

SIDE EVENT

ASSEMBLY OF STATES PARTIES OF THE INTERNATIONAL CRIMINAL COURT

*Creative responses to international criminal justice –
complementarity and capacity building*



THE HAGUE, NETHERLANDS | 10 DECEMBER 2018

co-hosted by:



Held as part of its yearly presence at the Assembly of States Parties (ASP) of the International Criminal Court (ICC), this year's Wayamo/Africa Group for Justice and Accountability (AGJA) side event focused on identifying creative solutions to intractable problems in the realm of international justice whilst showcasing the ongoing capacity building workshops in Nigeria.

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INTRODUCTION



Held as part of its yearly presence at the **Assembly of States Parties (ASP) of the International Criminal Court (ICC)**, this year's **Wayamo/Africa Group for Justice and Accountability (AGJA)** side event focused on identifying creative solutions to intractable problems in the realm of international justice whilst showcasing the ongoing capacity building workshops in Nigeria. It was opened by Wayamo Foundation Director, **Bettina Ambach**, who welcomed all the participants and thanked **Finland, Germany, Nigeria, Switzerland and The Netherlands** for co-hosting the event. She then handed over to Wayamo's international criminal justice lawyer, **Angela Mudukuti**, who was tasked with moderating the discussion.

Mudukuti introduced the topic for discussion by stating that devising creative solutions to the challenges facing international criminal justice is essential for the survival of accountability for crimes which shock the conscience of humanity; and herein lay the reason for convening the event.

She then presented the evening's keynote speaker, **Justice Richard Goldstone**, who explained the work of AGJA and highlighted some of the challenges facing international criminal justice and the rule of law.

KEYNOTE SPEECH



RICHARD GOLDSTONE

AGJA member and former prosecutor of the International Criminal Tribunals for the former Yugoslavia (ICTY) and Rwanda (ICTR)

Goldstone recalled that AGJA had been launched at the initiative of the Wayamo Foundation in November 2016 at the ASP. The Group is currently chaired by **Hassan Bubacar Jallow**, former Chief Prosecutor of the ICTR and current Chief Justice of The Gambia, and is

made up of 13 members who come from 11 different African countries and are experts in their respective fields. AGJA's designated mission is to support efforts to strengthen justice and accountability for grave crimes in Africa at the domestic, regional and international level.

Not only does AGJA pride itself on its capacity building efforts in a variety of countries, including Nigeria, but it has also offered its services to governments and civil society groups across the continent. For example, in 2017 AGJA sent a delegation to The Gambia to support the nation's transition from autocratic rule to democracy. Similarly, AGJA is engaged in helping to combat international and transnational organised crime in East Africa, a region-wide project which includes capacity building for prosecutors, investigators and judicial officers from Kenya, Rwanda, Tanzania and Uganda.

AGJA, said **Goldstone**, is committed to the ICC but also recognises its problems and shortcomings. His sentiment was that, while *"these problems should be faced head-on"* and remedies sought, they are no justification for withdrawing from or refusing to join the Rome Statute system.

He went on to remind the audience that the rule of law was under attack. Citing John Bolton's utterances,

he was quick to point out that such attacks on the ICC are not new, as similar posturing had been witnessed during George W. Bush's tenure in office. However, the USA is not a monolithic country and there are many US entities and organisations which are positive contributors to international criminal justice.

In **Goldstone's** view, African states must aspire to fill gap being created by the Trump administration. It was time to recognise that states which have threatened to withdraw or have in fact withdrawn are doing so to protect their leaders from justice, with Yahya Jammeh, Rodrigo Duterte and Pierre Nkurunziza all constituting classic examples of this phenomenon.

In conclusion, **Goldstone** did not discount that there were serious challenges facing the ICC, such as the questions surrounding head of state immunity, an issue he hoped would be further clarified by the forthcoming judgment from the ICC Appeals Chamber.



PANEL DISCUSSION



MODERATOR
ANGELA MUDUKUTI

International Criminal Justice Lawyer, Wayamo Foundation



DAPO AKANDE

AGJA member and Professor of Public International law at the University of Oxford



NETSANET BELAY

Africa Director, Research and Advocacy, Amnesty International



CLAUS MOLITOR

Situation Analyst, Office of the Prosecutor, ICC



MUHAMMED UMAR

Director of Public Prosecutions for the Federation, Federal Ministry of Justice, Abuja



MAJOR GENERAL SHALANGWA

Director Legal Services Nigerian Army, Abuja



OLAWALE FAPOHUNDA

Attorney General of Ekiti State and Chair, Nigerian Military Human Rights Dialogue



ANGELA MUDUKUTI

International Criminal Justice Lawyer, Wayamo Foundation

Picking up from where Justice **Goldstone** had left off, **Mudukuti** addressed the situation in Nigeria. Since the start of the Boko Haram insurgency some nine years previously, over 20,000 people had died and an additional two million had been displaced. The situation remains complicated and the people of Nigeria continue to suffer, thus making accountability essential. Given that Nigeria is under preliminary examination by the ICC, complementarity lies at the heart of the matter.

Complementarity **Mudukuti** insisted, is the cornerstone of international criminal justice and is central to the whole thrust of the Wayamo Foundation, which considers that it is essential for domestic jurisdictions to have adequate tools at their disposal to try core international crimes domestically.

To this end, the last 18 months had witnessed a joint capacity building effort by Wayamo, AGJA and the Nuremberg Academy, aimed at further equipping local prosecutors and investigators to tackle the most serious and complex crimes -international, transnational and terrorism-related- under Nigerian criminal law, including crimes that may potentially fall under the jurisdiction of the ICC. The project entailed holding six workshops in Abuja and Lagos, and collaborating with institutions represented on the panel.

Following this brief introduction, **Mudukuti** proceeded to introduce her panellists, who, she explained, would be discussing accountability efforts from various perspectives.



DAPO AKANDE

AGJA member and Professor of Public International law at the University of Oxford

Akande took the floor and set the scene in terms of ongoing capacity building efforts in Nigeria. Workshops have been and are being held to help strengthen the hand of civil and military prosecutors in Nigeria, as they seek accountability for crimes committed in the context of the Boko Haram insurgency. This includes developing their expertise in international criminal law and developing practical skills with regard to effective investigations and prosecutions. A range of experts -including international and local academic staff, investigators and prosecutors- had been brought in as trainers.

It had been interesting to see the development of both the workshop participants and the capacity building process itself. He highlighted the fact that the workshops were contributing to the ultimate goal, namely, that of ensuring justice for the victims and deterring would-be perpetrators.

Highlighting some of the topics covered during the training, **Akande** mentioned superior orders, sexual and gender-based violence, command responsibility and effective prosecution strategies. He concluded by saying that there was more work to be done by way of giving prosecutors and investigators an appreciation of how international criminal law works and furnishing them with the skills to deal with difficult questions.



NETSANET BELAY

Africa Director, Research and Advocacy, Amnesty International

Belay began by making the point that the critical initiative of building capacity should never be confused with complementarity assessments before the ICC. Amnesty International believes that these initiatives

and the participation of the ICC Office of the Prosecutor (OTP) do not fulfil the complementarity requirements. In his opinion, capacity building efforts are not matched by actual investigations and successful prosecutions.

Moreover, capacity building workshops run the risk of being a distraction, with little evidence to show that such capacities will ever be put into practice.

Amnesty International believes that the OTP should open full investigations immediately, as the Nigerian government is *“willingly unable”* to bring perpetrators to justice. To Amnesty International’s knowledge, there are no criminal investigations into allegations made against the military and no genuine domestic processes, due to a lack of political will. As outlined in the OTP’s **Preliminary Examination Report**, the Special Board of Inquiry, set up by the Chief of Army Staff, and the Presidential Investigation Panel, set up last year by the Office of the President, were both established to look into allegations brought against the military. According to **Belay**, however, neither of these processes was ever *“intended, designed or conducted with a view to any prosecutions”*.

The Special Board of Inquiry, which included retired military officers amongst its adjudicators, largely dismissed most of the allegations submitted, and its full report is yet to be made public, all of which makes it difficult to see the methodology applied. Indeed, nothing about the process demonstrated a genuine attempt to bring people to justice.

The Presidential Panel conducted 27 days of public hearings but the outcome remains unknown. Its very design indicates that the Panel was not meant to result in any criminal proceedings, in that there is nothing in its mandate to provide for such proceedings. In addition, **Belay** found it problematic that some of the Panel’s sessions were unjustifiably held in camera.

With regard to accountability for Boko Haram crimes, there had been a minimal number of cases relating to conduct amounting to crimes under international criminal law. Instead, there had been mass Boko Haram trials focusing on minor offences, such as membership of a terrorist organisation.

Belay concluded by asking when the OTP and the Nigerian government would provide answers to the victims, and made a plea for justice, indicating that there was little reason to believe that justice would be done if the matter stayed in the hands of the Nigerian government.





CLAUS MOLITOR

Situation Analyst, Office of the Prosecutor, ICC

Molitor spoke about the status of the OTP's Preliminary Examination in Nigeria, which had been launched in 2010 to advise the Prosecutor on whether the legal criteria for opening an investigation under the Rome Statute had been met. Issues being examined by the OTP were: jurisdiction; admissibility of cases that have been identified; and, the interests of justice.

The OTP is satisfied that there is a reasonable basis to believe that crimes against humanity and war crimes have been committed by both Boko Haram and the Nigerian Security Forces (NSF), and has engaged with the relevant authorities to ascertain whether there are national proceedings that cover the criminal conduct in question. The OTP's subject-matter jurisdiction assessment is ongoing, as is the conflict, and as a result the Office continues to receive information about new crimes on a regular basis, including the recent attacks against aid workers allegedly committed by Boko Haram and the allegations of sexual and gender-based violence allegedly committed by the NSF against women in internally displaced person (IDP) camps.

Outside the confines of the non-international armed conflict, the OTP also reviews reports it receives that include allegations of crimes committed in the Middle Belt and against the Islamic Movement of Nigeria.

In 2015, the OTP identified eight potential cases, two relating to the NSF and six relating to Boko Haram, and has since been liaising with the authorities to find out what type of proceedings have been conducted to achieve accountability. From the files and other forms of co-operation received from the domestic authorities, it appears that most of the domestic charges do not relate to the cases identified by the OTP. To illustrate his point, **Molitor** cited examples of charging suspected Boko Haram members with membership of a terrorist organisation, non-violent support for Boko Haram, and/or failure to disclose information about terrorist acts.



With regard to crimes allegedly committed by the NSF, the OTP has not seen anything which would indicate that the NSF are addressing the contextual elements of crimes against humanity and war crimes. There have been courts-martial but these do not necessarily relate to cases identified by the OTP.

Summing up, **Molitor** said that the Nigerian government had been co-operating but documents and files were still outstanding. Consequently, the tone of this year's Preliminary Examination had changed, with concern being expressed about the outstanding documents and more information being requested.



MUHAMMED UMAR

Director of Public Prosecutions for the Federation, Federal Ministry of Justice, Abuja

Commending Wayamo's efforts to strengthen the justice system in Nigeria, **Umar** explained that Nigeria was currently in the middle of a difficult war on terror. At the time when the war began, Nigeria had not been adequately prepared, in terms of its capacity and existing legal regime, to deal with the magnitude of the terrorist attacks. His office had since sought to deal with the challenges, including capacity building and law reform.

Historically, Nigeria has had a police-led investigation system, where a case is completely investigated by the police and then the case file is merely handed over to

the prosecutor. This mode of investigation has brought numerous challenges to light, namely, the fact that: investigators' inadequate knowledge of the law, results in the gathering of poor -often inadmissible- evidence; the evidence does not target constituent elements of the offence; and the late involvement of a prosecutor leaves little room for further investigation.

Recognising these challenges, Nigeria decided to adopt a prosecution-led investigation strategy. Today, a prosecutor is assigned to a case from the very beginning, in order to lead the investigation.



In 2013, Nigeria amended its 2011 Terrorism (Prevention) Act to cater for the inadequacies and gaps identified in it. Furthermore, a specialised unit, called the Complex Case Group (CCG), was specifically created to handle high-profile criminal cases. With the help of foreign partners, such as the United Nations Office on Drugs and Crime, the DPP’s office has identified and trained special prosecutors to handle the cases assigned to them. Similarly, investigation teams have been set up in the Nigerian Police Force to investigate complex cases, and these teams are usually led by a prosecutor.

In October 2017, the DPP’s office initiated the trials of Boko Haram suspects, some of whom had been in detention since the conflict began in 2011. The first round of trials involved 575 defendants, with subsequent rounds in February and July 2018 at Wawa Cantonment involving about 227 defendants, including three women tried for offences under the 2013 Terrorism Prevention Amendment Act. Three Federal High Court judges presided over the trials, which were held in small makeshift courtrooms on the military base where the suspects had been detained. The courts convicted 113, acquitted five and discharged 97 defendants. A further nine cases were adjourned for trial in Abuja.

The total numbers to date are as follows:

detainees	1,669
cases tried	838
convictions	205
cases struck out	34
suspects discharged	526
Cases adjourned	73

Notwithstanding the efforts made so far, there are still challenges in the effective investigation and prosecution of Boko Haram and other complex cases

in Nigeria. These challenges include:

- insufficient investigation facilities, equipment and modern scientific tools, leading to weak investigations;
- insufficiently experienced interpreters, since most of the suspects do not understand the language of the court;
- inadequate time for the defendants to meet their lawyers for the purpose of preparing their defence;
- unavailability of witnesses;
- lack of a proper witness protection programme; and,
- inadequate logistical arrangements for the prosecutors, in view of the dangers involved.

Umar was adamant in stating that, contrary to insinuations from some quarters that the country is shielding criminals, Nigeria is in compliance with its treaty obligations under the Rome Statute.



MAJOR GENERAL SHALANGWA

Director Legal Services Nigerian Army, Abuja

The Nigerian Army and the NSF, said **Shalangwa**, are a professional army, established by law and mandated to protect Nigeria and assist the civil authorities when the need arises. The terrorist insurgency is a new challenge, and is to be distinguished from the civil war of the 1960s: the NSF has no prior experience of asymmetrical warfare.

As a result, the challenges they face include insufficient manpower, plus a lack of adequate training, equipment and experience in fighting asymmetrical warfare. In the years 2013, 2014, and 2015, when the insurgency was at its most intense, the NSF were ill-prepared. A lot had changed in their approach since then, however, and they had been assisted with additional training, including that received from Wayamo. They do not, as a matter of policy, engage in unlawful acts. They do not contravene international humanitarian law nor their domestic laws.

The Chief of Army Staff has gone to great lengths to ensure that the Nigerian Army remains professional (indeed, this includes authorising three army officers to attend the Wayamo side event in the Hague). Army personnel have also been authorised to travel to other parts of the world for training. Steps have been taken to ensure that NSF counter-terrorism activities are conducted in accordance with the law and that the NSF remain committed to executing their duty in a lawful manner.

By way of example, **Shalangwa** mentioned the fact that legal attachés have been seconded to all units in the north-east of the country to advise commanders on the rules of engagement and international humanitarian law. He was personally responsible for posting legal advisers to these units and ensuring that they have received the necessary training before they are deployed. While acknowledging that violations may have taken place, he nonetheless insisted that these were just isolated incidents, as the NSF respect and adhere to the rule of law.



OLAWALE FAPOHUNDA

Attorney General of Ekiti State and Chair, Nigerian Military Human Rights Dialogue

Fapohunda noted that dialogue is important and that a conversation of this nature is a useful means to take matters forward.

In response to **Belay's** earlier comments, he said that, there was no doubt that Amnesty International played an important role as far as the human rights discussion in Nigeria was concerned, but in his opinion it needed to improve its report writing by verifying the accuracy of its information. Having quickly perused the latest Amnesty International report, **Fapohunda** found it to be *“full of truths, half-truths and a great deal of hyperbole”*



and reiterated that Amnesty International should have verified the information presented in the report, e.g., its allegation that none of the reports from the specially mandated bodies had found any military officers culpable was factually inaccurate.

He acknowledged that the full Panel Report was yet not accessible and that this posed a challenge for organisations like Amnesty International. Even so, he urged that, for credibility's sake, Amnesty International should have a look at it before jumping to conclusions. With regard to allegations of secret hearings, he said that the Panel had only adjourned to hear testimony from victims of rape as required by Nigerian law.

Focusing on the ICC's Preliminary Examination Report, Fapohunda felt that it was fair and balanced. However, it was necessary *"to bridge the gap"*, i.e., there was no

reason why the ICC has not been given the necessary reports and information. The DPP should advise the Nigerian Attorney-General to hand over all the necessary information to the ICC, including information about the military men who are standing trial. He was confident that this information would show that, to a large extent, domestic prosecutions were indeed taking place. It is important for the ICC to see that the Government is co-operative, and providing the necessary reports and information would go a long way to accomplish this.

Fapohunda turned his attention to Amnesty International again, saying that the use of inflammatory and insulting language was totally unnecessary. In his view, there was no need to insult authority and make the issue personal. Human rights must be a reality for the people of Nigeria, something on which the Nigerian Government, NSF and civil society organisations all agreed. Using distasteful language does not help, and all parties should remain diplomatic in their communications.

After his remarks, the discussion was then opened to the floor, with a series of questions and comments making for a lively and engaging discussion.

Responding to statements made, particularly with reference to secret hearings, **Belay** recalled being personally asked to present Amnesty International's evidence in closed session, despite the fact that the evidence in question was already in the public domain. Although Amnesty International fought for the public to have access to the proceedings, the Panel chose to hold that session in camera. He agreed that conducting interviews of rape victims in camera was a good strategy but reiterated that these were not the closed sessions to which he had referred. In his opinion, the respective reports of the Special Board of Inquiry and Presidential Panel should be published in full.

Belay agreed that dialogue was important but indicated that all Amnesty International's letters to the military and government officials went unanswered. This, he suggested, was indicative of a deliberate cover-up.

While conceding that, like any other organisation operating in a difficult situation Amnesty International had made mistakes but it had publicly owned up to and





confessed to errors made in the past. Nevertheless, **Belay** stated that Amnesty International's research methodology is rigorous, and that the allegations of systematic crimes committed by the military are based on solid evidence.

For his part, **Molitor** said that, technically speaking, there was no need for Nigeria to domesticate the Rome Statute. It might make the work of the OTP easier but was not necessary, as suspects could be charged with crimes that already existed under Nigerian law, such as murder.

He reiterated the fact that the OTP takes a close look at the case files provided by the Nigerian authorities, and if these have no connection to the cases identified by the OTP, they are deemed irrelevant for admissibility assessment purposes. The OTP's task is to assess whether cases prosecuted domestically relate to the cases identified by the OTP and thus render the case before the ICC inadmissible. The OTP remains in communication with the authorities and will continue

to assess the situation. Lastly, his Office's participation in capacity building workshops is unrelated to the admissibility assessment which strictly follows the legal criteria set out in the Rome Statute.

Fapohunda concluded by encouraging all parties to avoid generating hostility and urging Amnesty International to find a diplomatic approach to engagements and to seek meaningful dialogue. He also noted that administration of criminal justice in Nigeria needs to be improved, especially with regard to the vast number of prisoners awaiting trial.

Angela Mudukuti brought the proceedings to a close, by thanking the participants for engaging in a constructive, meaningful and respectful discussion. The event had been a successful exploration of all the different perspectives, and provided much food for thought.



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