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The International Criminal Court and Africa: A Discussion on Legitimacy, Impunity, Selectivity, Fairness and Accountability

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Excellencies,
Honourable Deputy Attorney General,
Honourable Chief Justice of the Supreme Court,
Your Honours,
Ladies and Gentlemen,

It is an honour for me to be here today before this esteemed audience.

It is of course a double pleasure for me to be speaking at this auspicious occasion back in my home Continent where the warm climate and the warmth of the people are always inviting.

Allow me at the outset to express my sincere thanks to the authorities of Ghana and the Faculty of Law of the Ghana Institute of Management and Public Administration, and in particular, the Ministries of Justice and Foreign Affairs; the Dean of the Faculty of Law, Mr. Kofi Abotsi, Professor Paolo Galizzi, Godwin Dzah and all other colleagues for all the support and efforts in realizing this impressive conference.

My sincere gratitude is owed to them for their hospitality and for hosting such an impressive gathering dedicated to the cause of international criminal justice.

I gladly accepted the invitation to be with you today as it provides a unique opportunity to engage in a fruitful and constructive discussion on Africa, criminal justice and accountability, and the role of the ICC in that debate.

In the coming one and half days, we will be tackling challenging issues relating to international criminal justice in particular as they concern Africa, and as seen from the African lens.

Our gathering here today in such large numbers is a testament to our shared belief in the law serving as a powerful tool to protect and advance the rights of the most vulnerable against unchecked mass atrocities.

As the theme of the Conference suggests, issues of legitimacy, impunity, selectivity, fairness and accountability have generated much debate amongst African scholars, legal practitioners, students and politicians.

These ruminations are important as they demonstrate the Continent's commitment and interest in such important matters, and it is only through an objective line of inquiry and questioning that ideas can be tested and opinions insightfully formed.

Africa's debate about international criminal justice and the International Criminal Court ("Court" or "ICC") should be no different.

While a critical interrogation of international criminal justice in Africa is indeed warranted and welcome, such discourse must be informed and objectively undertaken, devoid of political posturing.

It surely cannot be an acceptable fact of modern day life in Africa or elsewhere that women should be mercilessly raped, children abducted, drugged and used as killing machines or as sex slaves; neither can we continue to tolerate large scale killings and displacement of innocent African civilians.

And indeed, it cannot be accepted that those who seek to gain or to retain power at any cost can do so by committing mass atrocities against civilians and not be held individually accountable for such crimes.

Failure to hold anyone responsible for these crimes - irrespective of their status - would constitute a denial of the victims' right to justice.

The era where mass violence could be unleashed on the people and explained away as simply *politics by other means* is over.

The reality we face is that over the years our beloved Continent has been inflicted with atrocities that shock the conscience of humanity; sadly with more frequency than any other Continent.

Currently, 80% of United Nations Peacekeeping missions are in Africa. In each of these conflicts, untold suffering has been inflicted on innocent civilians.

The legitimacy of the ICC as a fair, independent and impartial instrument of justice to address these crimes and to bring an end to impunity by holding accountable those who commit such crimes responsible, derives from the Rome Statute and the mandate given to this institution by the 124 Member States - including 34 African States - that have signed on to this treaty.

The era of individual criminal responsibility for mass atrocities and the end of impunity was heralded seventeen years ago in the City of Rome when the international community adopted the Rome Statute that created the International Criminal Court.

As the preamble of this seminal document indicates, the adoption of the Rome Statute demonstrates a clear determination of the international community to put an end to impunity for perpetrators of atrocity crimes and by so doing, contribute to the prevention of such crimes.

Under the Rome Statute, the gravest international crimes, notably genocide, crimes against humanity and war crimes were all finally codified in an international legal instrument with the authority to hold perpetrators of such heinous crimes accountable in the first instance by ratifying Member States, or, that failing, by an independent, permanent, international criminal Court. It bears noting that the illegal use of force -

the crime of aggression – has also been included in the Rome Statute and the Court's jurisdiction over the crime may indeed be triggered following 2017.

Additionally, the consistent and effective prosecution of those responsible for atrocity crimes, both at the national and international level, will serve as a warning to any would-be perpetrators, that they would be held to account if they committed these crimes. In this regard, holding perpetrators accountable could have an important deterrent impact.

While sceptics and naysayers have been at pains to question the legitimacy of the ICC and to portray a dooms day scenario of an institution that does not enjoy the support of the African Continent, facts point to the contrary.

It is now well accepted that without Africa's support in the period leading up to and during the Rome Conference, the ICC would not have been borne.

In fact, in February 1999, it was no other than an African country – Senegal – that became the first State Party to ratify the Rome Statute. This was a historically important step and a hugely important one symbolically, which was soon followed by other states around the world.

Not only has the African continent and individual African States been instrumental in the creation and functioning of the ICC, African States continue to provide the critical support and cooperation for ICC operations including with protection of victims and witnesses.

Indeed, without such support, the ICC would not have recorded important successes such as the arrest and surrender of Thomas Lubanga, Bosco Ntaganda, Dominique Ongwen, al-Mahdi, to mention a few, neither would my Office have secured the necessary evidence to advance with its cases.

In the exercise of its legal mandate, the ICC has been guided by nothing but the law and the evidence. My Office has and will continue to apply the Rome Statute provisions without fear or favour, and the Court's decisions have been and will continue to be independent, impartial and fair.

Millions of African victims' fervent belief in an independent judicial mechanism that could curb these types of mass atrocities and their belief in this institution to bring justice to them remains as strong now as it was seventeen years ago when the Rome Statute was adopted. This is what gives the ICC legitimacy, not the wishes of a few select individuals who seek to shield themselves from the law by castigating the ICC's legitimate efforts to end their impunity.

It is also worth recalling that since the Court became operational in 2002, my Office has received a number of formal requests from African states to investigate allegations of atrocities committed on their territories. Uganda, the Democratic Republic of the

Congo, Côte d'Ivoire Mali and the Central African Republic on two occasions, have all invited my Office to step in to investigate and prosecute. Such self-referrals are clear demonstrations of the trust and confidence that African States have in the Court, and its importance to addressing serious crimes committed on their territories.

Unfounded accusations of ICC selectivity have also been rife. One only has to look at all the situations that are under preliminary examination by my Office to dismiss these allegations.

Since assuming Office, I have placed added emphasis on the importance of our preliminary examination activities.

Not only has my Office recently been granted authorization to open investigations in Georgia, but we are also seized of other situations outside of Africa.

We are conducting preliminary examinations in Afghanistan, Columbia, and Ukraine where we are carefully assessing whether Rome Statute criteria for opening investigations are met. I have also reopened preliminary examinations with respect to Iraq, where we are examining alleged detainee abuse at the hands of UK forces. And last year, I opened preliminary examinations with respect to Palestine.

As with all of our work, these efforts will be undertaken with full independence and impartiality, and should the legal requirements be met, *let me be clear*, I will *not* hesitate to open investigations in any of these situations.

As Africans, we should take pride in the many virtues of our picturesque Continent. But we must also recognize that there is much work to be done.

There can be no doubt that we all want to see a prosperous and more peaceful Continent in which democratic values, the rule of law, and human rights are universally respected and advanced. Holding those responsible for these crimes accountable is key for the Continent's success.

In a decade from now, I'd like to see the Continent emerge that is blessed with fully developed infrastructure, continuous economic growth, and ample opportunity for its young population, so that they can constructively contribute and secure the Continent's future; a more integrated and proudly pluralistic Africa which reverses its brain-drain problem and increasingly engages its vast and influential diaspora in moving it towards bigger and better successes.

We must also acknowledge that fighting impunity for atrocity crimes and cultivating the rule of law are fundamental preconditions for a more peaceful and prosperous African Continent.

How can societies plagued by recurring conflict in Africa or elsewhere prosper, attract investment or facilitate an environment conducive to economic growth and productivity?

History has shown that establishing the rule of law and a healthy, well-functioning judicial system are fundamental pre-requisites to political stability and economic growth in any country.

While in times of conflict, war economies may thrive, the net result is damage to the infrastructure, overall economy, development and investment in the country.

Therefore, to the extent that investigating and prosecuting mass atrocities will deter war making and the commission of such destabilizing crimes, certainly then, criminal justice at the national or international level can play an important role in Africa's economic growth and prosperity.

Your Excellencies,
Ladies and Gentlemen,

It would neither be responsible nor morally acceptable to deny that Africa faces a number of challenges. These challenges must be addressed, first and foremost, by Africans.

As an African, and as a Prosecutor, an important question for me, is:

Has respect for the rule of law and accountability for mass crimes progressed in Africa in this century?

My answer would be: it really depends on how you approach the question.

If you adopt a micro-level perspective, the picture does not look so promising.

But if you approach the question from a historical evolutionary angle, the story becomes a much more interesting one.

The African Continent still suffers from too many wars and conflicts, all of which result in too many atrocities. Accountability for those who commit these atrocities is yet to be fully and effectively implemented. But that is not the whole picture.

There are many developments that have indeed been encouraging.

The *Constitutive Act of the African Union* is a major step in the right direction.

Adopted with two thirds of African states, the Act lists major principles that the Continent has bound itself to follow, including with respect to the protection of its citizens from mass atrocities.

Article 4 of the *Constitutive Act* of the African Union is very clear: it recognizes an obligation to respond to mass crimes and underscores the importance of ending impunity. This novel ideal has to be translated into reality by holding perpetrators to account through effective, timely genuine investigations and prosecutions.

There are also, of course, the African Commission on Human and Peoples' Rights and the African Court of Justice and Human Rights.

These institutions certainly have their challenges, but from a 'Continent building' angle, these are all progressive and critically important achievements that other regions of the world are yet to accomplish.

Africa should be proud of these achievements and should build upon them to make them more effective.

At the same time, any attempt to subvert or weaken laws or institutions that protect and safeguard the rule of law in Africa must be frowned upon and rejected, again, first and foremost by Africans themselves.

In this new century, on balance, Africa has demonstrated a growing commitment to the rule of law and accountability for mass crimes and will continue to move in this positive direction.

Ending impunity for mass crimes is not the preserve of any one institution – it is a common goal and aspiration that ties us all together in our shared quest for justice, peace and stability in Africa and beyond.

The dilemma we face is that every situation ICC is called upon to deal with will always be politically volatile. Many interests may be at stake. However, justice for victims of crimes committed in these situations should never be sacrificed at the altar of political expediency.

As ICC Prosecutor, I am profoundly committed to end impunity for crimes that shock the conscience of humanity.

Where we have jurisdiction, we bring to justice those most responsible for mass atrocities when national courts are unable or unwilling to genuinely do so themselves. I will continue to do this crucial work whether in Africa or elsewhere I have jurisdiction.

We provide recognition to the victims, and we hope to honour the memories of so many others, whose voices have been forever silenced. The arrest and conviction of the perpetrators, I hope, provides some solace to the victims of these crimes.

Let me also state that protecting citizenry from the scourge of war and conflict through the vector of the law demonstrates political leadership, not weakness.

By shedding self-defeating rejectionist postures and by espousing the ICC as State Parties, those in power in Africa and beyond can enhance their national and international standing in the international legal order, and more importantly, they can demonstrate whether they are truly committed to the protection and promotion of the inviolable human rights of their citizens.

To use the words of my dear friend, and renowned Ghanaian, Mr Kofi Annan: let us imagine an international criminal justice system under which "no ruler, no state, no junta and no army anywhere will be able to abuse human rights with impunity" – end quote.

Time for imagining is over. We now have the legal instruments and the necessary assets to achieve this aspiration.

It is through full support for the ICC that humanity can bring us ever closer to this ideal existence.

It is only then that we can finally proudly proclaim that we as Africans, as citizens and nations of the world, recognize the inviolability of human rights and *will not* allow violations and violators to go unpunished.

The challenges aside, ours is in fact the age of rights consciousness where humanity, driven by new generations of ever enlightened youth, no longer accepts that victims of gross human rights violations and mass crimes suffer in silence; are forgotten or that their perpetrators escape justice.

Your Excellencies,
Your Honours,
Ladies and Gentlemen,

Let me conclude by observing that the fight against impunity, the ICC, and the international criminal justice system it is aiming to create, will persevere and thrive.

They will do so not because of hopeful aspirations of their supporters or faltering by their detractors.

But because of what they stand for as powerful ideas; because they meet vital needs for humanity's progress in the modern era; because without them, we'll regress into an even more turbulent world where chaos, volatility and violence are seen as inevitable norms.

This, humanity will *not* allow.

One of humanity's proudest moments was the creation of the International Criminal Court against all odds.

We owe it to ourselves, our children and to future generations to nurture the ICC so that it carries on with its crucial work around the world to fight against impunity for atrocity crimes and to foster the Rome Statute system of international criminal justice.

We must do all we can to ensure that security, stability and the *protective embrace of the law* become a reality to be relished *by all, in all corners of the world*.

Our responsibilities remain great, but our resolve *must* endure.

We have come a long way, but we have miles to go still.

And as we travel this path to a more just and enlightened world, I am confident that Africa will continue to play its crucial role to preserve the dignity and sanctity of human rights on the Continent and across the globe. I thank you for your attention. | ORP