



NARRATIVE REPORT

SEMINAR: THE NORTH-SOUTH ASPECTS OF INTERNATIONAL JUSTICE AND THE INTERNATIONAL CRIMINAL COURT

7-8 April 2005

Maastricht, the Netherlands

DAY I

Opening Ceremony

The Opening Ceremony was chaired by Prof. Louk de la Rive Box, Rector of the Institute of Social Studies (ISS), who, after some brief introductory remarks, introduced the various speakers.

The first speaker, Evelyn A. Ankumah, Executive Director of Africa Legal Aid (AFLA) welcomed all participants and informed them about the work of AFLA. In particular, she referred to AFLA's work on international criminal law and the 'Cairo-Arusha Principles on Universal Jurisdiction in Respect of Gross Human Rights Offences: An African Perspective', which have been coined the 'Voice of Africa on International Crimes'. Evelyn Ankumah introduced participants to the subject matter of the seminar. In particular she highlighted a number of issues of crucial significance to Africa including the possible inclusion of the crime of aggression and economic crimes to the list of international crimes. She also made note of issues of selectivity, the importance of diversity and respect for alternative forms of justice, among others.

The second speaker was Prof. Gerard Mols, Rector Magnificus of the Maastricht University and professor of criminal law. Drawing from his own experience as a defence lawyer before the International Criminal Tribunal for Rwanda (ICTR), Prof. Mols stressed the need to conduct trials nearby the places where the crimes in question are alleged to have been committed. In addition, he stated that the work of the International Criminal Court (ICC) should not be viewed in isolation. International justice is also a matter for the United Nations organs, and due regard should be given to the economic circumstances which often trigger abuses of human rights. In this regard, he referred to issues such as globalisation, international trade conditions, competition and corruption, which all affect people in the South.

The third speaker was the Minister of the Interior, and former Minister of Justice, of Ghana, Hon. Papa Owusu Ankomah. The Minister informed participants about his Government's commitment, and its work in relation, to human rights, good governance and the fight against poverty. The Minister stressed the significance of the ICC, the work of which he views as complementary to that of the African Union, NEPAD and regional communities such as ECOWAS. He paid special attention to the issues of selectivity and alternative forms of justice, particularly in relation to the need to respect specific African norms, values and traditions. The Minister ended by calling upon Governments, donor agencies, international organisations and civil society groups to work on international justice, which also involves economic development.

In her remarks, Hon. Fatou Bensouda, Deputy Prosecutor of the ICC, clarified that the ICC should not be seen as a tool for the North to 'bully the South'. She stressed the significant role that Southern States have played in establishing the Court and that the ICC Statute embodies, not just Northern values, but rather a hybrid of legal traditions. Referring to the so-called complementarity principle, the Deputy Prosecutor emphasised that the ICC is there to support and strengthen the position of national courts, which hold the primary responsibility to fight impunity. To make a success of the Statute, the ICC and national courts should build a proper working relationship. She stressed that the South can and should be more active and make itself more visible in this regard.

The Keynote Address was delivered by Prof. Shadrack Gutto, Director of the Centre for African Renaissance Studies (CARS) of the University of South Africa, and member of the Governing Council of AFLA. He highlighted six challenges and/or opportunities for the South in relation to the theme of the seminar. These were: (1) the contribution that Africa and Africans have made and can make to the development of international law; (2) Africa's position and role in the institutional reform of the United Nations; (3) the situation in the Darfur Region and the role played by the UN Security Council (Res. 1593); (4) the importance of Article 4 of the Constitutive Act of the African Union, allowing for humanitarian intervention; (5) the Cotonou Agreement between the European Community and the ACP countries; and (6) the need to ensure that injustices created or caused by Northern countries are taken up by the ICC, so as to ensure the legitimacy of this Court.

The chair, Prof. de la Rive Box, closed the opening ceremony by summarising the main issues that had been raised and stressing the need to tackle issues of poverty, the rights to food, health and education and the need to strengthen local systems of law.

Method of Work

The Seminar proceeded on a thematic basis. Each theme was addressed by a panel consisting of a Chair, a Presenter and a Discussant. After intervention by the panellists, the Chair opened the floor for discussion. Thereafter, the panellists were given the opportunity to respond to questions, observations and comments from the floor.

Theme: Africa and International Justice: Cases Identified for Investigation and Prosecution by the ICC

Chair: Judge Unity Dow, High Court of Botswana, Member of the Governing Council of AFLA

Presenter: Prof. Jan Wouters, President, United Nations Association Flanders Belgium (VVN), Director, Institute for International Law, Catholic University of Leuven, Belgium

Discussant: Chiseche Mibenge, the Netherlands Institute for Human Rights (SIM), University of Utrecht, the Netherlands

In his presentation, Prof. Wouters identified three cases that have been selected by the ICC for prosecution. These cases involve atrocities committed in the Democratic Republic of Congo (DRC), Uganda and Darfur (Sudan). The presenter analysed the various legal issues that will arise in each of these cases, including the ICC's jurisdiction and the admissibility of the cases

in light of the complementary role of the ICC and the ability and willingness of national courts to take up the cases. Prof. Wouters regarded the cases as test cases for the functioning of the ICC, to see how its procedures will work in practice, how efficient the co-operation between the ICC and national law enforcement authorities will be and how the ICC will approach amnesties granted by virtue of national law.

Discussing the presenter's paper, the latter issue of amnesties was elaborated on by Ms. Mibenge who further emphasised the need to draw lessons from the Yugoslavia and Rwanda Tribunals and, referring to AFLA's Cairo-Arusha Principles on Universal Jurisdiction, stressed the importance of including economic crimes and corruption in discussions on international justice.

In the subsequent, and lively, floor discussion various issues were raised by participants including specific aspects of the three cases discussed by Prof. Wouters, the relationship between the work of the ICC and national criminal authorities and the question of whether the ICC is aware of the perception that it might be accused of being biased or be seen as a Northern attempt to impose its will on the South. Hon. Fatou Bensouda, Deputy Prosecutor of the ICC, stressed that the ICC seeks to act objectively and independently and that it views its own task as being complementary to that of national courts.

Theme: Universal Jurisdiction for International Crimes: Issues of Diversity and Inclusivity

Chair: Dr. Medard Rwelamira, Head of the Secretariat of the Assembly of State Parties, International Criminal Court, The Hague, the Netherlands

Presenter: Dr. A.P. van der Mei, Department of International and European Law, Maastricht University, the Netherlands

Discussant: Sten Verhoeven, Institute for International Law, University of Leuven, Belgium

In his presentation, Dr. A.P. van der Mei addressed a variety of legal and political issues concerning the exercise of universal jurisdiction, and the famous or rather notorious Belgian Genocide Act in particular. He pointed out that virtually all universal jurisdiction cases so far have involved Northern court prosecuting and trying Southerners for crimes in the South. The reverse is rare. Dr. van der Mei was very critical of this imbalance, which gives the appearance of selectivity. He warned that this could undermine the legitimacy of cases based on universal jurisdiction, and that one should not be surprised that northern countries such as Belgium are accused of judicial imperialism. To avoid this, Dr. van der Mei came up with various suggestions as to what the proper role of universal jurisdiction (in relation to the ICC) could or should be. Ultimately, in Dr. van der Mei's view, universal jurisdiction can only contribute to international justice if (1) it is part of a coherent policy package aimed at tackling the problem of impunity at its roots; (2) exercised with due respect for the primacy of jurisdiction of the territorial and national States; and (3) if it is applied with political sensibility and historical consciousness.

The discussant Sten Verhoeven of the Institute for International Law of the Catholic University of Leuven, Belgium, was much less critical of universal jurisdiction and the

Belgian Genocide Act in particular. He opined that a much greater role might be reserved for universal jurisdiction in future years.

What followed was an interesting floor discussion, in which some participants clearly recognised the legal flaws of and the political frictions caused by universal jurisdiction, and shared the presenter's very critical remarks particularly in relation to the application of universal jurisdiction in the North-South context. Others, participants from Belgium in particular, were less critical. Views differed as to whether it is, and if so when it is appropriate for a former colonial power (such as Belgium) to exercise universal jurisdiction over crimes committed in former colonised and exploited territories (such as Rwanda), and in particular where the former colonial power is implicated in the events leading to genocide.

Theme: African Perspectives on Gender Justice

Chair: Melanie Werrett, former Chief of Prosecution, International Criminal Tribunal for Rwanda (ICTR)

Presenter: Angela Dwamena-Aboagye, Executive Director, the ARK Foundation, Ghana

Discussant: Prof. Cees Flinterman, Director, the Netherlands Institute for Human Rights (SIM), University of Utrecht, the Netherlands, Member of the United Nations Committee on the Elimination of All Forms of Discrimination Against Women (CEDAW Committee), Member of the Governing Council of AFLA

In her presentation Ms. Dwamena-Aboagye spoke of the plight of “Emma’s” in Africa, and the rest of the world, and questioned what justice is and who defines it. She regarded gender as a social construct describing the relationship between male and female at various levels of society. Women’s rights must be regarded as human rights. “Emma’s”, so Ms. Dwamena-Aboagye explained, are affected differently in various parts of the world, but there ought to be equal justice for all persons. Referring to various problems that especially African women encounter, the presenter stressed the need to increase African women’s access to justice and legal aid and she made a passionate case for legal literacy for all.

In his comments, the discussant drew inspiration from his work and experiences as a member of the CEDAW Committee. Referring to various reports he pointed out that women indeed are still often discriminated against in relation to economic and social rights and in family settings. Prof. Flinterman stressed, however, that States can be held accountable for these violations.

In the discussion that followed various issues were addressed, including the specific position that migrant women and refugee women often find themselves in, issues of poverty and religion, and the impact this has on women in Southern countries. The point was also made that it is only since three or four decades ago that the international community recognised that women occupy a special place in the human rights debate.

DAY 2

Theme: Cooperation of National Authorities in the Implementation of International Justice and the ICC Statute

Chair: Androulla Kaminara, Head of Unit, Coordination for the ACP Countries, EuropeAid Co-operation Office, Brussels, Belgium

Presenter: Phakiso Mochochoko, Legal Advisor, International Criminal Court, The Hague, the Netherlands

Discussant: Maria Cavarretta, Officer for Southern and Eastern Europe, Coalition for the International Criminal Court (CICC), Brussels, Belgium

In his presentation, Phakiso Mochochoko placed the subject of co-operation in a historical context, briefly touching upon the Rwanda and Yugoslavia tribunals, the special court of Sierra Leone and the court in East Timor and the notion of universal jurisdiction. Focusing on the ICC, the presenter mainly discussed the complementarity principle, and the fact that the ICC itself lacks enforcement powers. Thus, the role of national authorities in relation to investigation, arrest warrants, extradition, etc. becomes important. The presenter discussed relevant provisions of the ICC Statute and stressed the need for national legislation governing co-operation between national courts and the ICC.

The discussant, Maria Cavarretta, touched upon a variety of issues, including insufficient ratification of the ICC Statute, the African countries that have already adopted implementing legislation, and the position of the US vis-à-vis the ICC and States that have ratified the Statute (the so-called Article 98 Agreements).

The subsequent floor discussion was lengthy and often quite heated. Many issues, too many to mention here, were debated, including recent developments in the EU-ACP Cotonou Agreement, the legality of Article 98 agreements and the position of Islam/Arab countries.

Theme: Alternative Forms of Justice: Lessons from Rwanda

Chair: Prof. Khadija Elmadmad, Professor of Public International Law, Faculty of Law, Casablanca University, Morocco, UNESCO Chair “Migration and Human Rights”

Presenter: Chiseche Mibenge, the Netherlands Institute of Human Rights (SIM), University of Utrecht, the Netherlands

Discussant: Thomas Trier Hansen, the Danish Institute for Human Rights, Copenhagen, Denmark

Ms. Mibenge, a researcher on the Gacaca system (an ordinary court of sorts), informed participants what this alternative for full-fledged criminal procedures entails. She informed participants about the background of this system and how it operates in practice. Ms. Mibenge placed Gacaca against the background of the huge numbers of people who, so many years after the Rwandan tragedy, are awaiting trial in overcrowded prisons. Having highlighted the basic concept of the Gacaca system, the presenter then raised the following issues: Should it

be viewed as an inferior form of handling past criminal events or should it be seen as a realistic and feasible option for achieving justice?

In his comments, the discussant Thomas Trier Hansen, was much more sceptical of the Gacaca system. He noted the absence of legal representation, other fair trial requirements and the seriousness of the crimes in question and reasoned that there are still too many flaws to be too positive about the system.

The views of the various participants differed on various points, but there did seem to be some agreement that Gacaca, in spite of its flaws, is perhaps the only alternative ensuring that the cases of thousands awaiting trial in overcrowded prisons in Rwanda are processed.

Theme: Revisiting the ICC Statute in 2009: Prospects and Pitfalls

Chair: Koki Muli, Executive Director, Institute for Education in Democracy, Gender Commissioner, Kenya

Presenter: Prof. Shadrack Gutto, Director, Centre for African Renaissance Studies (CARS), University of South Africa, Member of the Governing Council of AFLA

Discussant: Elio Polizzotto, Assistant Program Director, No Peace Without Justice, New York, USA

In his presentation Professor Gutto placed the following subjects on the list of issues that should be addressed in 2009: the possible inclusion of the crime of aggression, corruption, terrorism and economic and social crimes in the ICC's jurisdiction, the possibility to have corporations prosecuted before the ICC, the relationship between the ICC and the UN Security Council, Article 98 of the ICC Statute (bi-lateral agreements) and the issue of sentencing.

On each of these issues a lively debate subsequently developed during which a number of issues to be revisited in 2009, e.g. amnesties were suggested.

Panel Discussion

Chair: Judge Unity Dow, High Court of Botswana, Member of the Governing Council of AFLA

Panellists: Hon. Papa Owusu-Ankomah, Minister of the Interior, Ghana

Phakiso Mochochoko, Legal Advisor, International Criminal Court, The Hague, the Netherlands

Melanie Werrett, former Chief of Prosecution, International Criminal Tribunal for Rwanda (ICTR)

Prof. André Klip, Faculty of Law, Department of Criminal Law, University of Maastricht, the Netherlands

The seminar ended with a panel discussion on how to implement African perspectives on international justice and to further develop strategies for South-North co-operation. The chair, Judge Unity Dow, commenced by giving an overview of the main issues that had been debated in the past two days. She singled out the relevance of the reform of the UN system and the notion of complementarity as the basis for promoting international justice. Hon. Minister Papa Owusu-Ankomah, speaking in a private capacity, called upon African countries to make the ICC an effective institution and to provide it with the needed financial resources. He expressed the view that there is willingness among African countries to make the ICC a success. Melanie Werrett stressed the need for the ICC to listen to local people and be particularly sensitive to gender issues and alternative forms of justice. Phakiso Mochochoko, once more, stressed that the ICC alone cannot solve the problems of impunity and that the role of national courts, both as supporter of the ICC and in their own right is crucial for international justice. Prof. André Klip, Professor of Criminal law at the University Maastricht raised a variety of points including the useful role that truth and reconciliation can play, either as an alternative or a complementary form of criminal procedure in the common pursuit of international justice.

The comments of the various panel members provided food for thought. One of the main issues was the following: given limited financial resources and the impossibility of prosecuting every perpetrator of an international crime, should one, particularly in relation to Africa, focus resources and activities at one specific level (local, national, sub-regional, regional, international) of finding justice? Should we focus on the ‘big fish’ only or should we also try to catch some small ones and continue to pursue justice at each of the levels mentioned? In addition there was debate on alternative forms of justice and the question on what balance to strike between pursuing criminal justice in relation to past events and securing future democracy and justice. At the end of the discussion, the Chair closed the Conference, *inter alia* by thanking in particular AFLA’s Executive Director and her colleagues in Maastricht, Marco van de Meughevel, Program Officer and Margo Weerdenburg, Program Associate for once again organising a successful and high level seminar.

List of Participants

SPEAKERS, CHAIRS & PANELISTS
Hon. Papa Owusu Ankomah Minister of the Interior Ghana
Evelyn A. Ankumah Executive Director, Africa Legal Aid
Hon. Fatou Bensouda Deputy Prosecutor, International Criminal Court (ICC) the Netherlands
Maria Cavarretta Officer for Southern and Eastern Europe, Coalition for the International Criminal Court (CICC) Belgium
Judge Unity Dow High Court of Botswana Botswana Member of the Governing Council of Africa Legal Aid

<p>Angela Dwamena-Aboagye Executive Director, The Ark Foundation Ghana</p>
<p>Prof. Khadija Elmadmad Professor of Public International Law University of Casablanca Morocco UNESCO Chair “Migration and Human Rights”</p>
<p>Prof. Cees Flinterman Director, the Netherlands Institute for Human Rights (SIM) University of Utrecht the Netherlands Member of the United Nations Committee on the Elimination of All Forms of Discrimination Against Women (CEDAW Committee) Member of the Governing Council of AFLA</p>
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<p>Phakiso Mochochoko Legal Advisor, International Criminal Court the Netherlands</p>
<p>Prof. Gerard Mols Rector Magnificus University of Maastricht the Netherlands</p>
<p>Koki Muli Executive Director, Institute for Education in Democracy, Gender Commissioner Kenya</p>
<p>Elio Polizzotto Assistant Program Director, No Peace Without Justice USA</p>
<p>Prof. Louk de la Rive Box Director, Institute of Social Studies (ISS) the Netherlands</p>

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