutions.

The presenter discussed the period before colonial rule, when African societies possessed many ways of managing diversity and difference. The formation of the colonial state, she argued, involved the imposition of European governing structures, bureaucratic processes, and constitutional values onto existing local social groups and territorial divisions. In order to gain some level of legitimacy, colonial powers allowed centralised and limited governing roles for traditional leaders in local matters. The colonial powers developed a system of welfare that allowed limited resources to the masses, and resulted in a struggle to gain access to power.

She further explained that although gaining independence from the colonies removed the common enemy for Africans, it also resulted in deep conflicts involving the struggle to gain access to the

centralised control over natural resources and political power. In the post-independence period, she argued, the majority of African countries experienced authoritarian rule from the 1960s to the 1980s. The problem was that the framework for unity in Africa was built on constitutional values and principles that had been imposed during colonisation, rather than based on a consensus of mutual understanding and agreement. A single-party system emerged as an answer to the question of unification. This, she stated, resulted in regimes that lacked legitimacy and were frequently overthrown or maintained through military and dictatorial means.

She then discussed the notion of African TJ, and listed the following assumptions surrounding what comprises TJ:

- 1) Impunity is a manifestation of the lack of institutions that can help to promote pluralism, fairness, participation, impartiality, and accountability.
- 2) There are shared African values of peace, justice, accountability, and reconciliation.
- 3) TJ takes place in diverse political, socio-economic, and cultural contexts that should inform its design and implementation.
- 4) The AU and member states should provide support and solidarity to countries emerging from conflict to implement effective TJ measures that meet national and international standards.
- 5) The design and implementation of activities under this framework should prioritise the use of specialised African agencies and regional bodies, as well as African technical expertise and knowledge at local, national, regional and continental levels.

The presenter then asked the questions, “Where do we go from here? What lessons can be drawn from existing engagements underway in Africa?”

She explained that state and non-state actors, including victims and civil society, should be the core actors in rebuilding trust and peace, and should be at the forefront of TJ initiatives. Consultation with, and participation of, affected groups should be central to all TJ processes. Then she asked, “What does this mean for the ICC in relation to African cases?”

The ICC has a role to play, however, given the reality of political inequalities, it is not straightforward to assign notions of responsibility for collective crimes and historical inequalities to a small number of commanders. This will not by itself end impunity, nor help victims in the long term, so long as inequality festers.

To conclude, she stated some considerations that international criminal law actors should keep in mind:

1. *Nomenclature matters*: We need to reconsider and rethink what justice is. We need to ask ourselves the following questions:
 - a. What do those victimised by violence want?
 - b. What is the role of those victimised by violence in procuring justice? Should justice mean the protection for victims?
2. *Sequencing and timing matters*: the ICC could consider better strategies around sequencing, especially in relation to the deeply entrenched political challenges at the heart of African violence.
3. *Complementarity relationships*: it is necessary to develop complementarity and cooperative relationships with the AU and other African regional bodies.
4. We should show humility and manage expectations through the language we use.
5. We should recognise the importance of mechanisms other than the ICC in fighting impunity in Africa.

Expectations of victims in the DRC: How can they be taken into account?

The presenter explained that she was speaking as someone who works closely with lawyers and witnesses, and would discuss what is taking place on the ground. She stated that the DRC has had more than 10 years of rebellion, and CSOs are facing many problems. The country, she explained, is in a bad state, especially in the eastern part, where there is an ongoing rebellion. Women in this area are suffering particularly from sexual violence. She stated that people have been suffering for far too long, and it was time to receive justice, which would include reparations.

She discussed the situation at the ICC with regret. People often hear of those who are arrested, but nothing is heard about the retribution faced by those who collaborated with the Court.

She explained that people are now finding justice to be a waste of time. People are asking themselves: Why should I go, waste my time, and humiliate myself when I can work on the farm to earn my living? CSOs on the ground are working towards more sensitisation of the communities, and showing them the advantages of justice both at the national and international level, emphasising the role they can play in bringing perpetrators to justice.

International justice, she explained, only touches on part of the problem. When the perpetrator is a foreign actor, the ICC is useful. As a way forward, she explained that they were trying to sensitise communities to the ways in which the ICC could be of assistance.

Yet, she lamented that people who have committed serious violations unfortunately remain free and live within the community. Even if the DRC government can arrest the perpetrators, national mechanisms do not have the capacity to prosecute them. In this respect, she asked, how could the ICC enhance the capacity of justice at the national level? For example, some officers had been accused, but were later released. Under these circumstances, she asked what can activists do? Her own recommendation was to turn to TJ.

She stated that despite the expectations of the community in relation to the ICC, there are areas not being attended to, such as reparations. Reparations, she explained, should be effective, elaborate, and well-defined. Clarity should be provided on what kinds of damages will be covered for each group of victims. They should be quantified. She questioned what should we give to an amputee or a person who was beaten, for example? Though difficult, it should be quantified.

Work on the plight of Darfuris

The presenters discussed their experience as counsel at the Special Court for Sierra Leone (SCSL) and in engaging victims in the Darfur situation at the ICC. They shared their experience with cross-examining women who had lived with perpetrators, and receiving statements from victims who were greatly traumatised from the events occurring in Darfur. In order to obtain statements, they first needed to create trust, which took time and effort to develop and maintain.

They mentioned that when the ICC was first established, it was met with a great deal of support, which seems to have been replaced with increased criticism. They then reflected on the issue of defining justice – a theme throughout the conference. Despite the dangers associated with collaborating with the ICC, they noted, it appeared that Darfuri victims were still very interested in the proceedings, not because they were seeking reparations, but because they were seeking justice.

The presenters articulated the ways in which they work together with victims to raise awareness; for example, through sharing victim testimonies during their international justice training sessions or through arranging for recognised victims to speak before the ASP or the New York Working Group on

Cooperation. Furthermore, to better inform lawyers and other stakeholders, audio-visual tools, such as maps, are used during outreach activities and missions to various communities. The presenters highlighted other campaigns to increase awareness, including the “Chasing Bashir” initiative, which tracks Sudanese President Bashir’s travel plans and visits, puts pressure on hosting governments, and ultimately promotes greater state cooperation on the development of creative arrest strategies.

The presenters next discussed how victims from Darfur come from a variety of cultural and ethnic backgrounds, but share the commonality of victimisation from atrocities from which the international community has failed to protect them. If one engages with people in an international justice process that does not provide anything in return, the question remains: what, then, is justice? In terms of TJ for these communities, the presenters suggested that we must question how to reach out to other actors, such as the world Islamic community and the AU in order to pursue TJ.

The speakers further discussed the definition of TJ as provided by a variety of stakeholders, including the International Centre for Transitional Justice and the Report of the UN Secretary General on “Rule of law and transitional justice in conflict and post-conflict societies”¹⁷. Finally, the presenters suggested that we could turn to the ICC for pursuing TJ, especially given the gap at the national level in certain countries, such as in the Darfur situation.

SESSION 6: FINAL QUESTIONS AND REMARKS:

- The ICC is accountable to member states. This accountability, however, comes with limitations. The mood among member states that approve the Court’s budget is to be restrictive in interpreting the mandate. Therefore, it seems that it will be difficult for them to approve TJ projects. Thus, it was suggested that if CSOs want to see such initiatives, they should advocate more with the ASP and states, rather than with the institution itself.
- It was then stated that the concept of TJ does not mean that there is no need for a fair trial. Those indicted and arrested must still be treated fairly.
- With respect to the point that “institutions are what Africa needs; impunity is the product of the lack of institutions”, it was noted by another participant that the solution will not end with institutions. On the contrary, it was stated that the African continent is great at generating institutions, but these do not always address the culture of impunity. African leaders need to be willing to be constrained by the institutions that they create.
- It was suggested that when discussing justice, the idea of institutional reform is critical. When discussing local partners (apart from ICC, which has limitations) and a range of TJ mechanisms, truth and reconciliation commissions, reparation etc, why not consider traditional mechanisms? Why not try *gacaca* as Rwanda did, for instance?
- It was reiterated that it is states that are to blame for the failure to arrest Bashir, as they are the enforcement mechanisms. They are failing in their obligations.
- Another participant noted that the international community, including civil society, needs to hear the voice of Africans.
- Another presenter argued that for TJ to succeed, it may be necessary to pull away from the framework of the institutions with which we work today. It was argued that TJ is not the mandate of the ICC, and that perhaps even the AU’s perception on TJ is not sufficient. The ICC is only a court, it can offer a judgment based on evidence and nothing more. In the words of one participant, it is not “the ministry of happiness.”
- Another participant commented that if the ICC was not meant to be involved in TJ, victim participation and reparations should not have been included in the mandate. It was suggested that the Court has failed to be imaginative with its own mandate, and that it should also have a deeper understanding of the context in which it is operating.

¹⁷ Available at: <http://www.unrol.org/doc.aspx?n=2004%20report.pdf>

- Another participant spoke of the Kenya situation, stating that the collaboration of Kenyatta and Ruto was the outcome of the ICC's work in the country.
- It was observed that Zimbabwe has great institutions, but they are not effective. It is the willingness of the leaders to be constrained that could bring change. In Zimbabwe, from about 1990-95, when the executive had issues with the laws, the president amended the constitution. It was stated that there was rule by law and not rule of law.
- One participant stated that there is no easy way to respond to the issue of intermediaries at the ICC, as the OTP will always rely on intermediaries. It was stated that the OTP cannot train investigators to learn all languages, and that national actors will always play a role. This remains an ongoing challenge.
- It was then stated that an intermediary is often assumed to be someone who is engaged by the Court, but there are different types of intermediaries. Some engage voluntarily and without previous consultation. When the OTP is on the ground and someone sends an email or spontaneously offers information, the OTP must inform the person that they are obliged to disclose certain information. In this context, it is not easy to operate in a country where people are targeted because they are suspected of giving information to the OTP. It was stated that the OTP is constantly receiving emails from people persecuted because they are assumed to be working with/for the ICC.
- With respect to intermediaries, a participant stated that IRRI is developing a handbook for local CSOs that will help generate awareness of the risks and benefits of engaging with the ICC. The speaker stated that they were surprised that the ICC is not able to provide a space for collaboration with intermediaries.
- The ICC has its difficulties and built-in restrictions. These are the challenges the Court faces, but it was stated that many are also self-made. Most tribunals are restrictive in their essence. It was argued that we need new methods for discussion and debate. How do we re-engage with the ICC on different terms?
- An additional participant lamented that the security of an intermediary is never truly addressed, to which another participant stated that relocation is an option, but that in reality, we cannot simply relocate people – we need to ask for state collaboration.
- It was recommended that the ICC have staff that reflect the countries it works in. "Justice cannot afford to be blind."
- It was also recommended that the proposed AU-ICC liaison office be set up.
- The session concluded with a final reminder that we cannot change regimes overnight, but that we must all keep fighting for justice.

THE WAY FORWARD: FORMULATION OF RECOMMENDATIONS AND STRATEGIES FOR ACTION FOR TAKING THE RECOMMENDATIONS FORWARD

During the final sessions of the meeting, participants formulated and adopted specific recommendations targeting key stakeholders and civil society.

Following our discussions and deliberations, the civil society organisations in attendance,

- Affirm our belief that no one should be above the law;
- Remind the international community that states have the primary responsibility to protect their citizens from mass atrocity crimes, however where the state fails its citizens, the international community must act;
- Recognise the important role that civil society plays in promoting justice for victims and accountability for international crimes;

Made the following recommendations:

Civil society must:

1. Recognise that while imperfect, the ICC is a young and developing institution with room for both critique and improvement. While understanding the limitations and managing their own expectations of the Court, civil society should make efforts to fill the inevitable gaps by:
 - a. increasing their knowledge on how the ICC functions in order to engage with it more constructively.
 - b. recognising the obligation of the ICC to protect and minimise the exposure of people who collaborate with it, while acknowledging that civil society also has an active role to play in ensuring its own protection. This includes raising awareness among civil society and individuals likely to engage with the Court about rules of evidence and disclosure in order to minimise risks associated with gathering evidence that is not useful to the proceedings or that leads to an identity disclosure. In addition, civil society should seek to establish complementary protection measures that can be used for individuals who may face risks on account of their work for international justice, but who may not fall within the protection mandate of the Court (for example, those who have no formal relationship with the Court but who may nevertheless face threats as a result of speaking out publicly in favour of accountability).
 - c. demonstrating to the ICC that the current disclosure rules are often a security risk to intermediaries, and proposing measures to better protect intermediaries without jeopardising the defendants' right to a fair trial.
 - d. working with the ICC to ensure that the protection of witnesses and intermediaries is given the primacy that it deserves, including through advocating with states to make the necessary resources available to offer effective protection.
 - e. facilitating further discussion as to whether intermediaries should have access to an independent legal representative.
 - f. considering litigation with the Court to clarify the scope of obligations to intermediaries in appropriate circumstances.
 - g. liaising with the Court in an effort to more effectively plan "next steps" after the ICC withdraws from a situation country when a case is closed or frozen, to ensure a smoother transition for the affected communities.
 - h. ensuring better organisation of the lawyers who are engaging with the court by welcoming and promoting meaningful discussions on the necessity and validity of creating an independent bar association for defence/victims' counsel.
 - i. ensuring local civil society is heard by the ICC directly, rather than through international CSOs. This includes committing to including ICC staff members in relevant meetings and discussions held on the African continent.
2. Continue to advocate and pressure permanent members of the Security Council, in particular Russia, China and the US to ratify the Rome Statute.
3. Engage in advocacy with the ICC but also with the ASP and individual states.
4. Facilitate further discussion on the issue of immunities on the continent. In so doing, civil society might advocate for clarification of Article 46 (a) *bis* of the AU protocol which remains vague on which state officials are not subject to prosecution and engage deeper with the underlying arguments in favour of immunities, in particular in terms of the rhetoric peace and security and clarifying whether the AU and its member states can be thought of as developing regional custom on this issue.
5. Conduct a study of the relatively high compliance rate of the East Africa Court of Justice in order to articulate and apply lessons learned.
6. Engage more actively on the issue of AU financing to ensure that the AU is in a position to offer appropriate responses.

7. Ensure that all accountability efforts are universal, transparent and widely disseminated.
8. Communicate accountability efforts more effectively and diversely. For instance, CSOs working on promoting accountability for western actors need to ensure that African civil society is included in, and informed about, their efforts. This will help address the impression of double standards and the problematic narrative that Africa is the only site of crimes in need of accountability.
9. Urgently engage with the ReVision process announced by the Registry, in particular in relation to the reformulation of their policy and promotion of field offices.
10. Engage more effectively with the institutions that already exist at the AU level, including the African Governance Architecture and the African Peace and Security Architecture, in order to ensure better implementation of existing international law related to peace and accountability issues.
11. Work together to support the ICC whilst continuing to debate on critical matters on the Rome Statute such as immunity, sovereignty, and Security Counsel referrals with a view to making recommendations for reform.
12. Engage in the development of mechanisms to encourage prosecutions at the national level and to combat the tendencies of some states, particularly in the West, to limit these efforts.

The ICC must:

1. Better engage with and promote mechanisms for dialogue with national and international civil society and the AU and its bodies.
2. Ensure substantial and meaningful ground presence, overall, but especially in situation countries, including that:
 - a. the Court engage more effectively with local CSOs while providing necessary protective measures to ensure this engagement does not increase the security risk to the CSOs.
 - b. there is a greater field presence, including a permanent presence where security allows, more frequent visits to the affected areas, and by utilising social media and other low cost but effective outreach strategies.
 - c. that the Court has appropriate outreach strategies in place for when they choose to withdraw from a country.
 - d. they have increased the capacity of, or engaged sufficiently with local civil society to enable them to fill the inevitable gaps.
3. Understand that some of the criticism levelled at it are due to a misunderstanding of the Court's remit and capacity, and accordingly, respond by:
 - a. taking more proactive steps in its outreach, especially, though not exclusively, in situation countries
 - b. working with NGOs to educate the general public on:
 - i. the strategy and limitations of the OTP in relation to case and situation selection.
 - ii. the practical constraints of conducting international justice investigations.
 - iii. how the different organs of the Court interact
 - iv. how the Court sources the necessary expertise
 - v. how they staff operations in particular situation countries.
 - c. specifically targeting international and local CSOs to ensure:
 - i. that the role of intermediaries is made clearer. The new Guidelines are a welcome step, but more must be done to actively disseminate them and sensitise local civil society as to its content. If resources are a concern, the Court should leverage relationships with international and local CSOs.

- ii. that those in possession of evidence, in particular local CSOs, fully understand the rules of evidence and disclosure. If these groups have greater knowledge on what information is useful, and how to collect, store and provide it securely to the Court, in addition to understanding the risks involved, they can make more prudent decisions as to whether or not to embark on this work and whether/how to approach or respond to the Court.
- 4. Respond to budget constraints in relation to outreach by pursuing cost effective outreach strategies including:
 - a. reinstating the weekly updates from the Office of the Prosecutor that were issued until approximately November 2013.
 - b. relying more heavily on new technology as an effective, low cost means of outreach, for example radio broadcasts, social media and text and video outreach that can be shared by mobile phone.
- 5. Show greater imagination on issues of complementarity and cooperation.
- 6. Ensure that victims receive real and meaningful representation.
- 7. Ensure legal aid lawyers and the Court work to improve contact between lawyers and victims.
- 8. Ensure information is passed to victims in a timely manner.
- 9. Ensure the Registry ReVision process is adequately discussed and monitored with and through civil society. In particular, we welcome the Registry's initiative to add and reorganise field presence through the ReVision process, but call on the Registry to proactively engage with civil society, in particular local CSOs, on the details of this policy change.
- 10. More robustly investigate and prosecute cases of contempt of court and obstruction of justice.
- 11. Do more to encourage direct interactions with those on the ground in situation countries.
- 12. Recognise the significant and unaddressed security concerns affecting intermediaries that work or have worked with the ICC, and thereby improve their ability to respond quickly and effectively to these needs, for instance, by creating a new protection unit within the Office of the Prosecutor which could respond to the needs of OTP intermediaries.
- 13. Work on strategies to identify how it can engage the capacity for national justice for lower level perpetrators – who are often the victims' neighbours.

The AU must:

- 1. Demonstrate a commitment to provide support and solidarity for the victims of atrocity crimes – recognising that these are their own citizens to whom they owe protection.
- 2. Explicitly express support for the ICC.
- 3. Reconsider authorising the establishment of an ICC liaison office in Addis Ababa.
- 4. Complete and finalise the African Transitional Justice framework, as well as work rigorously on the institutionalisation of norms and values that constrain and shape effective democratic values and ending impunity.

All states must:

- 1. Acknowledge that they have the ability to reinforce or undermine the efficacy of the ICC by their actions and rhetoric, and must act to ensure that impunity is not an option.
- 2. Ensure that the Rome Statute and the greater international criminal justice movement is, and is seen as, universally applicable to all those who perpetrate international atrocity crimes, regardless of geographic location or status. To that end:

- a. all countries must ratify the Rome Statute. Those that have permanent seats on the UN Security Council, in particular Russia, China and the US have a particular obligation to ratify.
 - b. all countries are obliged to investigate and, where appropriate, prosecute those involved in the perpetration of international atrocity crimes, including those outside of Africa.
 - c. those countries who are unwilling to do so must be sanctioned and
 - d. those that are unable must be supported in their prosecution efforts.
3. Promote and enforce the decisions of the ICC, in particular in relation to arrest warrants, especially those who are already party to the Rome Statute.
 4. At a minimum, respect international legal norms including with regard to refusing assistance to those with outstanding arrest warrants.
 5. Ensure that the ASP make the necessary resources available to allow the ICC to engage in outreach, including in countries where there is no ongoing judicial activity.
 6. Promote avenues for pursuing accountability at the national level. Some states, in particular western states, are now actively destroying the possibilities for accountability in their countries.

All interested parties (civil society, the ICC, and states) must:

1. Engage with transitional justice measures to address structural inequality, making use of African expertise in the design and implementation of transitional justice strategies.
2. Research and utilise traditional mechanisms where they can best contribute to accountability.
3. Continue to promote the essential role of victims in the Rome Statute system, including within civil society.
4. Acknowledge that victims often extend beyond those formally recognised by the Court. As such, there should be rhetorical acknowledgement that all victims of international crimes are of concern to the international justice community, even if they are not able to engage directly with the Court
5. Ensure that victims' representation not be internalised within the Court, and rather, allow and promote the important role of external counsel and the ability of victims to choose their own representation.
6. Engage more with national authorities to promote accountability, including national human rights commissions.
7. Make efforts to improve their communications and relationships with one another in support of the common cause to promote international criminal justice and the fight against impunity.

ABOUT THE CONVENORS



The [International Refugee Rights Initiative](#) (IRRI) is dedicated to promoting human rights in situations of conflict and displacement, enhancing the protection of vulnerable populations before, during and after conflict. IRRI accomplishes this by:

- tackling the exclusion and human rights violations which are the root causes of flight;
- enhancing the protection of the rights of the displaced, and
- promoting policy solutions which enable those affected by conflict to rebuild sustainable lives and communities.

IRRI grounds its advocacy in regional and international human rights instruments and strives to make these guarantees effective at the local level.



The [International Justice Project](#) (IJP) is an independent, nonpartisan 501(c)(3) organisation that works tirelessly to advance its mission of promoting human rights through the rule of law and providing holistic support to victims of the world's most heinous crimes – genocide, crimes against humanity, and war crimes. Their activities center around supporting and assisting the representation of recognized victims in the Darfur Situation before the International Criminal Court (ICC). In addition, IJP is also involved in research and advocacy for the development of mechanisms to address the health and welfare of victims of atrocities. Finally, IJP engages with decision-makers, academia and other members of civil society by delivering lectures and briefings, and through participation in public discussions in order to promote awareness of ICC activities and the ongoing conflict in Darfur.



The [Pan African Lawyers Union](#) (PALU) is a continental membership forum for African lawyers and lawyers' associations. PALU was founded in 2002, by African Bar leaders and eminent lawyers, to reflect the aspirations and concerns of the African people and to promote and defend their shared interests. It brings together the continent's five regional lawyers' associations, over fifty-four national lawyers' associations and over 500 lawyers. Their vision is to see a united, just and prosperous Africa, built on the rule of law and good governance. Their mission is to advance the law and the legal profession, rule of law, good governance, human and peoples' rights and socio-economic development of the African continent.