

The Relationship between the International Criminal Court and Africa
TH Barry lecture theatre, Iziko S A Museum, Gardens, Cape Town
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Chair: Dr Jeremy Sarkin

Rapporteur of the UN Working Group on Enforced or Involuntary Disappearances

Speakers:

Dr Comfort Ero

Director of the South African Office of the International Center for Transitional Justice

Mr Thabo Thage

Director, Department of International Relations and Cooperation

Dr Jeremy Sarkin: I've been asked to chair this evening on behalf of the Institute of Justice and Reconciliation and the Wolpe Trust. It's very nice to see everybody here tonight. This is really an important issue and we're pleased that so many people have taken an interest in this particular matter. And I think it befits us to thank both the Wolpe Trust and IJR for putting this together, and hopefully they'll put on other types of events like this, which they've been doing in the past and I'm sure they will continue to do so in the future.

Certainly the relationship between the ICC in Africa is an important issue. And this really has been sparked by many particular issues over the last year or two, but none as much as the indictment and the arrest warrant issued for the president of Sudan, President al-Bashir. And it's specifically the issue related to that which really brings our attention, when July 2009 a meeting of the African heads of state of Assembly of the African Union decided to withhold cooperation from the International Criminal Court because of the arrest the demand of the surrender of President Omar al-Bashir of the Sudan. And that really has brought out many particular issues about the way forward. And certainly South Africa was on the hook as far as that issue is concerned, because during that meeting both the president and our minister of foreign affairs were present, and supposedly, and I'm sure the director will correct us or change the issue specifically, did not disagree it seems with that particular position. There was quite a lot of flurry thereafter, and then finally the

president came out with a statement that South Africa would follow up with its obligations in terms of the ratification of the Roman Statute that should President al-Bashir arrive in South Africa and there was a question for extradition then in fact he might be handed over. So South Africa was clear that it would live up to its international obligations. But that certainly came about as a result of a lot of pressure and civil society played a major role in that particular issue.

It certainly befits us therefore tonight to talk about those particular issues. And certainly what I thought of doing before asking our two eminent speakers to address us on these particular issues is to just contextualise some of the pertinent matters which are important for these particular issues. And certainly when we discuss the role of the International Criminal Court, we need to see it as the end of a long process to try and ensure that there is accountability at the international level for international crimes. And there's been a long process to try and achieve it.

Certainly we could say that when we think about genocide and crimes against humanity – we think about Nuremburg and the Tokyo trials in the far-east. But from Nuremburg and Tokyo, which many people criticise as being post-reactive justice, as justice which did not tell the perpetrators beforehand that they might be prosecuted – from then, from the 1940s until 1993 there was no international justice and people have blamed the Cold War that disturbed the world before the fall of the Berlin Wall and obviously the 20th anniversary, the last few days has been important as a milestone. But certainly the contextualisation of it took a Yugoslavia to happen before international justice came to the fore; and probably had there not been a Yugoslavia we would not have had a tribunal for Rwanda. And those two particular tribunals are an important landmark in the process of what's been called the justice cascade, that since 1993 we've seen the arrival of the international ad-hoc tribunals. We've seen that what's known as the hybrid bodies – those of which are both international and domestic, examples being East-Timor and Cambodia and Sierra Leone, Kosovo – countries like that where you've had both an international and a domestic tribunal that's been established, sometimes at the same time with a Truth Commission. But certainly when we think about having accountability, these issues are critically important when we remember that more than 170 million people died in the 20th century alone because of things called crimes against humanity and genocide – and I repeat that number 170 million people. We can blame colonialism to some extent but many issues

happened in the post-colonial era as well. So certainly moving forward and having a sense of accountability has been important as far as that's concerned.

So there was a move even from Nuremburg towards establishing an international accountability system. The Law Commission began to look at those particular issues going forward; but it's only in the '90s that really it began to move forward, and finally the Rome Conference was held in 1998 where many countries around the world came together and finally decided to agree on setting up an International Criminal Court. At that time 120 countries agreed to the process; 7 countries disagreed and 21 countries abstained. And we've seen a pretty consistent attitude towards the ICC. Today about 110 countries have ratified the treaty and about 139 have signed the treaty. One country that's been in the middle to some extent has been the United States, which together with China and Russia and India have been the vocal opponents of the process. We've seen however that the United States signed under Bill Clinton, and George Bush, one of the first things he did was to withdraw the signature from the International Criminal Court. And the US today is looking at the way forward as far as that's concerned – what they're going to do about International Criminal Court.

So we've seen the idea of an International Criminal Court being a major and bold step forward in terms of insuring accountability and deterrence for international crimes. But the question about how does Africa fit in – and the major criticism over the last year or two or even three, is that the sole focus of the ICC is Africa. All the arrest warrants that have been issued so far in relation to the Central African Republic, in relation to the Democratic Republic of the Congo, to Uganda, and finally Sudan, which is probably the microcosm of the issues, have all been African focused. And the criticism is – why Africa? Why should it be an institutional focus on Africa? Certainly the prosecutor of the ICC has said – well, we've had many investigations on a range of other countries but we haven't been able to find the evidence which indicates that matters of the three crimes that criminal court can presently do, which are genocide, crimes against humanity and war crimes, were present and we can prosecute and secure convictions. And therefore it has been the countries now where the issues relating to genocide, crimes against humanity and war crimes have been specifically exemplified.

But it's particular in relation to President al-Bashir from Sudan where the issues have really come to the fore where the African Union, as I said at the beginning, put its own line in the said we will not cooperate, we will not allow this particular situation to exist. Some people said it's not only about President Bashir but there are many other matters. But certainly the fact that the matters of Darfur are seen to be matters where peace versus justice are a critical issue. Will such an incitement and such a trial should happen really undermine the peace process? What about the comprehensive peace agreement between the north and the south in Sudan? What will happen when the referendum happens in 2011; will the country break up and have another civil war? What about the question that President al-Bashir is the sitting head of state and international law says that a sitting head of state has immunity from prosecution, even though the ICC Statute makes it clear that there's no immunity for criminal prosecution before the statute itself. Certainly another major issue is what crimes have been alleged to be perpetrated by al-Bashir The one issue is genocide, and certainly the decision to go forward in terms of arrest warrant was problematic because you saw a split decision. One just said that genocide was not present and therefore those issues may not go forward – so certainly that was problematic. The fact that Sudan has not been party to the Roman Statute; Sudan has not agreed that the ICC can deal with its issues, the mechanism ensures that the Security Council can move forward and ask the ICC to investigate and in fact indict a particular person, and that happened even though the United States could have vetoed, but they decided to abstain. So certainly some people have read that as a process which ensures that the United States is being selective – and that's one of the issues in terms of those particular issues.

So what I've tried to do is give a contextualisation of some of the particular problems and some of the issues. And then we're going to rely on our two guest speakers to talk about these particular issues the first being Mr Thabo Thage, the director of the Department of International Relations and Cooperation of the South African government, and Dr Comfort Ero, who is the Director of the South African Office of the International Center for Transitional Justice. It's really very good to have both of them here today. I think we agreed that Comfort was going to speak first. And just by a way of introduction of Comfort, she before joining the ICTJ was policy advisor to the special representative of Secretary-General of the United Nations in Liberia. She was also a political affairs officer for the United Nations mission in Liberia. Before that she was the Public Director at the West African office of the International Crisis Group in London, and conducted research at the

Kings College University of London. She holds a PhD in International Relations from the School of Economics. It's really wonderful to have Comfort and we look forward to her particular comments. And then after 20 minutes I will introduce Director Thage. Thank you very much indeed. [applause]

Dr Comfort Ero: Thanks, I would just say we should open the debate because you've covered everything with what you said! I'd like to thank the Harold Wolpe Institute and the Institute for Justice and Reconciliation for asking me to speak at this open dialogue on such a timely subject, coming soon after the meeting of African ministers at the Africa Union earlier this month ...[TO BE ADDED]

Dr Jeremy Sarkin: Ladies and Gentlemen, I think Dr Ero's given us much food for thought, I think a great wisdom, particular on questions of recommendations on trying to move these issues forward, and I think has really given us much to work on in terms of question time. I'm sure that the next speaker is going to follow up with that just as illuminating and interesting perspectives on these particular matters. And it probably makes sense for him to do so with his particular background. He has a BA Honours from the University of the Western Cape in Developmental Studies. He's a Master's in Arts in International Relations from Coventry University in the United Kingdom. He joined the premier's office in Gauteng for two years as director. He was then drafted into the Foreign Affairs Department as a director in 2000. He served in the United Arab Emirates, in Brussels, overseeing the EU relationship with South Africa. And finally now he's the individual and director responsible for South Africa's work with the African Union. So certainly he's well placed to respond, I think, to Dr Ero's comments about the African Union and its way forward in terms of dealing with the ICC. Dr Thabo Thage.

Dr Thabo Thage: Good evening Ladies and Gentlemen. Indeed after such a detailed articulation of the situation in relation to the matter of the ICC, I have my work cut out. Actually, I was about to say I will say 'Amen' to everything. But thank you indeed for allowing me this opportunity to just share a few thoughts with you; and in particular as it relates to the sequence of events that led not to the July decision but to the February decision, which is where I will start. Actually, not even the February decision but July 2008 decision of the Peace and Security Council. I will not repeat most of the things that have already been said in detail, which I must say upfront that the majority of them are quite

factual. Insofar as the perception around the ICC, the role of the ICC in Africa, the role of the ICC internationally, and so on; the unprecedented indictment of a sitting head of state, and the perception that it created – I'll perhaps touch on that – and how it informed the heads of states decision of February 2009. But perhaps let's go back to July 2008. The matter was really not topical then. You will recall that when Moreno Ocampo decided to raise the flag on the possible indictment of senior people in the government of the Sudan, by then it was not yet known more or less who was he targeting. But when the flag was raised it really created some serious anxiety, such that ultimately when he made his decision to indict President al-Bashir, the Peace and Security Council met around the 21st of July 2008 to really discuss the broader implications of this indictment. It clearly stated that this would created major, major problems in the continent. But the primary concern clearly was that by first half of 2010 Sudan is expected to go through elections. Now clearly the timing of the indictment is of serious concern because basically the party, that the sitting head of state leads is the majority party in the Sudan. Now you indict him – what that results in is major upheaval in the Sudan, not only in Darfur but broadly in the Sudan. But clearly as the point was raised, the question is you have raised the bar; you are indicting a sitting head of state. So the implications are that it's a trend setting, and it is within that context – because I'm just trying to outline to you the factual outline of what transpired during the Peace and Security Council. So the decision was then reached to say: let us request the UN Security Council, which in the first instance referred the matter to the ICC prosecutor to defer this indictment at least for another year, not cancel but defer, which is within the right of the UN Security Council to do that. And as it defers this, allow the African Union to then look into the deeper details of the issues of peace, impunity, justice and reconciliation – so that you look at the entirety of the situation not only in Darfur but in the whole of the Sudan, and how that situation, if stabilised, will create better stability within the sub-region as a whole. Some of you may be aware that the Sudan borders over nine countries. Now whatever happens in the Sudan has far reaching implications in that region. And as others would say it's part of the belly of the African continent. So it is within that context that the Peace and Security Council requested a deferment, and that as the UN Security Council defers the AU should then put together a panel to investigate in detail the situation in Darfur. And that decision was then referred to the AU summit of January/February 2009, which summit essentially endorsed almost in its entirety the request by the Peace and Security Council.

Now the essence of the decision of February which is perhaps what I'll talk to in the main and compare it to the decision of July – was basically to say, please defer this; allow us to put together a high level panel that: 1) Will sit and engage the US Security Council together with the ICC prosecutor and discuss this matter in detail. 2) Investigate the situation in the Sudan together with Darfur, and then put together a report that will not only be an AU report but an international report that will also have the UN Security Council privy to it. So that is essentially the essence of that decision. But now fast-track to June, July – because it has said 'meet with this high-level panel', that is the UN Security Council, and hear them out. And this panel will then report to the July summit on the discussions with the UN Security Council together with the ICC prosecutor. But none of this happened. So come to the controversial July decision – and the unfortunate tragedy of that decision is that it's only a phrase out of an entire two-page decision, which at least I have a copy here with me, if you read that decision it's almost the same as the February decision. Almost. The only difference is that phrase that says "shall not cooperate until such time that there is further engagement", but further underscores the importance of cooperation between the African Union and the United Nations Security Council. But that is within the context of the AU decision.

Now what are the implications on South Africa? The implications on South Africa clearly, and as this has been said many a time, and which I am happy was alluded to earlier, is that South Africa is one of the founding members of the ICC. And South Africa has domesticated these international statutes that governed the ICC. So it has domesticated it; it has no option but to be an active member of the ICC, which it has been for a while now. Well, I will not delve into other issues but the reality is that this clearly did not in any way pose a crisis for the South African government; at no stage did it do that because already the country had domesticated the international statutes that govern the ICC. So the long and short of it is that as much as South Africa together with the rest of the 52 members of the AU, and the decision was obviously by consensus more or less, South Africa made it a point that we underscore the importance of thorough investigation insofar as the situation in Darfur is concerned. Perhaps let me just step back and unpack ultimately what led to a compromised decision. You had two schools of thought, fundamentally divided. One said we will not at all cooperate with this ICC, because of the reasons that we cited earlier; because of the bias of the ICC, there's no need, there's no reason for us to cooperate with the ICC. But then there was this other school of thought primarily from the members or the

state parties to the ICC to say we have obligations and commitments toward the ICC – but also there is the reality of the ongoing deepening crisis in Darfur. For us to say we will not cooperate with the ICC will by implication be perceived to be condoning what is happening in Darfur, because that's basically the message that would be conveyed. Because if you say you don't cooperate then what do you do or say about the situation that is clear what is happening in Darfur that is there for the international community to see. Of course, it's not only Darfur but it's quite a lot of countries wherein you have issues of impunity, human rights abuses, even possible genocide.

Now the long and short is that ultimately after a long debate, very long debate, the view then was that you clearly have to communicate a message that gives confidence in the continued survival of the African Union as a continental structure; a structure that helps to give confidence to the work about its commitment to issues of democracy, human rights abuses, and so on. But most importantly is the reality of impunity that continues to happen in Darfur. And out of that debate then you had this decision that said investigate impunity, human rights abuses, reconciliation and nation building. Out of that decision you are looking at the four key elements that have continued to be a major challenge. Those that have studied the history of Sudan will understand the continued problems in Darfur, north and south, relations. Others will talk of the challenges of the relationship between the Arabs and Africans in Sudan; that has continued to be a problem. Now this decision said there has to be a thorough going investigation but which investigation must also enjoy the support and cooperation of the United National Security Council and the broader United Nations family.

And it is out of that you had the AU panel led by former President Mbeki being put together to investigate. Now that panel presented its report last week Thursday in Abuja, Nigeria – which report was endorsed in its entirety by the summit of the Peace and Security Council. Now what is clearly going to happen is that the summit of the Peace and Security Council constitutes of 15 member countries. Out of that it then makes its own recommendations to the AU summit in February 2010. For us perhaps, not only me, I think that's the question that most of us would have, is that clearly and perhaps before I even go further, to explain that one of the mandates of, not in the mandate of this panel was the issue of the ICC, was to investigate the issues I've just sketched up in justice, reconciliation, impunity, and so on. The instruction was not to deal with the ICC at all; so perhaps that is why maybe there

may be concern that the ICC is not dealt with in detail, because that was never part of the mandate. Maybe we can discuss that during question time but it was not part of the mandate of this panel.

So what is going to happen now, as I have I said, is to present the report to the summit. Now the critical challenge, and I'm happy also that it was touched, that obviously the government in Sudan is worried about the recommendations of the panel, because its recommendations that have already been endorsed – its recommendations that will make it impossible to opt out of this current process that all of us have tied ourselves into – to look into the matters of injustice, impunity and the rest. So I will invite everyone, perhaps if you have a chance, to look thoroughly into the report itself. But the challenge that the AU faces, in my opinion, is that now clearly you've got this report which we have requested the Security Council to cooperate in its putting together. You have requested the Security Council to say – give us time to put together this report; investigate the issues of justice, and so on, and then come together – because when the report was presented in Abuja, the P5 members were there. That's the P5 members we've discussed, France, US, Russia, China, and so on – they were all invited to that presentation of the report. Now going forward it has implications; clearly there is no opting out but to remain engaged in this process. So clearly it poses for us greater challenges in terms of executing or actualising the report, especially its recommendations. So from where I sit and where the report hopefully will have a chance to engage come February or March, on the implications, I hope I won't be able to opt out because sometimes you never know what really pans out. But the reality is, clearly there is a challenge now. Africa had said: Give us a chance to investigate. You have investigated; the report is now presented; when we have not heard what the international community's response, especially the P5 response is insofar as this report is concerned.

The other issue perhaps that I needed to clarify; last year I almost overlooked it, is that the decision of heads of state is not signed decisions. So the AU chair, and in this case is leader Gadaffi, did not request anyone to sign them off. So these decisions are not signed off, they are only signed off by the legal head of the African Union just to make sure that they are factually reflective of the discussions and decisions reached. So I was just trying to explain that against the context of the fact that we have domesticated these international statutes – so that is where we have got obligations. But also we are a

member of the African Union. And being in a multilateral structure you look at issues within their broader context and ensure that sanity prevails. And I think in this instance the South African government did all it could; and at least it has done all it could and it will continue to do all it can to ensure that the challenges relating to justice and impunity are addressed and addressed vigorously, not only in the Sudan but globally speaking. I will like to thank you. [applause]

Dr Jeremy Sarkin: Wonderful, thank you very much, Mr Thage for that; really I think you've given a very deep understanding of the AU processes and how South Africa interacts with that, and I think it really provides a useful counterbalance to the points that Dr Ero was making – so thank you very much for those points that you've raised. Certainly now we have an opportunity to engage with those particular issues. We've got an over-qualified person with a microphone to allow you to come and talk and to raise any questions or comments. So I invite you to put your comments to either of the speakers, even the chairperson will be willing to engage as well.

Question: The first [inaudible] ask the person rhetorically as to whether African leaders speaking for themselves or for the people they're supposed to represent. I think that African leaders speak for themselves. I don't hear African leaders appearing to be concerned about the plight of the victims in Africa – in Zimbabwe maybe to ten years [inaudible]. The OAU before the AU, and the African Union have not convinced me as an African man that they are concerned about the plight of people, of all sorts of categories of victims in Africa – they're only concerned about themselves, about protecting individual African leaders and it's all about that. And many of the African leaders in Africa are not properly elected. It's almost impossible to sanction South African leaders on the continent because they're not elected properly, they do not be sanctioned by the electorate, there is no such thing as electorate. .So it's very unfortunate to hear -. And I think what the AU has been doing, especially in the case of Darfur – it's Zimbabwe, it's [inaudible] Zimbabwe because I think that Mugabe is the next one that should be going to the ICC. Africa is concerned about this perception that the ICC and the international community is looking at it almost as in a way looking down at it. But they're not making sufficient noise about what to do about the many men, women, children who get raped and murdered; who get thrown out their homes by African leaders.

Dr Jeremy Sarkin: I think that's a very useful question to start with – let's bring it into the ICC perspective. Certainly the one point that Comfort raised in her presentation was the idea that the three countries that we discussed first before we got to Sudan were asked of the ICC to investigate, to indict and to issue arrest warrants: Central Africa Republic, the DRC and Uganda. But we need to remember it's against opposition forces, it wasn't against the government of the country itself. But Sudan, is where the issue that comes to the fore where it's the government of the day that is the issue before the ICC. So I'm going to ask for both your comments on that particular point. How do we kind of deal with these issues in the context of problems of democracy, problems of human rights abuse across the continent and how do we relate those issues together?

Dr Comfort Ero: I can't disagree with you as you are endorsing what I am saying. And I didn't mention Zimbabwe but there are people here who can talk on Zimbabwe. And I agree with you but I wouldn't go as far as to make the next step because that wasn't the issue of the day. I wanted to go back and answer the question that you raised in a round about way, to pick up a couple of points that you raised, and to say that there are two facts that were not put on the table in your presentation. One is that in 2004 the African Union had a chance to deal with the very issues that have been raised by the ICC. And also soon after the decision was taken in 2005 to refer to the ICC – the AU also had another opportunity. And on those two occasions it was undermined by Sudan. So I think those are two facts that are often left off the table. There was a fact finding mission led by the AU Commission which highlighted every single crime with the International Commission of Inquiry, labeled – eventually that's the ICC. Again, a year after the ICC invited all these issues, the AU appealed to Sudan to have what now today became the Mbeki panel. And those recommendations made by the Mbeki panel were made back in 2006. So I think that answers your question about how we don't deal; how our leaders always manage to avoid the impunity question.

Dr Thabo Thage: I couldn't agree more with what you just said now. But also to say the concept of democracy or the deepening of democracy in Africa is fairly new. When we discuss these issues at the level of the summit, let me sketch it out for you. It's always a major challenge; and I am speaking here as a diplomat [chuckles from the floor]. Yes, because I still want to retain my job. [laughter from the floor].

Comment: That's the problem in Africa.

Dr Thabo Thage: When I spoke to Dr Louw yesterday to say do you have Chatham House Rules, and I couldn't be guaranteed that, so -. Okay, let's discuss but will discuss it fairly open. The reality is there's still a great amount of reluctance, that's a fact. And when some of these decisions are taken, you don't only look at Bashir, you look beyond Bashir – that's a fact. That's the truth. Now, the challenge is then that you'll have this major debate that takes almost the whole day on just one issue. And that is the nature of a democracy that is deepening in Africa, in my view. But I wouldn't go so far as saying there is no such a thing as an electorate in Africa; I think that is absolutely untrue. We have had so many observer mission, not only the AU or Pan African Parliament or SADC, international observer missions that have come to Africa to observe elections. And the reality is that in most of the African countries clearly democracy is on course. So I will say there are many challenges, yes, but you can see that there is this upward trend in terms of a democratic culture. But it is something that continues to have its own challenges, absolutely it is. And I would be lying to you if I said it's a rosy picture everywhere; I'll be lying to you. But the reality is that there are those semblances of democratic culture that continues to deepen in the African continent. There are electorates that go to vote; the results are results that are verified by credible international institutions to be a fair reflection of the majority of the people, wherever that may have happened.

Dr Jeremy Sarkin: Thank you. Now we've got lots of hands.

Question: I have to start with the previous question that Africa, the rate of rape of women by the various rebel groups is unbearable, as is the other forms of torture and murder. Now this is all going on, plus the starvation while we hear about the AU and its talks, and then the Security Council and its seemingly disregard for the AU. We're in a situation in which many of the countries are led by people who want to retain power – and let's forget whether it's democratic or not. But there is a power struggle going on in Africa, and the people there are not concerned with what's going on at the ground level. But I found the point that you made at the beginning where you said the civil society simply does not agree with the AU leaders – so for me in sociological terms it's a power struggle between leaders, civil society and the United Nations sitting on the outside passing judgment. In the meantime, how do we deal with these travesties of justice.

Question: I come from Zimbabwe. It is frustrating really to see the protection, the words which I call the brotherhood in Africa. I have noticed this issue of the head of states in Africa emanating from believing that they are the sole liberators of [inaudible], and they have got a similar connection to that. South Africa inasmuch as I have said ANC, almost made government was dilly-dallying to deal directly with the issues of Zimbabwe because they believe in the same principle of politics. And coming to Bashir – Bashir, all African head of states, they have got that soft push, soft touch to protect their friends. This is bloody nonsense – how can you do investigation through this way someone was brutally killing people, looking at people being killed – and you want to take 20 hours to investigate – this doesn't make sense. Thank you.

Question: Thabo, we can talk about the details of my analysis over a whisky tonight. I'm the director for International Affairs in the Western Cape. Let me just perhaps make two distinctions here. I think it's one thing to define the workings of the AU towards a consensus seeking approach, and I think it's dramatically another matter to look at the impact of that process on the decision that is taken by the AU. And I am saying this in the context of the New Partnership for Africa's Development, Nepad. Because I think Africans have agreed and have qualified the [inaudible] back which forces the African leadership and the AU in particular to hold themselves accountable for decisions emanating from the old political activities. And clearly I think the Sirte conference suggests is that for the time being we can shelve aside Nepad and shelve aside implications of the decisions of the AU and try and overlook Nepad, which is a significant African programme of renewal. And I watched the Sirte conference on webcams and I think that one of the disturbing [inaudible] consequence of that is that the world is saying, well, while the African Union and the Africans in general agree to Nepad to revive the continent, on the other hand we are shelving a strategic programme to deal with matters which have no immediate implications certainly on how Nepad and the seriousness of the African Union is looked at throughout the entire international community.

Dr Jeremy Sarkin: Last question this round before we come to the responses of the panelists.

Question: I'm originally from Belgium; I work for the Legal Resources Centre here in Cape Town. I actually did my thesis on the ICC and the al-Bashir case. I just have two comments before my question. I'd first like to say something about free and democratic elections in Africa. No offence but I think I only have to pull the examples of Zimbabwe and the DRC where international observers trashed the actual elections and said how unfree and undemocratic they were – but Kabila and Mugabe still won the elections and they are still in power. I also can pull the example of Uganda for [inaudible] power after changing the constitution so that he could stay in power for another term. I think Africa has a real issue with free and democratic elections. My second comment is about the African Union – also regarding the fact that they said they would not arrest al-Bashir. Again, no offence, but I think a Union that is run by Gaddafi of all people shouldn't be allowed to comment on the arrest of the [inaudible]. And then my question would be – the Sudan case, the Darfur case has actually been [referred - unclear] by the Security Council – do you think that African states have more obligations to the Security Council over what the AU says?

Dr Jeremy Sarkin: And obviously there's a tension in the sense that not all AU members are a part of the ICC; only 30 of the 52, and obviously that causes a particular difficulty – how do we relate those particular issues? Who wants to go first?

Mr Thabo Thage: The question on the Union, no, a comment, the Union run by Gaddafi. Err, no, I won't comment. [laughter and inaudible comments from the floor]. No, no, no, I would not comment. But by the way his term is coming to an end in January. [inaudible comment and chuckles from the floor].

Now on the democracy issue I think we can have a long debate. While you have made examples of DRC and Zimbabwe, I can make examples of Namibia and Mozambique recently; and then Tanzania – a classical example of democracy in action. So there may be many, many examples, including in this country, relatively speaking, relative to the African continent. Now the question raised around Nepad, clearly there are challenges in relation to Nepad. And I think specifically you were referring to the peer review mechanism because that is in essence where the heads of state are able to be frank to each other, I suppose, and challenge each other on issues of democracy. But not all countries that sit in the peer review are all AU members – or how do I put it? Not all AU members sit in the peer review, so it's a smaller group. As to why it's a smaller group, I leave it to you. But the

reality is that it's a relatively smaller group. And of course, most of us would really look forward to that day when there will be frank and open talk that takes place in the form of the peer review mechanism. But I think also the reality is – if you happen to sit in some of the summit meetings of heads of state, and hear the account of what South Africans will call brutally honest talk, from certain heads of states against others, you will then understand that it's not just a talk-shop. It's not just a talk-shop but the reality is that sometimes the decisions taken are not the kind of decisions that some of us or some of you would be happy with. That is in the nature of multilateral diplomacy. Sometimes decisions because of whatever reason that are taken are not decisions that you would have preferred. But the reality is, as I have said, Nepad clearly faces some challenges, especially arising from the summit of July in Sirte. And we continue to be hopeful in terms of its future. And come January/February 2010 we will all be more or less certain as to how the process proceeds going forward.

Dr Comfort Ero: I come from a region where Gaddafi's history has been more harm than good for west Africa, and so we know our history quite well. And so we are troubled in west Africa when our leaders rally behind Gaddafi and support the AU decision in July. Ten years in west Africa that Gaddafi sanctioned war that started in Sera Leone, spread to Liberia, and spread through Ivory Coast – and when the special court of Sera Leone tells its story it forgets to mention Libya's own role in causing war crimes in the region. So I think most of us in civil society and west Africa are astonished at the short memories of our leaders who tried to reverse Gaddafi's own history in our region. And it's also deeply troubling when we hear that although there are weak and poor states in west Africa, that they accept money from Gaddafi for the sake of protecting Bashir in Sudan. So that's my own response to that concern.

In relation to Nepad, I'm glad you brought that up – because one of the things that's troubled me is that – let's for a second satisfied the ICC and its role in Sudan and we don't even mention the fact that leaders referred three countries to the ICC for the sake of political expediency. Put aside the ICC for a moment – we have structures and institutions within the AU that can deal with some of the crimes that have been committed. When the AU was being created in 2000 it was claimed in the name of some birth of an African renaissance. What happened to that renaissance that Thabo Mbeki himself preached upon here in South Africa? Forget the ICC; Africa itself through the constitutive Act of 2000 went

further than the UN Security Council and the UN responsibility and the right to protect. That AU constitutive Act was far more reaching than the ICC. So let's set aside the ICC and let's hold ourselves to account within our own far reaching own Acts as well.

On the issue of democracy, I find it very deeply troubling, in fact, democracy has become a metaphor for a government of national unity. Here we have a situation in Kenya, in the Ivory Coast, in Zimbabwe and nearly in Sudan that national unity governments become the force de tour on the continent. And we allow this to continue to happen. This is not about democracy; it's deeply troubling that we're allowing this continuation of violence and accepting and becoming heads of state through violence and then calling that acceptable national government of unity, meanwhile if you go back to the issue of suffering victims.

But I want to correct the lady at the top there in that there are cases on this continent where free and fair elections have taken place: Sera Leone managed successfully to hold its own elections; for the first time hold its own elections without the assistance of the United Nations. Liberia too managed to hold free and fair elections. Ghana's President Kufour reversed what could have potentially been a serious situation in Ghana. So there are cases and histories of free and fair elections. And on the issue of whether African states are obliged to the Security Council or to the UN instead of the AU, I also think that this is a wrong assumption. The AU is not subordinate to the Security Council, it is not subordinate to the world body. It is seen as the first port of call in situations of regional conflict or conflicts on the continent, and it's seen as an equal partner in dealing with international security.

Dr Jeremy Sarkin: Thank you very much. [applause]

Question: Thank you very much. I'm Sweden's ambassador to South Africa, so I can claim immunity [refers - sounds like] [chuckles from the floor]. Just a few points and then one question at the end. When it comes to [inaudible] heads of state I think one should also recall that there other [inaudible] heads of state and recently also in Europe with Milosevic and [Milothinovic sounds like], certainly under [inaudible]. So there are examples of [inaudible]. Then also the debate which we are having, I think not only this and also other, I think it's also the trend of an increased accountability – that's the debate which is going on; and perhaps also the debate about ICC could also be good as it provokes this

kind of development. And I don't know to what extent it also provoked the panel. And I think it's also important to remind what you said is that we shall recall that ICC is a call of last resort, and that it takes cases on a [inaudible] able to conduct credible investigations and prosecutions. And then also just to remind the concerns that you stress, there is a continued process with ICC and a renew conference next year which will look at this year's. The question that I have – could you, and the panel rightly has come up with lots of [inaudible] which are rather good; one is of course the proof of the pudding is the implementation. Could you reflect something on the risk when you look at the recommendations of the panel – do you see any problems with implementation of the panel's recommendation when it comes to local justice – how do you address that? Thank you very much.

Dr Jeremy Sarkin: Thank you. Could I just clarify the ambassador's first point – that's the question about international law and head of state immunity. Just to clarify the point - it's only dealing with sitting heads of state. Charles Taylor, Milosevic are ex-heading the states, no longer immunity. So it's particularly the present sitting heads of state where the immunity applies. Your question.

Question: I'm from Sudan, I'm a lawyer. Recently there's three human right defenders. They submit their complaint before the AU about they have been harassed and tortured by the government because they delivered some document to ICC; they have been suspected of this thing – and I just want to know what the African [inaudible] towards the government maybe?

Dr Jeremy Sarkin: So what could the AU or other institutions within the AU do about the arrests and other issues that have been dealt with to those particular journalists – we'll come back to that. Third question, yes.

Question: I'm from Kenya, I work at the Centre for the Study of Violence and Reconciliation. It's a question that I wanted to ask and I am happy that we have diplomats here, and ask for this particular purpose in my point of view is Chatham Rules so they are not bound by the [inaudible] rules. There is [inaudible] I would want to ask one question to the director. One is that South Africa questions its international obligations under the Roman statute and also that you indicated the domestic approach. But also again you are

also bound by international rules especially customary law, international customary law – and as he has indicated in terms of [inaudible], although you can indict him, the process of arresting him and prosecuting him, he enjoys that and he can't be taken at that particular time. Does it mean that he cannot be Indicted – he's indicted, and as the other person here from Sweden and the other man from [inaudible] has just indicated that there are instances where heads of states, but as he's correctly put it, it's an ex-head of state, not a sitting head of state – so in terms of that [inaudible]. If Bashir came to South Africa would you arrest him knowing that you would be flouting international customary law and diplomatic relations.

Question: I'm working [inaudible] in Darfur since four years. So I'm just actually [inaudible] political manipulation on this issue and the [inaudible] over Bashir [inaudible] sitting or standing [chuckles from floor] – but the [inaudible] seems that it's really making someone [inaudible] – because some people maybe [inaudible] Bashir [inaudible] to be in [inaudible] of ICC. And this what [inaudible]. But really what happened as I just remember when I am saying Nobel Prize Menachem Begin and Anwar Sadat, they shared a Nobel Prize – they didn't put an end for the conflict [inaudible] growing peace for Middle-East [inaudible]. President Barack Obama quoted for few good deeds and lots of good cooks and got Nobel Prize. So for Bashir who put an end for 20 years fight in Sudan and [inaudible] benchmarks for census, for election, for even self-determination – this is the point – what he was [rewarded/ordered - unclear] to be [inaudible] Security Council referred him in the same year they signed the comprehensive peace agreement through the ICC. I don't think [inaudible] will have any problem because there is war crimes and both leaders may be ready [inaudible] criminal [inaudible] when these atrocities happened in the south – both [is a - unclear] smart charismatic leader [inaudible] and Bashir would be war criminals [inaudible].

Dr Jeremy Sarkin: Thank you very much.

Question: I'm in my private capacity. I just want to generalise the situation. Someone once said that democracy is what the people deserve. But when you look beyond the polls and it appeared to me that democracy is determined by the candidates and the politicians that we vote for. Now long ago in the history of the world, before the colonial powers colonised most of Africa, great thinkers and philosophers of Britain wrote what the policy

should be. And to me it appears that all we are discussing here, it was engineered by some great philosopher, thinker – the policy is already determined; and the manipulation or the conspiracy or whatever is predictable. And just like those British writers obtained knighthood for determining what kind of policy to use in different countries. I think here we should strive to attain knighthood to get those ideas, to find out who the real people are who pull the strings; the real people are who give the ideas and the real agenda that those [inaudible] have. Maybe we can talk about that. Thanks.

Dr Jeremy Sarkin: Thank you very much for that. I think we've got some interesting to move forward.

Dr Comfort Ero: I think I'll just respond to the question about implementation. I think we're already seeing the challenge already for the AU in terms of implementing the recommendations of the Mbeki panel. As I said in my presentation, President Bashir and the Sudanese government were quite shocked by the far reaching recommendations made in the report. And much of those recommendations were already made earlier in about 2006. The biggest challenge for Bashir of course is that he can't ignore the AU, and his response when he was advised on the eve of the report he said: How can I ignore my brothers, this is their report. But already there are attempts that have been made to enter the report. I can't speak about the possibilities of how local, traditional law can be implemented but there are already attempts by the Sudanese to claim the idea of a hybrid court, the idea of reforms within the legal structure cannot happen for a number of reasons. And there are a number of attempts already by the Sudanese judges to question the constitutionality of some of the recommendations that have been made by the Mbeki Panel. So you can already see the challenge. My only response on the Mbeki panel is that it might afford the Security Council, the AU and other more intellectual bodies including the ICC to come together on a common platform in terms of now agreeing that these are the key pillars for trying to develop peace and security in Darfur.

Mr Thabo Thage: Just to add, especially on the last point – clearly the AU panel report has made great strides in trying to bring together or to ensure convergence or view in actioning the difficult issue of Darfur between the AU and the United Nations Security Council. Now going forward clearly there are going to be challenges, as I have said – amongst others, and I think that's what the report tried to do, to lessen ambiguities so that

you don't spend more time on interpretation. The greatest challenge for me is in ensuring that there is speed in actioning the recommendations. For me that's the greatest challenge. But, secondly, is who takes the centre stage in implementing? Can you entrust it with the government of the Sudan or you need an outside entity? I think for me those are the challenges that going forward must be faced and be faced forthrightly. The reality is – can you request the Ministry of Justice in Sudan with all its challenges around integrity and so on, to be central to the actioning of these recommendations? Well, I don't know. And I'm told when a diplomat says he doesn't know it means more or less he doesn't -. I don't know. But the reality is there are serious challenges in the implementation. But the good thing is that the UN Security Council and other international partners have come onboard or are likely to come onboard. So that partnership will ensure momentum in the actioning of it. It has to.

Will South Africa arrest Bashir if he comes to South Africa?

From the floor: He'll never come to South Africa.

Mr Thabo Thage: I think all of us are aware that the international arrest warrant for President al-Bashir was received by the South African state, amongst other states – it was received by this state and endorsed by one of the magistrates, I don't know which one, but it was endorsed; so it has been domesticated as well. That's as far as I know what happened. And I don't think, personally I've always said wherever I talk on this issue that why really do we always want to focus on this arrest issue?

From the floor: Why not?

Mr Thabo Thage: No, no, no – my question is – you see how international practitioners of diplomacy work. Obviously as I have said we have received the arrest warrant and we have endorsed it, the government has endorsed it, or a magistrate – as I have said, the state has endorsed his arrest warrant. And that says a lot. So the question is – will South Africa arrest him if he lands here? By endorsing it it tells you that once he lands you have to take action. But will he land after you have endorsed it? For me it's a moot point because already he knows you have endorsed it. So if he comes here you have no option

but as a constitutional democracy you have no other option but to heed what you have already endorsed. I think that clearly says a lot – but the reality is will he land here?

From the floor: It depends if [inaudible].

Mr Thabo Thage: There won't if, in my view there won't be if because obviously as a constitutional state you have endorsed that decision, right, or the indictment. If he lands you have no option but to action it. So, I mean, well, he's a head of state, I almost said something else - but really he will be ill advised, he will be ill advised to visit this country even if he was refuelling – because heads of state don't travel commercial, do they? Ja, very few do – so that's why I'm saying it's a moot point for me, especially when it is well known that South Africa has already endorsed the decision.

Dr Jeremy Sarkin: Thank you. We're going to close it unfortunately. The boss over there has instructed me. But generally we've had a very lively discussion; and I certainly think that panels like this are most interesting and most useful for building a tolerance of human rights and democracy, so certainly we hope that the Institute and the Harold Wolpe Memorial Trust will have similar events in the future. Lionel.

Dr Lionel Louw: I just want to say thank you very much to each one of you for being here, and I certainly want to say thank you to our chair and our two speakers. [applause] And I do this on behalf of the Harold Wolpe Memorial Trust and the Institute for Justice and Reconciliation. This has been a partnership and it's been a good partnership. And Fanie du Toit, the director of the Institute is unable to be with us because he's indisposed but we have staff of the Institute here and we certainly want to say thank you that we could come together to have this evening. Thank you to you for being here.