NIGERIAN INSTITUTE OF ADVANCED LEGAL STUDIES
LAGOS, NIGERIA

POLICY DIALOGUE ON THE REVIEW OF THE ROME STATUTE OF THE INTERNATIONAL CRIMINAL COURT

COMMUNIQUE

INTRODUCTION

In response to some of the worst atrocities in history notably, fall outs of the Second World War, the United Nations created a permanent International Criminal Court (ICC) on July 1998 with the adoption of the Rome Statute which came into force on 1st July 2002.

The International Criminal Court (ICC) was set up to fulfill two objectives:

- Safeguard higher values such as the protection of human rights; an obligation that transcends state borders;
- Accountability for those responsible for the commission of these crimes, so as to put an end to the impunity that is associated with these violations.

The ICC has been in existence for eight years (2002 2010) and has during the period contributed immensely to global initiatives against impunity by holding accountable, persons responsible for the most serious crimes of International concern. The regime of the ICC is however complementary to national criminal jurisdiction.

The Rome Statute provides for its review in two instances under Article 123:

- After seven(7) years of its entry into force, and
- Upon request by a State party

In line with the above review process, the Kampala Review Conference is scheduled to hold on 31st May to 11th June, 2010; being the first review to be undertaken since the Statute came into force in 2002.

The responsibility for a successful review conference lies on the Secretary General of the United Nations who has the duty to convene review conferences. In line with this mandate, the UN Secretary General has been making concerted efforts to ensure this. Preparations have been ongoing, culminating in a number of meetings of state parties. Based on these meetings, a number of issues were agreed for stock taking namely: complementarity, (three ideas are here represented a division of labour between the ICC and domestic jurisdictions ; duties of states, including the understanding that complementarity should not be a short cut for impunity; and the power of the ICC to assess the requirements under the Statute); co-operation, (for example national provisions for universal jurisdiction); the impact of the Rome Statute on victims and affected communities; and Peace and Justice.

State Parties to the Rome Statute have also been holding preparatory meetings towards the Review Conference. The Ministerial Meeting of African State Parties took place under the auspices of the AU from 8TH -10TH June, 2009; while the meeting of State Parties took place in The Hague, on 18th of November, 2009.

In line with its mandate as the leading hub for research and policy formulation on law and related issues, the Nigerian Institute of Advanced Legal Studies convened this Dialogue to discuss issues arising, and make inputs towards the review and possible amendment of the Rome Statute. The input will be transmitted to the Kampala Review Conference which is scheduled to hold from the 31st May to 11th June 2010.

The Dialogue held at the Institute's Ayo Ajomo's Auditorium on 14th April 2010.

OBSERVATIONS

1. Complementarity is based on respect for the primary jurisdiction of states and is designed to promote the ability of national jurisdictions to stamp out the culture of impunity. Complementarity encourages states to adopt legal mechanisms to prosecute international crimes domestically. However Complementarity in practice, especially by the ICC in the last four years, has presented numerous challenges both to the ICC and the states parties in relation to effective functioning to combat impunity.
2. National laws impede prosecution of perpetrators of crimes against humanity through incorporation of immunity clauses in National Constitutions.
3. Though most states always have legislation in place to try components of the crimes under the ICC jurisdiction; these are not sufficient and their judiciaries are not differentiated to conclusively prosecute some of the very grievous and complex cases.
4. Individual justice needs of victims can hardly be assuaged by reference solely to national / community interests of peace building.
5. The limited amount of ICC resources, and unwillingness of some governments to act, leads to situations where perpetrators of the most serious crimes under International Law go unpunished without national provisions for universal jurisdiction.
6. The failure or seeming inability to give effect to indictments and enforcement warrants undermines confidence in the integrity or effectiveness if the ICC.
7. African States have evinced the tendency to understate the gravity and genocide proportions of conflicts in Africa. Thus the reference to the goings on in Darfur where over 50,000 people have been killed as a “humanitarian crisis” portrays a culture of impunity.
8. The obligations to prevent, suppress and punish the crime of genocide are both customary and preemptory norms of international law, hence the failure of states to ratify the Genocide Convention does not shield them from obligations to prevent, suppress and punish crime of genocide.
9. There are perceptions that the indictments of African perpetrators by the ICC are skewed and too focused on prosecuting crimes committed on the continent of Africa while paying scant regards to similar situations elsewhere in the world.
10. The ICC prosecutor has power to investigate or prosecute cases referred by national governments or by the Security Council. However cases referred to the ICC by African leaders have so far been disproportionately focused on rebel leaders, a fact that has led to the referrals being seen as political tools in the hands of leaders who wished to remove their opponents.
11. The warrant against the Sudanese President in respect of his role in the Darfur crisis has provided extensive debate regarding whether the peace before justice approach is preferred; and conclusions that the peace before justice argument serves to perpetrate impunity. The issue of the warrant was opposed by the AU leaders who argued that the search for justice should be pursued in a way that does not impede or jeopardize efforts aimed at procuring lasting peace and regarded the warrant as impeding the peace process.
12. The granting of powers to the Security Council to refer cases to the ICC, or to block them, provides escape routes for those accused of serious crimes but with clout in the UN body especially where Council members were not all signatories to the treaty. For instance, three of the Security Council's veto wielding permanent members China, Russia and the US, have not ratified the Rome Statute. Thus it is believed that they would never allow the Security Council to refer any cases related to their nationals.
13. The ability of the veto- wielding powers to protect their nationals from prosecution has lent credence to the claim that the ICC system engages in selective justice or that it is biased or discriminatory against the weak in the International system.
14. While the ICC was intended to be a court of last resort to be used only after national systems proved unwilling or unable to

prosecute gross violations this has not worked well in Africa. This contrasts with countries like Argentina and Chile that have successfully prosecuted leaders accused of similar crimes. More so, donor countries have invested more in building ad hoc tribunals and international courts, rather than giving much support to Africa's judicial system. Thus there is more reliance on international tribunals to fill the gap.

RECOMMENDATIONS

1. States should review the definitions of crimes in Articles 6 -8 of the Rome Statute in order to ensure that prohibitions under national laws encompasses all relevant conduct and provide a range of penalties compatible with the Statute.
2. States should ensure national legal systems investigate and prosecute the crimes within the jurisdiction of the court in a way compatible with the statute by incorporating or reproducing the relevant definitions, defenses and general principles from the statute itself, with appropriate penalties directly into national legislations.
3. ICC has no power to enforce directions and has to enforce through national institutions. This can only be effective where the Statute is domesticated in most jurisdictions. National regimes should put in place implementation mechanisms that incorporate aspects of the ICC provisions and certain procedural aspects like extradition and execution of court orders.
4. Domestication should be at all tiers of government that is Federal, State and Local governments.
5. African states should strive to implement the Rome Statute in their domestic legislation, which is the first step toward retaining domestic jurisdiction. Strengthening of domestic prosecutions should be the ultimate goal of every state.
6. States should resolve the question of competent jurisdiction over war crimes. That is civil rather than military jurisdiction.
7. States should institute credible protections for the fundamental human rights of defendants (fair hearing)
8. State parties should advocate and perhaps insist on the need to ensure the involvement of the Attorney General of the State party concerned whenever there is referral against citizens of the state party who are to stand trial for any indictment under the statute. This will serve as additional safeguard against feared manipulation of the process of the court to achieve some clandestine motives to the detriment of not only the affected individual, but equally important, the state party in general.
9. The functions of the “pre- trial chambers” of the ICC should encompass the processes of investigation, framing and confirmation of charges.
10. The genocide dimension of the Darfur crisis should be put in perspective and not be treated as mere humanitarian crises. Thus the perspective held by a section of the leadership of the AU trivializing the killings in Darfur by reference to the number killed (“a mere” 50,000 as against the almost one million in Rwanda) is condemnable.
11. National law should allow charge and trial of any person on whom the statute would impose criminal responsibility (see especially Art. 25(3)). Some of these forms of responsibility (e.g. Art. 25(d) and (e)) reflect the specific character of the crimes within the jurisdiction of the court, and may not be accounted for in national law in the same way.
12. State parties wishing to ensure that cases involving their own officials be tried before national courts rather than before ICC should ensure that immunities or special procedure rules under national law do not inhibit the imposition of criminal responsibility with respect to any person acting in an official capacity (art.27). Special procedures and modalities of doing justice where heads of states or other officials are involved are not in themselves objectionable
13. National law should explicitly provide that statutes of limitation do not apply to crimes within the jurisdiction of the court from any available statute of limitation, in accordance with Art. 29.
14. As for grounds for excluding criminal responsibility, the particular formulations related to “mental disease or defect”, intoxication, reasonable defense of self, other or of certain property and duress (all in Art. 31) should be compared to terms of national law. The same is true of Art 32(mistake of fact or of law) as of Art. 33 (superior orders and prescription of law). In this area, the court is likely to afford a certain margin of accommodation to national variations.
15. African countries require a great deal of technical assistance from the ICC in order to enhance the skills of prosecutors and investigators
16. ICC should establish more presence and work towards reducing the communication gap. In this regard, it should have an office in the AU to ease the diplomatic challenges that come into play between the AU and the court. Further, the ICC has to scale up interventions especially in States without as much current visibility in order to make ICC institutional/ technical expertise more widespread.
17. Though the possibility of striking a balance between justice and peace is daunting, there is need to do justice to affected communities and victims of crimes against humanity in order to build confidence towards achieving lasting peace.
18. Crimes against humanity should attract immediate punishment proportionate to the gravity of such crimes to serve as effective deterrent and do justice to victims and affected communities.
19. States must constitute an international bulwark against evils of human conflict. This resolve must not be amenable to pseudo-nationalism and ideologies.