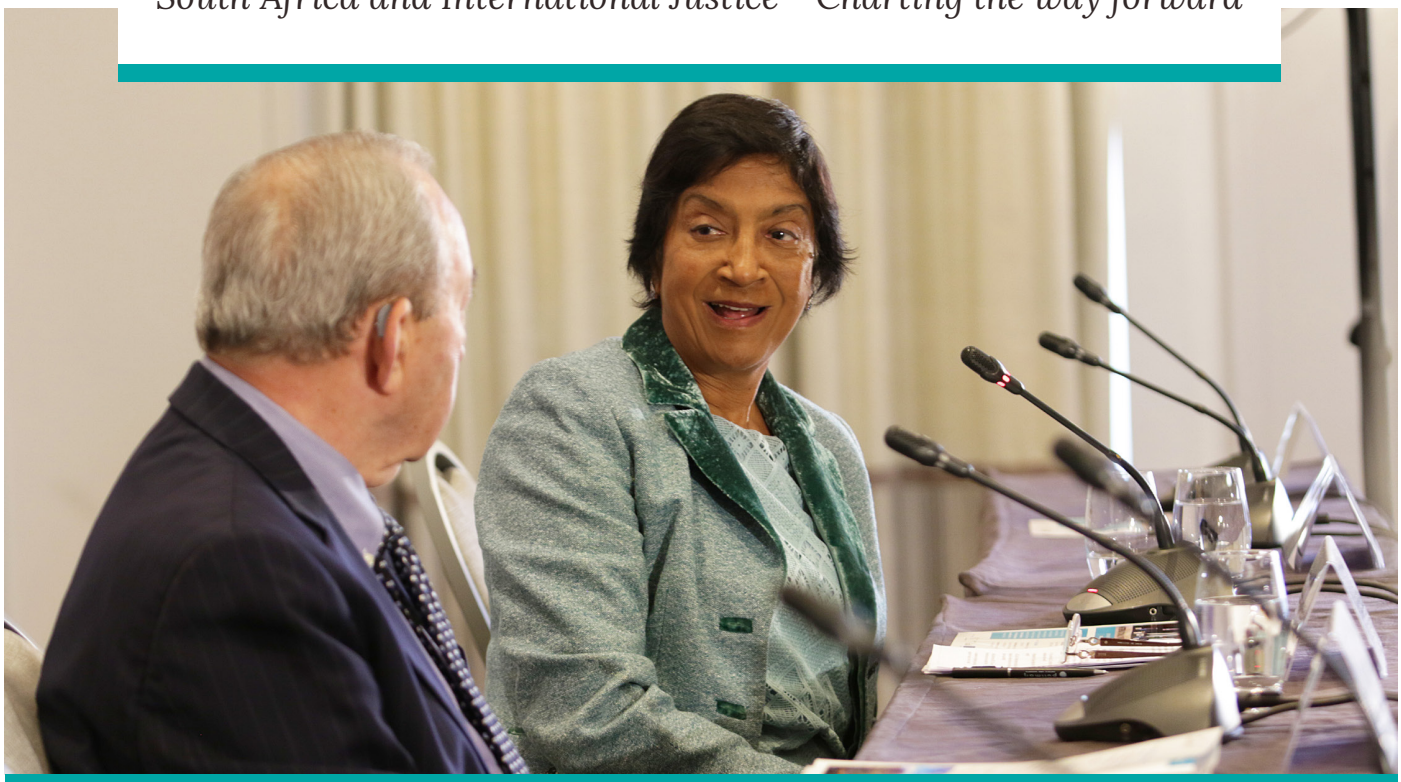
WAYAMO FOUNDATION

AFRICA GROUP FOR JUSTICE AND ACCOUNTABILITY

INTERNATIONAL SYMPOSIUM

South Africa and International Justice - Charting the way forward



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With the introduction of the ***International Crimes Bill*** *before the South African Parliament, South Africa's commitment to* ***international criminal justice*** *and the* ***International Criminal Court*** *is under discussion.*

To take advantage of this critical moment, the ***Africa Group for Justice and Accountability (AGJA)*** *and the* ***Wayamo Foundation*** *held a one-day public symposium in Cape Town on 29 August 2018, under the banner of "South Africa and international justice – Charting the way forward".*

TABLE OF CONTENTS

EXECUTIVE SUMMARY

At a crucial point in time, when South Africa's longstanding commitment to the International Criminal Court (ICC) hangs in the balance, and many countries across Africa and other parts of the world are looking on with real interest at the direction it will take, the **Africa Group for Justice and Accountability (AGJA)** and the **Wayamo Foundation** held a one-day public symposium in Cape Town on the issue. The event was made possible thanks to the combined generosity of the Swiss Federal Department of Foreign Affairs, the German Federal Foreign Office, the European Union, and the Government of Canada.

Not only did the symposium prove highly successful in bringing together a varied and prestigious group of international and local experts on international criminal justice, non-governmental organisations, academics, practitioners and members of civil society, but it also managed to address topics of pressing concern and importance, ranging from **"International Criminal Justice – The Road Ahead"**, **"South Africa and the ICC – Where Now"** and **"The UNSC-ICC Relationship and Head of State Immunity"** to **"Thinking Outside the ICC Box: Domestic and Hybrid Justice for core international crimes"**.

The day began with words of welcome from **Bettina Ambach**, Director of the Wayamo Foundation, **Michael Hasenau**, Head of International Criminal Law and International Criminal Court Unit at the German Federal Foreign Office, and **Hassan Jallow**, AGJA Chair and Chief Justice of the Gambia, and two thought-provoking keynote speeches from **Michael Masutha**, South African

The sheer spectrum of opinion represented, including that of the country's government, ensured that widely differing points of view were expressed, challenged and debated in an environment of reasoned dialogue, mutual respect and a genuine search for a just solution.

Minister of Justice and Correctional Services, and **James Stewart**, Deputy Prosecutor of the ICC.

Guest panellists included: **Navi Pillay**, AGJA member and former UN Commissioner for Human Rights; **Richard Goldstone**, AGJA member and former ICTY and ICTR Chief Prosecutor; **Max du Plessis**, Advocate of the South African High Court; **Kaajal Ramjathan-Keogh**, Director, Southern Africa Litigation Centre; **Stephen Rapp**, former United States Ambassador-at-Large for War Crimes Issues in the Office of Global Criminal Justice; **Dire Tladi**, Professor of Law, University of Pretoria and Member of the UN International Law Commission; **Elise Keppler**, Associate Director, International Justice Programme, Human Rights Watch; **Lami Omale**, Associate Legal Officer at Office of the Legal Counsel, African Union Commission; **Netsanet Belay**, Africa Programme Director, Amnesty International; **Geraldine Okafor**, Chief State Counsel, Complex Case Work Group, Federal Ministry of Justice, Nigeria; and **Sarah Kasande**, Head of Office, Uganda Programme, International Centre for Transitional Justice.

The sheer spectrum of opinion represented, including that of the country's government, ensured that widely differing points of view were expressed, challenged and debated in an environment of reasoned dialogue, mutual respect and a genuine search for a just solution. Having two keynote speakers coming from such diametrically opposed directions meant that Minister Masutha was called upon to elaborate on what he had said, and define the government's rationale and stance in far greater detail than might otherwise have been expected at such an event. Indeed, the entire day was singular for the way in which both the Minister and the remaining speakers were probed and tested by keen questioning from the floor, underscoring the degree of engagement shown by a closely attentive, well-informed audience. Similarly, having organisations such as the Southern Africa Litigation Centre, International Centre for Transitional Justice, Human Rights Watch and Amnesty International in the room allowed for a series of critical views to be voiced, whether of the UN Security Council, the ICC, Uganda, Nigeria or South Africa itself. On the academic-legal side, Dire Tladi and Max du Plessis coincided on some points and agreed to disagree on others, while Navi Pillay, Richard Goldstone and Stephen Rapp drew on their vast stores of experience to argue the cause of international criminal justice in its various shapes and forms. Other topic areas touched upon included challenges facing the application of international justice at the domestic level in countries such as Uganda and Nigeria, and the African Union's policy on the competing obligations placed on its Members by the Rome Statute and customary international law in the sensitive and controversial area of head of state immunity.

Aside from providing a much-needed space for dialogue, the day was seen as having afforded people on both sides of the debate -with the Minister of Justice graciously leading by example- an invaluable chance to meet, air grievances, listen and discuss the situation from many different angles: historical, political, legal, practical and, as Richard Goldstone went to some pains to point out, moral.

The symposium was unanimously voted a signal success by participants, audience and funders alike.

OPENING SESSION

Welcoming remarks

BETTINA AMBACH

Director, Wayamo Foundation, Berlin

Bettina Ambach (BA) opened the day's proceedings by welcoming her distinguished guests -including the Minister of Justice, Michael Masutha, and former Ambassadors, Iqbal Jhazbhay and Stephen Rapp- members of the AGJA, and the public to the international symposium on "South Africa and international justice – Charting the way forward".

In recognition of the "generous funding" that had made the event possible, she thanked the representatives of Switzerland, Germany, the European Union and Canada, and then went on to greet other diplomats present from the USA, New Zealand, Norway and The Netherlands.

While the germ of holding an event of this nature had been laid at an AGJA meeting held earlier in the year in Nairobi, the fact that the International Crimes Bill had been introduced before the South African Parliament meant that this was a propitious moment for listening to and discussing South Africa's concerns about international justice, and seeking a **"constructive dialogue as to how, by remaining an ICC Member, South Africa could help change things from within"**. There would, she promised, be ample time for questions to ensure that members of the public would have a role to play.

MICHAEL HASENAU

Head of International Criminal Law and International Criminal Court Unit at the German Federal Foreign Office

On behalf of Germany, one of the main funders, **Michael Hasenau (MH)** welcomed participants and public alike to the symposium. Explaining that this was a "follow-up" to the South African-German Justice Dialogue (Pretoria, 27-28 March 2017) which had explored the relationship between the International Criminal Court and Africa, he stressed **"the need for South Africa's active engagement and support during this phase of consolidating achievements in the area of international criminal law".**

MICHAEL MASUTHA

Minister of Justice and Correctional Services

"**The decision to withdraw from the ICC was not taken lightly**. South Africa played a significant role in the Rome Statute negotiations and was one of the first states to enact its implementing legislation. The decision was made after very careful consideration of all relevant issues, including South Africa's obligations to the ICC, its recent interaction with the Court, its obligations towards the African Union (AU), the role that South Africa plays to resolve conflicts and make peace on the African continent and elsewhere, and litigation which ensued in the domestic courts."

According to **Minister Masutha**, South Africa found itself in "the unenviable position where it was faced with conflicting obligations, those under the Rome Statute (RS) and those under customary international law pertaining to immunity for sitting heads of state and others who have historically enjoyed diplomatic immunity."

When confronted with this dilemma in relation to the visit by Sudanese President al-Bashir, South Africa accepted an invitation by the ICC Registrar to consult under Article 97. Minister Masutha indicated that despite the fact that Article 97 consultations are diplomatic and not judicial, a Pre-Trial Chamber judge was present during the consultation, directed the initial discussions, and heard an urgent application made by the Prosecutor for an order declaring that the consultations had been finalised, without South Africa being given notice of the application or even an opportunity to be heard. Hence, said the Minister, South Africa -a sovereign state and ICC member- did not receive the fair and just treatment to which he felt it was entitled.

Minister Masutha explained that South Africa raised its concerns about the tension between Articles 27 and 98, and about Article 97 and that both the Assembly of States Parties (ASP) and its Bureau chose to ignore South Africa's concerns about Articles 27 and 98.This he understood to be an endorsement of the ICC's reluctance to fulfil the obligations specifically imposed on it by Article 98. **"The ICC cannot expect States Parties to comply when it does not live up to its own obligations"** he said. Minister Masutha went on to state that, as far as he was concerned, the ASP Bureau's failure to address the issue, had resulted in a situation where **"there is no clarity whatsoever on the relationship between Articles 27 and 98"**.

Minister Masutha reiterated that South Africa sees a distinction between the two Articles and has to fulfil its obligations as it understands them. He said that while Article 27 addresses the question of ICC jurisdiction, Article 98 addresses international co-operation and judicial assistance; and although the ICC might arguably have jurisdiction over an individual head of state, that the same individual would have immunity from proceedings in national courts aimed at arresting and transferring him.

He further indicated that by laying down that the ICC may not make a request for surrender or assistance, if this would require the requested state to breach its obligations under customary international law with respect to state or diplomatic immunity, Article 98 provides a way of avoiding conflict between States Parties' Rome Statute obligations and international laws affording immunity from national proceedings for officials of a third state.

Minister Masutha added that **there are perceptions of inequality and unfairness in the practices of the ICC, which arise, not only from the Court's relationship with the Security Council, but also from the ICC's perceived focus on African states to the exclusion of other continents**.

On 31 March 2005, the Security Council, acting under Chapter VII of the UN Charter referred the situation in Darfur to the ICC and "urged all States to co-operate fully with the ICC". This is where "the [South African] Court [judgements] come into sharp focus" According to Minister Masutha, on the occasion of the AU Summit in June 2015, South Africa and the AU concluded a host agreement that they hoped provided for the immunity of representatives of states and other persons who were due to attend. The Southern Africa Litigation Centre (SALC) made an application to the North Gauteng High Court, challenging this and the High Court

held that South Africa had a duty to arrest him. This decision was taken on appeal to the Supreme Court of Appeal.

The Supreme Court of Appeal agreed with the High Court and held that the host agreement between South Africa and the AU did not provide immunity for sitting heads of state and that South Africa was obliged to arrest President al-Bashir. In Masutha's view, against this, was the opinion that head of state immunity under customary international law had not been eroded and was therefore still applicable. Notwithstanding that, the Implementation of the Rome Statute of the International Criminal Court Act, 2002 ("Implementation Act") obliged South Africa to arrest President al-Bashir. In essence, this is what, according to Minister Masutha, moved the South African government to resolve to withdraw from the ICC.

At this point in his address Minister Masutha took time out to stress the fact that **"South Africa will not become a safe haven for fugitives, especially those who have committed atrocity crimes"**. He emphasised that an extensive review of legislation had been undertaken to consider whether some laws needed to be amended and whether new laws to deal with serious violations of human rights would have to be enacted by Parliament.

Minister Masutha concluded his remarks with the ICC withdrawal process. The North Gauteng High Court had ruled that the country's Constitution governs the manner in which international agreements are concluded, made binding and domesticated. The judgement appeared, by extension, to infer that the reverse process ought to be followed when it came to withdrawal from international agreements, i.e., **"... parliamentary approval of the notice of withdrawal and the repeal of the Implementation Act are required before a notice of withdrawal is delivered to the United Nations..". The initial withdrawal course pursued by South Africa was thus held to be flawed and been set aside. In light of this ruling, the government had therefore taken measures to rectify the situation, by tabling the International Crimes Bill, to repeal the Implementation Act and ensure that there would be no impunity for perpetrators of atrocities.**

HASSAN BUBACAR JALLOW

Chief Justice of The Gambia and Chair of the Africa Group for Justice and Accountability (AGJA)

Hassan Bubacar Jallow (HBJ) welcomed all those attending on behalf the AGJA, and added that they, the organisers of the symposium, were greatly honoured by the presence of the Minister of Justice and the other distinguished guests and dignitaries, which would "enhance the quality of the dialogue on this important topic". Lastly, he wished to make specific mention of the presence of Navi Pillay and Richard Goldstone, both of whom were founder members of AGJA.

The AGJA had been founded in Cape Town three years earlier as an independent, non-governmental organisation of African personalities from across the continent, aimed at promoting justice and accountability in Africa and strengthening Africa's role in the global international criminal justice system. In this respect, the Group acted in *pro bono* advisory capacity at a government level and had engaged in capacity building to improve the quality of justice in countries such as Kenya, the Central African Republic (CAR) and Senegal, among others.

While there can be no doubt that Africa has seen some significant progress in recent decades, it is only in an environment of respect for human rights, the rule of law and the broader principles of good governance that one can look forward to enjoying peace and progress. One aspect of this is the management of serious crimes of an international nature; and though the investigation and prosecution of such crimes is the primary responsibility of national systems, effective realisation of this task requires the closest international co-operation. States must discharge this responsibility on their own or in collaboration with other states and regional and international institutions. **"International criminal justice must always be an option", especially where states are unwilling or unable to deal with the problem.**

Beyond promoting participation by African states in the ICC, AGJA advocacy thus extends to promoting universal adherence to the Rome Statute, so that all states become part and parcel of the global effort and become equally subject to law and the Statute.

Turning to matters closer to his home, i.e., The Gambia, the AGJA warmly welcomed the country's return to the ICC after the withdrawal engineered by the former regime, and congratulated the people and government for taking this decision, despite the difficulties and challenges facing the nation. Not only was there a need to work within the Rome Statute but all states should be called upon to collaborate with the ICC.

JAMES STEWART

Deputy Prosecutor of the International Criminal Court

Following the Minister's lead, **James Stewart (JS)** pointed out that South Africa had played a pivotal role in the creation of the ICC and, with it, the present international criminal justice system. As President Nelson Mandela had said in 1998, on opening the 2nd Conference of African National Institutions for the Promotion and Protection of Human Rights, **"Our own continent has suffered enough horrors emanating from the inhumanity of human beings towards human beings. Who knows, many of these might not have occurred, or at least been minimised, had there been an effectively functioning International Criminal Court."**

These remarks had been made in the very same year that the Rome Statute came into being.

Referring to another eminent South African, Dr. Medard Rwelamira, the first Director of the ASP Secretariat, **JS** said that **"the significance of South Africa's contribution, through him and other South African officials, to the creation of the ICC cannot be overstated".**

In his capacity as UN Secretary General, Kofi Annan too had played a crucial role in the adoption of the Rome Statute, having gone on record as saying that **"the establishment of the Court is [...] a gift of hope to future generations, and a giant step forward in the march towards universal human rights and the rule of law."** In his latter years, as Chair of The Elders and founder and chairman of the Kofi Annan Foundation, he had remained a strong supporter of the ICC and its mandate.

Accordingly, **JS** saw the 20th anniversary of the creation of the RS as a fitting moment to do some stock-taking and assess just how well the Court was "realising the promise of 20 years ago", so as "to learn from its setbacks, build upon its successes and improve its delivery of justice."

It was indisputable that **"Without the full co-operation and support of the States Parties to the Rome Statute, which now number 123, the Court cannot succeed in its endeavour to combat impunity for the worst crimes, and contribute to the prevention of these crimes. In particular, without the unstinting support of African States Parties, the Court, which is so heavily engaged in delivering justice in situations affecting so many African individuals and communities, who are the victims of horrendous atrocity crimes, the Court cannot succeed in its fight against impunity and its goal of contributing to prevention."** Moreover, "South Africa's history and high standing in the world" meant that its support would be invaluable as the Court moved beyond Africa and faced new challenges.

While conceding that South Africa's stance on ICC membership was a matter for it alone to decide, **JS nonetheless expressed the hope, shared by all at the ICC, that South Africa would remain a "key element in the system of international criminal justice that it has helped create. It is, in the end, a matter of shared values. I believe that the values enshrined in the Rome Statute are values that South Africa shares in the very core of its being, as a country and as a people".** The ICC stands for an end to impunity and accountability for the most heinous crimes, i.e., war crimes, crimes against humanity, genocide and the crime of aggression. "I believe we all share these goals, however we wish to achieve them. **If there have been tensions between South Africa and the ICC, the difficulty does not lie with the matter of shared values."**

What had happened was that, in one specific situation where South Africa had been called upon to co-operate, it had **"felt itself caught between what it perceived to be conflicting obligations under international law"**. The ensuing controversy was resolved through judicial decisions, both domestically in South Africa and at the ICC. To address South Africa's concerns, the ASP, for its part, had ensured that the necessary procedures were devised and put in place to facilitate consultations between a State Party and the Court.

Although the Office of the Prosecutor (OTP) regarded head of state immunity, the point in contention, as a clear-cut issue, **JS** nonetheless hoped that the decision of the ICC Appeals Chamber in the case of Jordan, also a State Party, would serve to clarify States Parties' obligations under the Rome Statute. To his way of thinking, the process for resolving such questions forms part of the natural evolution of international criminal justice and the ICC. Even so, **it would, he urged, be in the interests of all parties "to put aside past controversies, for the moment, and focus upon ways to improve and strengthen the Rome Statute system of international criminal justice, in pursuit of the goals we all share. In other words, it may be important now to ensure that we have, in the words of President Mandela, 'an effectively functioning International Criminal Court' "**.

Under the RS, states have primary responsibility to address the core international crimes, with the ICC being a "failsafe mechanism" to ensure justice is done in those cases where states are either unwilling or unable to act. Hence, **"the ICC is an integral part of national justice systems, by virtue of its default role"**, whether by spurring national action, or "helping shape attitudes and perceptions of what justice should be".

While freely admitting that the ICC had not always succeeded in its endeavours, **JS** insisted that it was "constantly learning" by -among other things- setting exacting standards against which to measure its forensic work, recruiting skilled people and ensuring their continuing professional development, creating a culture in the OTP that prizes critical thinking and the rigorous testing of evidence and cases, before going to court, and striving to improve working methods to optimise structures and procedures, and use resources as wisely and as well as possible.**"Constructive criticism is welcome – after all, the justice we seek is the justice that individuals and communities that have suffered the impact of Rome Statute crimes need and deserve"**.

"There is every reason to hope for a productive relationship between the ICC and African States Parties, for the benefit of the victims of atrocity crimes and for the development and strengthening of the rule of law. **South Africa, as a key actor in the creation of the ICC, and as a State Party that shares the values enshrined in the Rome Statute, must surely have an important role to play in this relationship. Our endeavour at the ICC is to deliver justice that is independent, impartial, and objective –this, I suggest, is a matter of immense value and an endeavour worth supporting in every way"**.

CONVERSATION

International Criminal Justice – The Road Ahead

A CONVERSATION WITH

NAVI PILLAY

AGJA member and Former United Nations Commissioner for Human Rights

RICHARD GOLDSTONE

AGJA member and former prosecutor of the ICTY and ICTR

MODERATOR

ANGELA MUDUKUTI

International Criminal Justice Lawyer, Wayamo Foundation

***Angela Mudukuti* (AM)**, *International Criminal Justice lawyer, Wayamo Foundation, noted that the year marked the 20th anniversary of the RS and the 16th year of the ICC's existence and was "therefore an important moment for both the Court and South Africa at a time when its future with the ICC is in question". She was joined by two international criminal justice luminaries to help understand some of the pressing challenges and issues, and come up with possible constructive solutions.*

Angela Mudukuti (AM): *"In 2002 Kofi Annan said, 'Our hope is that, by punishing the guilty, the ICC will bring some comfort to the surviving victims and to the communities that have been targeted. More importantly, we hope it will deter future war criminals, and bring nearer the day when no ruler, no state and no army anywhere will be able to abuse human rights with impunity'." Do you think that the ICC has really lived up to this expectation? Has it really been a form of deterrence so far?*

Richard Goldstone (RG): Nobody's perfect!: very few institutions can live up to their expectations, which were possibly fixed far too high anyway. The problem with international justice -and with international courts in particular- is that they are ultimately dependent on the co-operation of governments. Judge Antonio Cassese referred to the ICTY as a "giant without limbs. The limbs, he said, were provided by governments co-operating with the Tribunal.

This is further complicated when one enters the political field, with the al-Bashir case being a classic example. Under Chapter VII of the UN Charter, the Government of Sudan was bound to co-operate but did not do so. What can the Court do in such circumstances? Furthermore, when the matter was referred back to the Security Council, it did nothing. This lies at heart of the problem which the Court faces.

Even so, the ICC has been seen to issue indictments and has tried a number of people (though "not too many"!). Having regard to the fact that the Rome Statute is now 20 years old, **"the record of the Court is not one of which one can boast"**. On the other hand, it had to be said that if there was no such thing as an international criminal court, efforts would be made to create one. **"It is what we have and we have to make the best of it that we can, especially in the interest of the victims, whose own governments are unlikely to act and who can only look to the ICC for solace and justice"**.

AM: *Would you agree that there are areas of reform that the ICC needs to consider?*

Navi Pillay (NP): As a judge who had served on the Appeals Division of the ICC, **NP** wished to endorse what **RG** had said with regard to the Court's successes. Who initiates changes and advancement in human rights?, she asked. Not states but civil society! Fifty years after the Nuremberg trials this is the world's first international criminal court, a new agenda for civil society. "That's why the ICC is such a success".

Working as a judge, one looks at a statute drawn up by politicians and takes on the "huge challenge" of trying to understand what they had in mind. By extension, this means that reform must come from legislation, and States Parties have the power within the ASP to do just that. Judges are often asked by the ASP to suggest possible changes but that is difficult because judges speak through their judgements. The matter of immunity raised through the case of Jordan is currently

before the Appeals Court and is thus sub judice. **NP** saw this as an area for judicial reform, but Member States, for their part, were free to hold a dialogue and discuss the matter amongst themselves.

Apart from this specific issue, there is whole area of UN Security Council referrals and deferrals that needs "to be fleshed out".

Lastly, she sympathised with the ICC's position that the Security Council should pay for any cases it refers, in view of the fact that only a certain number of UN states are members of the ICC and therefore fund the Court.

AM: *I want to pick up on the thread of the Jordan case and the ICC Appeals Chamber and link that to the immunity issue, insofar as the African Union is seeking an advisory opinion from the International Court of Justice (ICJ). If the question goes to the ICJ and its opinion is one that is not favourable to states that adhere to head of state immunity, do you think that states will abide by this advisory opinion?*

RG: This gives rise to a question that is not new, namely, the problem of decisions of international courts being in conflict with each other. Indeed, this happened in the case of the Yugoslavia Tribunal, when it reached a decision that was inconsistent with one of the ICJ. "The two have to live together [...] that's a feature of international law". That answer had in fact been given by a former President of the International Court of Justice, who said that the only way was for international courts to take notice of other courts decisions and respect them. Personally, **RG** hoped that, before taking its decision, South Africa would await the decision of the General Assembly on whether to request an advisory opinion from the ICJ. Such an opinion would most likely produce some answers to the dilemmas raised by the Minister. Similarly, he hoped that the South African Parliament would support the AU request for an advisory opinion and adopt a wait-and-see policy.

AM: *Speaking of South Africa's desire to withdraw from the Rome Statute and some of the issues that have been raised, including sequencing peace and justice and the fact*

that the ICC Rome Statute has been called a hindrance to peace efforts, do you think that this is just a tool being used to delay justice or is there some merit to sequencing peace and justice?

NP: "I have been on so many panels and still can't understand why people think it's one or the other. Victims, such as those in Rwanda, want both!". Loyalty clearly lies in seeking justice for victims.

South Africa had played a key role in advising Colombia but when the plan came off the drawing board, "the people voted against it because it did not have enough on justice and accountability". As a consequence, the authorities had to go back and include this component, before the project was finally acceptable to and accepted by the population.

RG: Expressing entire agreement with his colleague, **RG** explained that he wished to give two short illustrations of the peace-justice question. The so-called difference between peace and justice, he said, is really between the role of criminal justice and that of politicians: each have their jobs to do.

I. In July 1995, he issued the first indictment for genocide against Radovan Karadžić and Ratko Mladić. Shortly afterwards, he received a "strange request" from the assistant to Ambassador Richard Holbrooke, who was then busy negotiating with Karadžić. When asked, "Would you condemn the Ambassador meeting Karadžić and even shaking hands?" **RG** answered, "No!": Karadžić had not been convicted, and as far as **RG** was concerned, "the Ambassador had his work to do".
II. Arising from this same incident and immediately following Karadžić's indictment, Secretary-General Boutros-Ghali furiously reprimanded **RG**, saying "How dare you issue an indictment when we are trying to negotiate peace". To this, **RG** simply responded that he had done his job as per his mandate and that the reason for not consulting Boutros-Ghali was precisely because he had been vested with the necessary independence by the UN Security Council. Boutros-Ghali, however, saw the situation as being the other way round and said, "You should have consulted me!". Little did anyone know at the time that it was that very indictment which was to prevent Karadžić from going to the 1995 Dayton meeting that put an end to the Balkans war: "So in this instance, justice aided peace".

At the end of the day, however, "it is about the need to get the job done".

NP: As regards the justice-peace debate and the Minister's contention that the issue of head of state immunity had rendered South Africa incapable of carrying out its work in peace negotiations across Africa, **NP** confessed to being at a loss to see how this could be an obstacle to working for peace in Africa. Of all the AU member states, it was just one country and its head of state that was causing difficulties for South Africa. It had taken "50 years of hard work to get where we are". "Victims want this institution". In her opinion "South Africa's problem is about just one individual that is being protected" and she therefore felt that "South Africa's decision to withdraw has been taken lightly". That very same morning they had heard from the Chief Justice of The Gambia, a country where the AU had been and was currently involved in promoting peace and justice.

AM: *I am going to shift to the question of withdrawals from the Rome Statute. We've seen Burundi, we've seen the Philippines. Do you think there's a trend or are these isolated incidents?*

RG: It seems to be receding. South Africa is an exception to the threats of withdrawal made by other states such as Burundi and the Philippines, which are trying to evade justice and retribution for international crimes/atrocity crimes, and "do not want to be dragged before the ICC". The case of South Africa is very different: there is no suggestion of the commission of international crimes. That is why **RG** fully agreed with **NP:** "to withdraw because of head of state immunity is really putting the cart before the horse". The erstwhile fear of a mass walkout by African states had receded completely.

AM: *Staying with South Africa, what would you say to convince South Africa to stay within the Rome Statute system?*

NP: Not only is the South African government clearly against impunity for international crimes, but it respects the judgements of the national courts which have likewise made this crystal clear. Nelson Mandela showed the way by signing up to all international conventions. Indeed, as a judge in The Hague, she herself had been "really proud to come from South Africa" and, "had been seen by the Dutch press as epitomising what the Court stood for", namely, a black woman from South Africa who gone through apartheid. The change from apartheid to democracy had been a dream, and so this is what the country had come to stand for in the outside world.

She confessed to feeling "empathy" with the South Africa's struggle with "these two provisions", and that is why it had been important to hear from the Minister. The matter was before the Appeals Division which might well rule on the matter, though personally she would have preferred to see a diplomatic solution. She felt "pretty certain" that South Africa did not support the notion of immunity for all heads of state. In the Middle East, the Chief Justice of the Emirates Constitutional Court had said that "they would never ever point a finger at a head of state", and other countries, such as India, had told her much the same. However, it was "totally different" in South Africa, and in Africa which had gone through so many problems -economic and political- arising from deprivation dating back to colonisation and, before that, to slavery. **NP** repeated that she was "pretty convinced that that was how the government thinks" and confessed, once again, to being puzzled as to why "the government was going to so much trouble to protect one individual".

RG: Citing the USA's current stance vis-à-vis the World Trade Organisation and the illiberal populist movements sweeping Hungary and other parts of Europe, **RG** said, "The rule of law -domestically and internationally- has never been in poorer shape!" "There's a vacuum!" Accordingly, he saw "an opportunity for democracies in Africa to fill that vacuum".

q&a

A brief sampling of comments on some points of interest from the floor.

Minister Masutha rose from the floor, stating that wished to clarify a few points. To his way of thinking, South Africa had done its best over the past few years. Personally, he had made representations to the ASP, which has responsibility to ensure that the Statute which it created does not cause confusion. He could never understand why the ASP shied away from its obligations. **Why was there such a concentrated focus on Africa?** "Look at countries such as Syria", he said, "where human rights violations have led to atrocities". With this, he proceeded to fire off a series of questions: When will the super powers themselves be held accountable; Why is it only the small nations that are called to account?; Where is the principle of equality before the law?; and, **"You at the ICC know where the culprits are; why are you turning a blind eye?!"**

Coming closer to home, the Minister said, "We are in no way affording impunity. Our own former head of state is undergoing a judicial process. **So the rule of law is very much alive in South Africa.** The very [International Crimes] Bill precisely re-enacts most of the Rome Statute". President Mandela had introduced the Truth & Reconciliation Commission in the recognition that peace and justice must be accommodated, "and it's working for South Africa!" **"Is immunity from prosecution, injustice? I think not!"**

While admitting that its interpretation might not be shared by everyone, South Africa nonetheless had concerns about the Rome Statute being properly constructed. Heads of state were reluctant to come to South Africa because of the prevailing legal uncertainty, **"so our diplomatic position is being held to ransom"**.

An example of this was to be seen in the protests and incidents surrounding Shimon Peres' visit to the country in 2016.

NP: At this, **NP** protested to point out that there was a **radical difference between the cases of al-Bashir and Peres because an international warrant of arrest had been issued against the former**. Furthermore, she saw the vigilance of civil society and NGOs as "a good thing" and praised them for having been active in cases such as President Bush's intended visit to Switzerland.

Floor: Would it not be better to wait, as suggested by Richard Goldstone?

Minister Masutha: As a cabinet minister, he was under an obligation to implement government and party decisions. Nonetheless, the issue was now before Parliament. It would, he assured, be an open process and parliamentarians would take into consideration all points relevant to South Africa's concerns about the Court.

Floor: The contrast between the Minister's emphasis on avoiding the possibility of the country becoming a safe haven while at the same time adopting a stance that would actually go to preserve it as a safe haven was "striking". Might it not be a moment for the Minister to reconsider, and for South Africa to take "the high ground" and work within the system?

Floor: The al-Bashir matter had been "the trigger" but a lot of water had flowed under the bridge since 2015. The international institutional apparatus and infrastructure built up over last 70 years was "under vicious attack": in short the international rule of law was under attack. The principle of multilateralism has been close to the ANC and South African governments since 1994, and it was time for South Africa to defend this principle. What is the way to address imperfections in the ICC … from within or by withdrawing?

Floor: South Africa needs to attract investment: investors were waiting to see it take action and resume its place as a leader and responsible member of the global community. The country had to be careful about taking steps with possible negative consequences. How would a step like withdrawal help the most vulnerable and marginalised population segment in South Africa?

Floor: The Minister had talked of being "held to ransom" by civil society organisations: is the search for justice then unacceptable?

Minister Masutha: He took pride in South Africa's history of eradicating apartheid and preserving human rights. South Africa continued to uphold the principles of the rule of law. Reiterating what he had said earlier about the effects of the Rome Statute obligations on South Africa's international relations, he pointed to the fact that the recent BRICS summit had nearly collapsed due to some heads of state being reluctant to come to South Africa for fear of being arrested on charges brought by civil society organisations. South Africa, he said, is part of global society that seeks to advance and develop. Hence, if its conflicting obligations obstruct the role that it wishes to play, this cannot be seen as promoting the interests of the people of the country. On the other hand, he had no argument with civil society's actions: indeed they could serve to highlight aspects that needed to be corrected.

Floor: Do we really want to be the kind of country that asserts friendship and diplomacy over justice, […] the kind of country that creates a safe haven for war criminals?

Floor: The Minister had highlighted the fact that, in its judgement, the Supreme Court of Appeal's had reflected that, under customary international law, the stage had not yet been reached where head of state immunity was removed. The "important bit" however, was that the judgment had gone on to say that South Africa had taken a step which other countries had not taken, namely, to ensure, through its implementation legislation, that international criminals who came to South Africa and had head of state immunity, did not benefit from that immunity. To the extent that this was a positive and progressive step, said the court, it was one in which South Africa took pride and was consistent with the country's human rights

commitment at a national and international level. Accordingly, if there is a debate in the cabinet and parliament, then where in that debate is the third arm of government, i.e., the judiciary, going to resonate?

Minister Masutha: "We certainly would have been proud of that step if it did not impede the pursuit of national policy in relation to the country's diplomatic work". **South Africa cannot go back to being a "pariah state", which other countries will not visit for fear of placing their heads of state in a position of legal uncertainty**. It seemed to him that people had not paused to reflect on the consequences of such a stance. For instance, Sudan had actually re-elected its President: "Did you really expect South Africa to effectively bring about a change of government in the Sudan and go against the majority of the people in the Sudan?" Uganda too had made its position clear by "happily welcoming the Sudanese President to the country…and nobody did anything about it" **"Let's not be hypocritical here [---] which super power has ever rejected a visit by a sitting head of state?"**

It was time to reflect on the position of "other more senior nations in the world" and "the skewed nature of this discussion".

NP: This is the first time that a serving head of state has been indicted, a situation which cannot be compared to that of any other leader who visits states around the world. In this connection, **NP** cited the co-operation shown by States Parties in turning over other heads of state, memorably Charles Taylor. There had been no objections to his arrest, showing that, **"there is a record of no impunity for atrocity crimes for anyone!"**

RG: Aside from well-embedded international legal principles, there was a wider moral issue at stake. **"Anybody who reads the indictments against al-Bashir would be horrified at the evidence indicating that he gave the command and was responsible for the commission of genocide and murder of tens if not hundreds of thousands of people."**
In 1973 the UN General Assembly declared apartheid

a crime against humanity, and those countries that ratified this convention "became obliged to arrest and put on trial any leaders of South Africa who were guilty of the crime of apartheid". In contrast to African and Middle Eastern countries, not one Western nation supported the move because of commercial reasons. South African leaders were free to roam the world and enjoyed red-carpet treatment because these other countries were doing good business with South Africa. **RG** felt sure that, **if South African leaders in the 1970s and 1980s had been unable to travel abroad for fear of being brought to trial for the crime of apartheid, "apartheid would have ended a good decade or more before it did". "I believe that democracies should not welcome people accused of the sort of crimes of which al-Bashir is charged." Just as South African apartheid leaders should not have been allowed to travel the world, so al-Bashir should not be allowed to travel.**

> *"To withdraw because of head of state immunity is really putting the cart before the horse."*
>
> **Richard Goldstone**
> AGJA member and former prosecutor of the ICTY and ICTR

PANEL I

South Africa and the ICC – Where Now?

MODERATOR

HELEN SCANLON

Convenor Justice and Transformation Programme, University of Cape Town

***Helen Scanlon (HS)** briefly introduced the members of her panel and explained that each speaker would have 5 to 7 minutes to make his/her initial address.*

KAAJAL RAMJATHAN-KEOGH

Director, Southern Africa Litigation Centre

The application and enforcement of international criminal law occurs in a setting where "law, politics, international relations, diplomacy and justice intersect", something which had been graphically illustrated by the attempted arrest of al-Bashir on the occasion of the 2015 AU Summit in Johannesburg, in which the Southern Africa Litigation Centre (SALC) had played a pivotal role.

Bearing in mind the fact that Africa comprises the largest regional bloc of States Parties in the ICC **KRK "it would be a tragedy if Africa were to pull back on the substantial intellectual investment" which African states -and South Africa in particular- had made in international justice.**

South Africa's newly tabled International Crimes Bill's seeks, inter alia, to "regulate immunity from the prosecution of international crimes" and envisages situations in which the state can refer cases to the ICC. In essence, however, the Bill guarantees immunity from criminal prosecution to sitting heads of state, heads of government and ministers of foreign affairs.

In this connection, it is perhaps worth noting that the decision taken by the AU in January of this year urges Member States to continue complying with Assembly decisions pertaining to the ICC's warrant of arrest in respect of al-Bashir.

KRK reminded her listeners that this was not South Africa's first attempt to withdraw from the ICC. It had tried in 2016 but had failed to adhere to the prescribed parliamentary procedures and been successfully challenged in the country's High Court. Consequently, the government was being far more cautious this time and, as yet, no new instrument of withdrawal had been laid before the UN Secretary General. The "most pressing issue" for South Africa is the conflict

between what it perceives as its obligations under its own diplomatic immunity laws and its obligations under the RS. Despite the rulings handed down by the country's domestic courts, the government contends that, as a sovereign country, "it should be able to grant immunities and privileges unhindered".

Even so, there was some speculation about whether the government "continues to have the appetite for withdrawal" or whether there was some type of split, with the Ministry of Justice and the Department of International Relations and Co-operation's (DIRCO) rumoured to be at odds over the issue. To date, however, no public communiqué had been released.

With the single exception of the al-Bashir incident in 2015, South Africa had and continued to have an unblemished record of compliance with its international obligations under international criminal law. Moreover, it was continuing to uphold its domestic and international justice obligations, said **KRK** in reference to the role that the National Prosecution Authorities were playing in the extradition of a convicted Dutch war criminal currently residing in Cape Town's Fresnaye district.

In her opinion, **"withdrawal from the RS and repealing the Implementation Act would add to the discourse that the nation is witnessing the degradation of the rule of law, the flouting of court orders and the possible destruction of important legislation"**. As things stand, it is unclear whether or not South Africa will withdraw, since this requires: firstly, that the Bill be approved; and, secondly, that the government take the necessary decision to proceed. **KRK** was therefore of the view that withdrawal was not foreseeable in the short term, not, at least, until after the national elections in mid-2019.

NETSANET BELAY

Africa Programme Director at Amnesty International

On joining what he termed "this lively and never-ending debate", **Netsanet Belay (NB)** said he would highlight four areas in which the context had shifted since South Africa's announcement of withdrawal, thereby making it necessary for South Africa to reconsider its stance.

REGIONAL

The threat -real or perceived- of mass withdrawal of African States Parties from the ICC was no longer present. Of the three countries -Burundi, The Gambia and South Africa- which started the move to withdraw, only Burundi remained, and that largely for self-seeking reasons of a regime intent on protecting itself. Even vocal ICC critics like Kenya had shown no intention of withdrawing from the RS. Hence, if South Africa were to withdraw, it would be in the same category, by association, as the Burundian leadership, at a time when 33 African states, 60% of the AU membership, were States Parties.

In addition, there was no prospect of mass withdrawal of AU Member States. Indeed the so-called "African Union Mass Withdrawal Strategy" was nothing but a misnomer. While there were admittedly prevailing concerns about the conflict of laws and obligations, the message from a growing number of African States Parties was nonetheless one of complete rejection of any notion of "collective withdrawal" and the realisation that change had to come from within. **"There is a loud clear message to South Africa coming from the AU!"**

GLOBAL

Since 2016, the world had been facing a crisis in government. This was not limited to the direction taken by the Trump administration in the USA, but was something that was being seen more widely in Europe and elsewhere as a demonisation of certain, often incoming, population groups as enemies posing a threat to a way of life. The implications of this were being felt in the form of a lowering of the defence of human rights in Africa and across the planet as a whole, leading in turn, said **NB**, to "a vacuum of leadership".

THE ICC

The South African government needed to acknowledge that a lot of lessons had been learnt at the ICC from experiences such as Kenya, "opening up a genuine debate on how to strengthen the ICC". Moreover, the Court had taken on new challenges and was venturing into new areas, such as its investigation of the situation in Afghanistan and its preliminary examination in Palestine/Israel: "Genuine steps are being taken".

AREAS OF NO CHANGE

What had really not changed was the situation for families living in places ranging from South Sudan, Darfur, Northern Nigeria and Libya across to Myanmar. Gross human rights violations continued, with no meaningful actions to hold perpetrators to account and end the cycle of impunity.

It was in this context that South Africa was having its debate. **"There is a strong moral issue at stake here when the country's government talks about the 'inconvenience of its RS obligations'. People need to be held accountable in places like South Sudan. What is South Africa doing?... it has not taken a single step!"**.

MAX DU PLESSIS

Advocate of the High Court, South Africa

Noting that South Africa had tried twice to withdraw from the ICC, **Max du Plessis (MdP)** recalled that the first effort in 2016 had been met by a successful challenge in which the High Court ruled that, in its haste, the government had unconstitutionally bypassed parliament. After suffering this reverse, the government reacted by announcing in December 2017, that South Africa would withdraw but that this time Parliament would be engaged. The upshot of this state of affairs said **MdP** was that **"while it limps on, South Africa's interests are being harmed"**.

Furthermore, the government's arguments in support of its withdrawal are "weak and have been subjected to withering criticism" by many, including a number of eminent legal figures such as former UN Human Rights Commissioner and ICC Judge, Navi Pillay. **"There are"**, insisted **MdP**, **"no credible grounds for withdrawal; reasons are significantly wanting".**

Not only did he regard the government's argument in favour of a credible substitute in the form of the African Court on Human and Peoples' Rights as being a weak stance, but he also found it difficult to accept the official line about withdrawal being due to the Pre-Trial Chamber's unfavourable decision in the al-Bashir case. To his way of thinking, South Africa could have appealed but had chosen not to. While it goes without saying that head of state immunity is a thorny issue, instead of withdrawing, South Africa has the chance to remain in the ICC, show its leadership qualities and pursue change from within.

In this regard, **MdP** stated that he wanted to make three points:

I. in a "Trumpian world", South Africa is poised to make a significant contribution on the international stage when it comes to tackling multilateral challenges, such as climate change, migration, trade, terrorism and transnational crimes, all of which "require strong states with principled commitment to the values of the rule of law, accountability and human security";
II. South Africa needs to be constructively engaged with the ICC "to show its dedication and commitment to principles such as accountability (..) and the rule of law at an international level". It could "set the tone" by working to improve the ICC from within, help solve the immunities issue and, in particular, constructively debate the problem of heads of state being accused of ICC crimes. Efforts could be directed at the UN Security Council to ensure that, where the Council intends to remove immunities from state officials when sending cases to the Court, it does so unambiguously. Similarly, the Council could be encouraged to improve its consultation process with African states and the AU in relation to ICC matters. Lastly, South Africa could help the ICC to dispel the perception that its Prosecutor has been overly selective and thereby "liberate the Court of its political shackles"; and lastly,
III. South Africa's efforts to withdraw from the ICC

are "easily reversible", as shown by events in The Gambia: "The gains are likely to be immediate and globally impactful."

"As partners, rather than divorcees", South Africa has a place in the ICC reform process. South Africa is special place, and the ICC is a special institution.

JAMES STEWART

Deputy Prosecutor of the International Criminal Court

James Stewart (JS) began by remarking that it was clear that South Africa had a strong commitment to international justice, and that the only reason why the mood had changed in recent years and the question "South Africa and the ICC – where now?" had arisen, was because of the controversy involving South Africa and the Court. **Up until then, South Africa had been seen as one of the ICC's staunchest supporters across Africa and the world.**

While unwilling to go into the specifics of head of state immunity, he nonetheless underscored the fact that, in the case concerning South Africa, there had been a full debate on the issues in the Pre-Trial Chamber, the Chamber had duly decided on the matter, and **neither party had appealed that decision**. Moreover, September of this year would see these selfsame issues being brought up before the ICC Appeals Chamber in the case of Jordan, with the Chamber taking submissions not only from Jordan and the Prosecutor, but also from the AU and the League of Arab States, showing **"the Court has endeavoured to open up the debate to all points of view, so that it takes a considered and authoritative decision"**.

As he had said in his keynote speech, **JS** felt that, while it was for South Africa to decide what course of action it would take vis-à-vis its ICC membership, the ICC hoped that "South Africa would remain an important member of the Rome Statute family, supporting and strengthening a system of international criminal justice it had helped create". South Africa's contribution was valued, both in terms of its potential powers of moral suasion, and in terms of practical matters, ranging from witness protection to information- and skills-sharing.

By virtue of the constraints imposed by the design of the RS system of international criminal justice, the Court has to rely on States Parties and others for co-operation and support in the investigation and prosecution of crimes coming within its jurisdiction. Having no police force, it must thus depend on States Parties for the execution of its orders and arrest warrants.

Returning to the question posed to the panel, "South Africa and the ICC – where now?", **JS** was of the opinion that **"the ICC should have a close, collaborative and productive relationship with South Africa".**

People were suffering in Africa and beyond, and so the ICC needed to be an "effective instrument for the vindication and protection of fundamental human rights". A multi-faceted response was called for. **"If we can combat impunity, we can hope to contribute to prevention. Our focus is upon the victims and the communities that suffer the impact of mass atrocity crimes, and especially those most vulnerable members of the population, namely, children and the victims of sexual and gender-based violence".**

Given the necessary evidence to show individually criminal responsibility, the Rome Statute had been intentionally designed to bring the most powerful to account. **"No one can be above the law"**, said **JS**, **"that, as a principle, must remain sacred!"**.

JS saw the Court's designated goals as being "vitally important". He thought Max du Plessis' ideas were "very useful". Along with the other States Parties, South Africa could assist the Court in achieving these in many practical ways. "I hope that will be what the future holds for the relationship between the ICC and South Africa."

q&a

A brief sampling of comments on some points of interest from the floor.

Floor: Would it be possible for collaboration to take place between South Africa and the ICC if South Africa were not a State Party?

JS: Yes!, e.g., the USA. However, the type of co-operation in cases where the state is a State Party is "far superior".

Floor: Are there any alternatives or is the ICC "the only game in town"?. For instance what about the Belgian initiative on horizontal collaboration?

JS: The ICC is designed as the "failsafe system" and thus necessarily relies on states to do their part.

MdP: When it came to alternatives such as the Belgian initiative, "the more, the better"! Nevertheless, one had to contextualise South Africa's situation of withdrawing from a working model: this was "a backward step". In reality, many of the so-called alternatives were still future initiatives: it was bit like choosing to change vehicles en route to one's destination, only to find the second vehicle had no engine.

Floor: MdP had spoken about the judgement of the Supreme Court of Appeal: what if South Africa decides not to withdraw from the ICC but rather to amend its domestic legislation? Would t be a satisfactory response?

JS: Article 27 is a matter of principle and States Parties sign up to that, but this in turn poses the question of what to do with non-States Parties. In **JS**' view, the UN Security Council Resolution puts Sudan on the same footing as a State Party. However, one would have to see what happens following the debate in the Appeals

Chamber. Up to now, his reading had been that, in this particular case, Article 98 was irrelevant.

NB: Although such a move would "definitely be pragmatic", the question was, would it be satisfactory? "I don't think so!" If he were a victim, he "would want to see the principal perpetrator in court, not the menial person who had dragged him to prison". Moreover, the political will to make regional mechanisms work in Africa was lacking.

Floor: As regards MdP's suggestion about the role that South Africa could play from within by helping to craft UN Security Council's resolutions, realistically speaking there was very little chance of changing resolutions in view of the pressures brought to bear.

MdP: While agreeing that a little realism was important, he nonetheless felt that the examples cited by the questioner (Dire Tladi) were "a little dated". "Now is the time to admit that there is a problem, and to try and solve it: one should at least try".

Floor: South Africa had been offended by the lack of consultation and respect it felt it was due as a State Party. One could not treat States Parties like suspects. Could things have been done differently or more diplomatic measures taken?

JS: While he quite appreciated the point made, what had to be understood here was the pressure of time. The hearing had been held on the Friday night preceding al-Bashir's impending arrival on the Saturday. The initiative to consult had come from South Africa. The single judge felt that there was no need for a request from the Prosecution because the position was clear. Eventually the Pre-Trial Chamber had made its decision on the merits of the case. "It's time to move on!", he said.

NB: "As an African, I would love to be treated with respect but that's not happening. That's reality, that's the game". Even so, one wanted to be there because the only way to change things was by fighting from within. Insofar as this pertained to the whole ICC-AU issue, he frankly regarded it as "a game".

MdP: He fully agreed that more respect was due, and that it was time to put an end the ICC's "high-handedness". However, "this is a high stakes game". South Africa knew well in advance what it intended to do: the only possible conclusion is that "al-Bashir must have been given assurances". "There's gamesmanship on all sides", he observed. Frankly, he could not understand South Africa's attitude: if they did not like the decision, they should have appealed. One could not act like his 8-year-old son, who only wanted to play cricket on his own terms, always demanding the right to bat. **MdP** could do no better than tell the South African authorities the same thing he told his son, "That's not how cricket works!".

> *"The ICC should have a close, collaborative and productive relationship with South Africa."*
>
> **James Stewart**
> Deputy Prosecutor of the International Criminal Court

PANEL II

Boiling it Down: the UNSC-ICC Relationship and Head of State Immunity

MODERATOR

MARK KERSTEN

Deputy Director, Wayamo Foundation

***Mark Kersten* (MK)** *opened the afternoon session by observing that he had the "perfect panel" to discuss issues which had already been touched on during the morning's deliberations and which "go to the very core of ICC", i.e., the UN Security Council-ICC relationship and the matter of head of state immunity.*

DIRE TLADI

Professor of Law University of Pretoria and Member of the UN International Law Commission

Dire Tladi (DT) announced that, as a lawyer, he would be coming at the topic from a purely legal perspective. Hence, while personally on record as opposing immunities, he nevertheless believed that, rather than ignoring the law for reasons of expediency in specific instances, any "gradual erosion" should properly occur in law-making forums.

He wished to address two aspects: on the one hand, the role of immunity in the context of ICC-AU tensions; and on the other, the jurisprudence of the ICC Pre-Trial Chamber (PTC) on the immunity question and the issue of the Jordan appeal.

I. On the centrality of the whole immunity question, **DT** noted that ICC-AU tensions and the matter of South Africa's withdrawal could not be separated from the immunities issues. Indeed, tension had only arisen when a person with immunities had been indicted and an arrest warrant issued, and was bound up with the relationship between Articles 27 and 98 of the Rome Statute. In his view, there was no conflict between these two provisions: they dealt with distinct issues and "are full consistent with each other". Whereas Article 27 concerns immunity before the Court itself, Article 98 concerns immunity from domestic jurisdiction.

From 2008 onwards there had been a series of AU decisions on non-co-operation. These had been based on strong legal arguments, which **DT** considered correct notwithstanding their political tone: "It's hard to disagree if one's objective".

II. Despite having had had the opportunity to address the immunity question a number of times, in each instance the ICC had based its decision on different reasons and rationales. In the Malawi/Chad case, the PTC I essentially decided that immunities did not apply to cases before international criminal courts. "This decision -one of the worst I've ever read in my life- was clearly wrong", stated **DT**.

The subsequent PTC II decision in the case of the Democratic Republic of the Congo (DRC) shifted to a new theory, and ruled that, by obliging Sudan to co-operate, the UN Security Council Resolution had in effect waived Sudan's immunity.

When South Africa was given the opportunity to appear before the ICC, it argued that the DRC decision was incorrect because the rules of interpretation had not been followed. The PTC II then came out with a completely new ground, arguing that the Security Council Resolution had the effect of turning Sudan into a State Party so that Article 98 did not apply. Whereas South Africa chose not to appeal, Jordan, which was found guilty of non-co-operation in the selfsame circumstances, lodged an appeal, with the result that all the issues were being aired and the appeals chamber would have the opportunity to issue a final decision.

With respect to the interpretation put on the Statute by the PTC, **DT** had this to say, "There is nothing in the Rome Statute or the Security Council Resolution to state that a non-State Party becomes a State Party. It is based on fiction!" "If you adopt the PTC decision, most non-State Parties will get away, except those referred by the UN Security Council."

OTTILIA MAUNGANIDZE

Head of Special Projects - Office of the Executive Director, Institute for Security Studies

"I love dates", a wry tongue-in-cheek remark, might have been the title of **Ottilia Maunganidze's (OM)** address, as she proceeded to use the chronology of events to highlight the perceived failure of the UN Security Council to work in the interests of peace and security.

In May 2014, 13 of the 15 Member States on the UN Security Council voted to refer the Syrian situation to the ICC. One of the 13 countries to support referral was Rwanda, a non-State Party and a regular critic of the ICC. The Rwandan representative to the UN, Eugène-Richard Gasana, stated that, despite the failure to adopt the Resolution, Rwanda would not lose hope for justice and accountability. Citing Gasana who said, **"We should listen to the voices of the more than 55,000 souls slain in Syria. [...] the international community must take immediate action, in particular the Council"**[1], **OM** concluded that, **"action for humanity should be put above action aimed at advancing national interests"**.

Ultimately, the resolution was vetoed by Russia and China. "Why deal a blow to the Permanent Five (P5) in this case?" asked Russia's representative, Vitaly Churkin: "Forcibly referring the situation to the Court in the current environment was neither conducive to building trust nor to the resumption of negotiations," argued China. It is now 29 August 2018, observed **OM** scathingly, and the conflict in Syria is still ongoing. The humanitarian catastrophe continues with millions of people having been displaced. **"The refugees are not the crisis but rather the situation that forces them out! [...] If the UN Security Council cannot perform its function for one state, how can it possibly do it for all states if just 2 permanent members can veto it?"**

Continuing with her date-by-date review of the UN Security Council's track record, **OM** turned to its referrals of non-States Parties to the ICC, namely, Sudan (Darfur) in 2005 and Libya in 2011. Beyond referral, little -if anything- had since been achieved: in the case of Libya, **OM** limited herself to observing that there had been no prosecutions; in the case of Sudan, she was even more dismissive, "That was 2005 and we are now in 2018." True, there had been recommendations for justice to be dispensed, not necessarily by the ICC but by a hybrid court. As yet, however, no such court existed. Indeed, some victims "have grown tired".

"Referrals are blocked because they can be blocked. If these crimes are really so serious what then is available as an alternative mechanism to UN Security Council referral? We don't see anything being done about it." There are inherent challenges in getting the UN Security Council to promote peace and security when some members use their veto to override international interests in favour of their national interests. Might there be a role here for the UN General Assembly?, she wondered.

1 Security Council, 7180th Meeting (SC/11407, 22 May 2014). *Referral of Syria to International Criminal Court Fails as Negative Votes Prevent Security Council from Adopting Draft Resolution.* [online] Available at: https://www.un.org/press/en/2014/sc11407.doc.htm [Accessed 15 Nov. 2018].

LAMI OMALE

Associate Legal Officer at Office of the Legal Counsel, African Union Commission

Looking at immunity from an African Union perspective, **Lami Omale (LO)** stressed that the AU had consistently shown commitment to the fight against impunity for international crimes. This was borne out, not only by the "unprecedented provision" in its Constitutive Act entitling the AU to intervene in a Member State to stop war crimes, crimes against humanity and genocide, but also by various decisions taken by the AU Assembly.

Furthermore, the AU had played a key role in bringing the ICC into existence, with Africa still being the largest regional bloc in the ICC. **"We love the ICC!"** said **LO** with a somewhat mischievous smile. The disagreement between the two institutions -AU and ICC- centred on the single point of contention about head of state immunity.

The AU and African states feel the pressure of so-called "competing obligations", i.e., being pulled between their legal obligations under the Rome Statute and those under customary international law and international agreements to which they are signatories. In a number of decisions, therefore, the AU Assembly has expressed concern at the PTC decisions and cautioned Member States against accepting this line of interpretation of their ICC obligations.

As her fellow panellist, Dire Tladi, had pointed out, there is no contradiction between the provisions of Articles 27 and 98. Yet, the ICC remained adamant, insisting that States Parties were under an obligation to arrest and surrender al-Bashir if he was found on their territory, ignoring the existence of Article 98 and the "legitimate concerns raised by States Parties in this regard".

Consequently, the AU was currently seeking an advisory opinion on the immunity issue from the ICJ. In doing so, explained **LO**, it was not looking for any particular decision but rather seeking to gain clarity on conflicting obligations under different areas of international law.

q&a

A brief sampling of comments on some points of interest from the floor.

Before opening the discussion to the floor, Mark Kersten put a question of his own to each of the panellists.

MK: *"We love the ICC!" That is a pretty remarkable thing to hear when the AU is often seen as the "bad guy". Earlier, Netsanet Belay talked of the withdrawal strategy as really amounting to "constructive engagement". So, what is the feeling in the AU towards the ICC: antagonistic or one of engagement?*

LO: The AU is genuinely trying to engage with the ICC; and it is not just African states. Indeed, the interest in referring the matter to the ICJ was supported by many non-African states. It is not a matter of antagonism: it is just a matter of being on opposite sides of the issue. The AU is a political body whereas the ICC is a judicial body. The AU supports the mandate of the ICC but would like to see diversity, with the accent on peace and justice and not merely on accountability and justice.

MK: *With respect to the power to defer an investigation or prosecution under Article 16 of the Rome Statute, the AU has sought this course in Kenya, Dafur and Libya. It's meant to mediate peace and justice. But should it ever be used? Is it ever appropriate?*

OM: Deferral is an option open to the UN Security Council. Are there situations in which deferral is a

good idea?: the simple answer is "Yes." However, "the issue then is what do you do with that time?" By the very nature of things, prosecutions at a domestic level do not necessarily start at the instant that they are initiated by, say, the investigative arm, and "can often be delayed, without the need for having another political body to do that". National prosecuting authorities take that decision in light of the prevailing circumstances, in order to ensure that justice is done. Deferral should certainly be an option, but it is the intention underlying the deferral that "ought to be important". In 2010, an African Expert Study on AU Concerns about Article 16, authored by Dapo Akande, Charles Chernor Jalloh and Max du Plessis, indicated, among other things, that requests by AU states have largely been ignored. "A response", said **OM**, "is better than none at all".

MK: *The debate around head of state immunity at the ICC is often painted in very binary terms: as having a bad side and a good side. It's clear that what is needed is constructive dialogue. So, what can be done to recast this issue as one that shows respect for different perspectives and positions?*

DT: "You've really hit the nail on the head by pointing out the 'good guy/bad guy' approach". **DT** had himself complained about the "hero-villain" approach: there is good and bad on both sides. The challenge therefore was to find how to resolve the immunity issue in a way that avoids this. The first thing that needs to be done is to identify areas on which decision-making bodies on both sides agree, e.g., there are situations under current law where heads of state enjoy absolute immunity with no exceptions. **If one thinks that immunity is bad, one should work on changing the rules "rather than saying 'we want to get him so badly that the rules don't matter'"**. "That's the discussion we need to be having". In other words, **"if we want to do away with immunity, it might be better to find ways of reducing its scope"**.

Floor: **What is the AU Members' plan to convince the UN General Assembly to refer the matter to the International Court of Justice? Indeed is there such a game plan?**

LO: There had been a number of meetings in New York with African group and other parties. It was "all very political" with states wanting to know the position before endorsing the request. Overall, however, things were looking positive.

Floor: On the question of whether the use of the veto to prevent an enquiry into atrocities and/or genocide is contrary to customary international law, should the General Assembly approach the International Court of Justice?

OM: She felt inclined to agree that the UN Security Council P5 members should in some way be prohibited from using their veto. One of the reasons from a purely legal point of view was that "under the UN Charter there are no prescriptions on the veto itself". It is posited as an option for the P5 without an indication as to when members can or cannot use it: indeed, no justification for the decision to use it has to be provided. This opens a door in terms of asking **"are there instances where exercising that veto should not be the case?"** If, as with Syria, the overwhelming majority of the UN Security Council is in favour of referral, should there then be a space for using the veto? In this respect, she did not consider it important that it had been a specific country -Russia or China- which had resorted to the veto: in other words, **it was not so much a question of which state used the veto but rather its use *per se***. Ultimately the P5 countries were using their might.

This in turn raised the whole question of UN Security Council reform. In line with what her colleague, Dire Tladi, had said about steamrolling things instead of working to change the rules, perhaps "we should be actively considering the options of changing the rules so that they fit our current discourse".

DT: Explaining that he felt "constrained" by law, he disagreed on purely legal grounds that there was a customary international law rule that required the P5 to vote one way or another. Nonetheless, he thought it was more important to look for ways to change the position by putting pressure on governments "to change something that's unfortunate".

MK: A veto of referral to the ICC may well be repugnant legally and morally repugnant, but referrals that do nothing for victims, and are not followed up with enforcement or support and thus damage the Court are also legally and morally repugnant. "Might there be a dilemma here?", he wondered

Floor: Can you anticipate the outcome of the Jordan appeal?

DT: Up until a few days previously, **DT** thought he had "a good prognosis" but now the only thing he could say with any certainty was, **"The ICC's approach to immunity is a 'shifting sands' one"**.

Floor: Any further thoughts or advice on possible changes to existing law against immunity?

DT: Currently there is an ongoing International Law Commission project on the immunity of officials from foreign jurisdiction. The project divides immunity into two types. The first question is how widely does one define immunity?, e.g., does it apply to both private and official acts while in office. A very strict interpretation would say such immunity applies to heads of state only, thereby affording an opportunity for all states, including those that are "shouting up and down", to reduce the scope of immunity. NGOs are not involved in that discussion but should properly be holding states accountable for not supporting a narrow interpretation.

In 2017, the International Law Commission adopted a text that was "really progressive" on exceptions for Rome Statute crimes (though it did not apply to the "troika", namely, heads of state, heads of government and ministers of foreign affairs). States had an opportunity to comment on this text, which was then adopted by vote. Here, **DT** commented drily that his audience would be interested to see who voted for and who voted against this progressive text, "You would be amazed!". Interestingly, most states, even those that supported the text, agreed that it did not reflect the law.

Floor: Are you saying there is no conflict between Articles 27 and 98? How do you see this working if the person is not going to be surrendered?

DT: "If you read the Malawi/Chad decision, one of the bases is that, if you adopt this interpretation, you are making the Rome Statute process useless". **DT** begged to differ, saying "the statistics show this to be untrue". If one counted the case of Kenyatta, the issue had arisen in three cases, though in real terms it had arisen in only two, i.e., al-Bashir and, for a very brief period, Gaddafi. It was therefore a 'red herring' to say that it made the ICC useless.

Assuming for argument's sake that an arrest was indispensable, how then could it be done?: there are, said **DT**, "a number of ways to effect such an arrest". The UN Security Council could adopt a resolution that all states have a duty to arrest, and because of the Security Council's superior power Article 98 would not apply. Additionally, the Security Council could authorise peacekeeping missions to make arrests.

Floor: It could be said that the ICC has the responsibility to interpret its own statute. Would there be any risk if the ICJ were to take a different view from that potentially adopted by the ICC? Do you see a risk if the ICJ were to take the same view on the issue of immunities?

LO: The problem as **LO** saw it, was one of the inconsistency of the Pre-Trial Chamber's interpretations of the Rome Statute, which had gone through three changes! The AU had no preferred outcome: it merely wanted clarity.

DT: The ICC is a specialised court. Yet the questions that it has been answering are not specialised but rather about treaty law and customary international law. Accordingly, it would be good to have an international court to look at international law objectively: "The International Court of Justice is just that". This would start a conversation.

Floor: At one point Mexico and France attempted, without success, to get the Security Council to agree that it would suspend the veto power when a referral issue related to Rome Statute crimes. Has that idea got any traction?

OM: The France-Mexico initiative was initiated in 2013. It was a "good, pragmatic proposal". "The problem with a lot of the instruments and the otherwise useful tools that we have", said **OM**, "is that they are framed in a way that presumes goodwill", namely, that the P5 and the other ten countries act not only in their own interests but also in those of international peace and security: "That's a presumption that no-one should have ever made". The reason it had been made was because it dated back to the 1940s, when many of today's countries, including the majority of African countries, were under colonial rule. "That presumption is actually the thing that blocks everything." Furthermore, the proposal is "wonderful, except for the part that says the decision not to use the veto remains voluntary". This is based on a fallacy, since the way in which countries vote is not based on a "five-minute presentation" but is made well before the delegates go into the room. So, even if a country were to be swayed, the decision is one that has already been made.

Floor: With respect to an anti-African bias, clearly the ICC is not going to open an investigation for the sake of appearances or in order to dispel the bias narrative ...but when one knows that 7 of the 9 ongoing examinations affect countries outside Africa, does that dispel the bias?

DT: While the process of preliminary analysis had been very quick in some cases, such as Libya, in others, such as Afghanistan, it had been painfully slow. This was for fear of "poking the hornet's nest because", said **DT** accusingly, "you're going after the big boys and that makes you cautious".

OM: There was concern as to why the OTP had chosen a specific case to prosecute and others had not been pursued. It was not a question of efficiency or professionalism but of perceived bias when it came to the choice of whom to try: **"The challenge is the people whose default presumption is that you're out to get them even when you're not."**

James Stewart intervening from the floor: The ICC issues a report every year on the preliminary analyses that are under way. **JS** would proffer no apologies for the time taken: they had to be sure before proceeding: in the case of the Rohingya, for example, "we cannot afford to fail".

Netsanet Belay intervening from the floor: Criticising the annual reports, he said that, while everybody recognised the need for confidentiality, greater transparency was nevertheless needed.

Floor: The AU said no to the prospect of an ICC office in Addis Ababa. Is that going to change? The situation has been seen as "good versus bad": does the AU office feel that there's a need to rebrand its strategy?

LO: The request had been retabled. The reason why it had initially been denied involved budgetary, legal, structural and political considerations. In **LO**'s opinion, the ICC "needs to push even more".

As regards rebranding strategy, she "would love to" but her office had a limited mandate.

> *"Action for humanity should be put above action aimed at advancing national interests."*
>
> **Ottilia Maunganidze**
> Head of Special Projects - Office of the Executive Director, Institute for Security Studies

PANEL III

Thinking Outside the ICC Box: Domestic and Hybrid Justice for core international crimes

MODERATOR

HASSAN BUBACAR JALLOW

Chief Justice of The Gambia and AGJA Chair

***Hassan Bubacar Jallow* (HBJ)** *noted that the last session of the day would be taking "a slightly different tack" in taking a look at "the architecture and fundamental principles of international criminal justice".*

Since all the international ad hoc tribunals had closed and were survived by the Residual Mechanism, one was essentially looking at the ICC as ***"the only player in town"****. Was it then necessary for old forms to be revived? What are we doing, he asked, to ensure that complementarity is a success and that national jurisdictions are responsible?*

Good examples of some of the challenges currently being faced would come from panellists Geraldine Okafor, and Sarah Kasande in their national jurisdictions, while Stephen Rapp was a man with experience of all three systems.

SARAH KASANDE

Head of Office, Uganda Programme, International Centre for Transitional Justice

Sarah Kasande (SK) said that when it came to the primacy of state jurisdiction, **"Uganda is a good example of how not to do complementarity"**. In light of the Ugandan situation, it is necessary to consider the following questions:

I. what are the minimum conditions that must be in place for the domestic prosecution of international crimes?;
II. what are the motives for setting up a special judicial division?;
III. can accountability be pursued in the context that is inherently "anti-accountability"?; and,

IV. how can we limit the manipulation of a legal process to achieve political gains and international legitimacy?

The International Crimes Division (ICD) of the High Court had been created as a result of the Juba peace process between the Lord's Resistance Army (LRA) and the government of Uganda. This was at a time when accountability had to be seen to be part of the agenda. More cynically, the existence of an international division would also serve to limit the jurisdiction of an international court.

The ICD had originally been vested with jurisdiction over international core crimes but this had subsequently been expanded to include terrorism, human trafficking and piracy.

One of the notable cases before the ICD was that of Thomas Kwoyelo, a senior LRA commander charged with "a raft of offences" under the Geneva Conventions Act and Penal Code. The trial began as long ago as 2011, and while it had admittedly been delayed by a series of challenges on amnesty grounds, seven years have gone by and the charges had still to be confirmed!

Secondly there was the case of Major General Achellam, the LRA's top military strategist and liaison officer between it and the Sudanese government. The Uganda People's Defence Force (UPDF) was refusing to hand him over to the ICD to face trial because of his perceived value as a source of military intelligence.

Lastly, another of the ICD's pending cases was that of Jamil Mukulu, the leader of the Allied Democratic Forces alleged to have committed atrocities in Uganda and the DRC.

All three cases had been marked by perpetual delays, some structural, some procedural.

On the procedural side, Kwoyelo's lawyers challenged

his denial of amnesty, a process which took 4 years. The 2012 Amnesty Act granted amnesty to all combatants, with the result that many returnees were granted amnesty and thus removed from the ICD's jurisdiction. The Supreme Court clarified the application of amnesty in the Kwoyelo Case, holding that amnesty did not extend to international crimes and grave breaches. It only applied to political crimes. In 2015 the Supreme Court reinstated Kwoyelo's trial.

Despite the fact that the pre-trial hearing commenced in 2016, the charges have yet to be confirmed because of:

- a lack of a permanent ICD bench, with frequent changes due to retirement and/or promotion
- having caused a great deal of delay;
- an inadequately resourced Registry facing serious human resource constraints, to the point where there is insufficient staff to perform some outreach functions;
- legal challenges, such as the fact that the indictment has been repeatedly amended;
- the lack of a clear witness protection mechanism; and
- uncertain procedures for victim assistance and participation.

As to the motives for setting up the court, **SK** said that the establishment of the ICD was nothing more than a political tool to shield the Ugandan government from external accountability by demonstrating that Uganda has a domestic system that could handle all these cases. "Can this be legitimately claimed for an inadequately equipped court?", asked **SK**. President Museveni may claim that the country has no need of the international court because it has its own domestic mechanisms "but that is just rhetoric".

"Should we accept it when states say that they are going to implement complementarity, especially when they exercise selective justice?" There was abundant evidence of atrocities committed by the UPDF, yet the government had been reluctant to have investigations and prosecutions carried out by the ICD, arguing that the UPDF had a robust internal disciplinary mechanism for the purpose. To **SK**'s knowledge, however, no soldier had been held accountable by a military tribunal: **"military justice will not satisfy the needs of victims".**

Minimum conditions must be in place for complementarity to be successful. Hence, the question to be asked is, **"Do governments set up these divisions in good faith?"**.

GERALDINE OKAFOR

Chief State Counsel, Complex Case Work Group, Federal Ministry of Justice, Nigeria

Geraldine Okafor (GO) explained that she would be talking about domestic laws, e.g., the Nigerian Penal Code, Criminal Code and Terrorism Prevention Act, as they affected international crimes.

It was difficult to prosecute terrorism offences since this was new under Nigerian law: in the past the Penal and Criminal Codes had been used for common offences but the advent of Boko Haram (BH) had brought with it the need for new legislation in the shape of the Terrorism Prevention Act (TPA). In upholding the rule of law, one of the major challenges faced by prosecutors is balancing defendants' fair trial rights against the interests of national security, which, in the case of Nigeria, have been threatened by BH-perpetrated violence in the form of church bombings, attacks on government buildings and newspaper offices, mass killings, etc. The Complex Case Work Group had been set up to address such cases.

GO proceeded to list some of the challenges confronting Federal prosecutors at the trial of BH suspects at Kainji. These challenges were of various kinds.

- On the investigative side, there were concerns about the methods of investigation. Investigation reports were based primarily on confessional statements taken from defendants with no other supporting evidence. In addition, basic facts and exhibits were missing from some case files.
- Mass arrests led to situations in which the names of suspects occurred more than once, with no way of knowing whether these were cases of mistaken identity or simply instances of different persons

having the same name.

- The suspects presented for trial included a good many victims who had been forced to join BH, thus posing the challenge of how to distinguish victims from culprits.
- On the purely prosecutorial front, the simultaneous existence of two anti-terrorism enactments, the above-mentioned TPA 2011 and the Terrorism Prevention and Amendment Act 2013 (TPAA), raised the problem of which Act to cite when formulating charges. In addition, the sheer volume of cases also made for poorly drafted charges.
- Judicial hurdles included the need to move the court to where the suspects were located, the difficulty of finding trained and qualified interpreters, and the release of under-age suspects for lack of evidence, with the ensuing problems of their rehabilitation and integration into society.
- Witness protection issues: the likelihood of threats and intimidation meant that it was difficult to persuade prospective witnesses to testify.

Despite this, some 2056 suspects were brought to trial. Arrangements were currently under way to go to Maiduguri, where another group of suspected terrorists had been detained and was awaiting trial.

STEPHEN RAPP

Former United States Ambassador-at-Large for War Crimes Issues in the Office of Global Criminal Justice

Before warming to his subject proper, **Stephen Rapp (SR)** took time out to say, **"The AGJA is an extremely important organisation for fighting injustice on the continent and globally"**.

After World War II, courts had been established from the top down by the victorious powers, with the result that an enormous demand for justice was created by these tribunals. However, what he personally would like to see was "not so much justice from the top down but rather from the bottom up …though not exclusively!" Such a development necessarily entailed:

I. victims and survivors that are actors;
II. strong documentation and evidence;
III. supportive officers in justice systems, ideally national;

IV. the need for international assistance, not only from the United Nations but also from states; and,
V. the will to conduct an independent judicial process. Indeed this was precisely why hybrid courts might well be apposite.

Although his attention was currently taken up by Syria and Myanmar, he wished to mention some successful examples of "bottom-up justice" delivered in Africa.

DEMOCRATIC REPUBLIC OF THE CONGO

Here, survivors had worked with medical clinics in the town of Kavumu to bring local militia members to trial in the domestic courts for crimes against humanity. Similarly, there were other instances of international crimes being prosecuted locally, in one case memorably due to the personal efforts of Zainab Hawa Bangura, AGJA member and former UN Special Representative of the Secretary-General on Sexual Violence in Conflict.

CENTRAL AFRICAN REPUBLIC

Despite the fact that the ICC was involved in investigating both sides to the conflict, it was recognised early on that it could not do the job alone. As a consequence, the Special Criminal Court, made up of local and international judges, had been set up within the country's national court system, to work in complementarity with the ICC.

SENEGAL

The trial of Hissène Habré was "a classic example of how everything came together", namely, survivors, evidence, support from Senegal, pressure from the AU and a budget raised internationally, in order to hold a trial some 2,000 km from the scene of the crime. Since the ECOWAS Court (Economic Community of West African States) ruled that a national court could not try Habré retroactively, a "mixed court" had to be created. Accordingly, "the precedent of Sierra Leone was used to establish a court of an internationalised character" in the shape of the Extraordinary African Chambers with an AU-appointed president in Dakar, where a trial was held in which the victims participated. Habré received a life sentence -subsequently confirmed on appeal- for

crimes against humanity and war crimes, **"showing that justice is possible if the various elements are present"**.

LIBERIA

Lastly, **SR** mentioned the Special Court for Sierra Leone which had tried Charles Taylor for crimes committed in Sierra Leone, though not in Liberia. Indeed, there had been "a total deficit" as regards crimes committed in Liberia during the coup, the civil war and Charles Taylor's presidency!

On a more positive note, **SR** focused on "one of the great things in extraterritorial justice" which showed how partnership can work. Firstly, "we have Hassan Bility", with an organisation in Liberia that is developing solid evidence against perpetrators who are in Western countries", and secondly, "we have Alain Werner" the "great Swiss lawyer" who heads up Civitas Maxima and works "to get such cases planted in the right countries".

"In a twelve month period, there have been and will be five major trials", said **SR**. Two had been held in the USA, with the aim of trying, not the original crimes, but the false statements made on entry into the USA and on application for US citizenship. In Philadelphia, the trial of Mohammed Jabateh (aka "Jungle Jabbah"), a man guilty of brutal and horrendous crimes, had seen 15 witnesses flown in from Liberia to testify: Jabateh had been convicted to 30 years. Similarly, in July 2018, a further 20 Liberian witnesses had been brought over to testify in the case of Charles Taylor's former Minister of Defence, Thomas Woewiyu, accused of being the mastermind behind the notorious "Operation Octopus" launched against civilian communities: theoretically, Woewiyu could be facing a sentence of a long as 110 years.

In October of this year, Charles Taylor's second wife, Agnes Reeves Taylor, responsible for organising the special girls unit and allegedly guilty of war crimes, will be in the dock at London's Old Bailey, in what will be only the third extraterritorial case ever to be heard in the United Kingdom. Finally, later this year or early next year, the cases of Martina Johnson, also involved in Operation Octopus, and another warlord are scheduled to be heard in Belgium and Switzerland respectively.

All in all, said **SR**, this showed that, **"it is possible to achieve justice at this impossible time!"**

ELISE KEPPLER

Associate Director, International Justice Programme, Human Rights Watch

Elise Keppler's (EK) experience over the past 14 years of domestic and hybrid accountability efforts across Africa served to show that there is **"some good news"**, in that there are many ways in which accountability can be pursued. To illustrate her point, she proceeded to discuss four examples.

I. The Special Court for Sierra Leone, the "original hybrid court", had enjoyed significant international support and been staffed by a mix of international and Sierra Leonean prosecutors, judges, and registry personnel. In trying individuals from all three warring factions it stood as **"a benchmark for international criminal justice"**.
II. In Guinea national judges have conducted an investigation into the 2009 stadium massacre in which peaceful protesters were allegedly killed and raped by the security forces. **EK** described the investigation as halting and slow but said that matters were nevertheless progressing. To date, over 400 victims have been interviewed, and a former minister and President, among others, had been charged. It has the potential to be an **"historic achievement and an example for Africa" if the trial moves ahead following the investigation's close**, she said.
III. Turning to more recent hybrids which seek to leverage domestic ownership and international collaboration, she cited the Special Criminal Court in the CAR, as a national court in a national system which draws on the expertise, impartiality and independence of its roster of senior international staff who are participating in the proceedings.
IV. As her last example, **EK** mentioned another African hybrid court, the EAC and "the precedent-setting case of Hissène Habré".

Not only is international justice invaluable in Africa, but there are new ways of approaching and delivering that justice. Justice grounded in domestic systems

and delivered as close to home as possible is needed and should be prioritised. Nevertheless, there can be "significant challenges" to prosecuting the worst crimes in national or hybrid courts, and one should therefore not rely solely on such courts. Indeed, **"it is essential to have a global court of last resort" where justice at home, even with some international participation, is not possible.**

The challenges to local solutions are twofold: capacity issues and political will.

Capacity issues are important but can normally be managed. Often these issues relate to mobilising adequate resources, such as computers and adequate evidence-storage facilities, and international expertise. Where there is political will, such support can often be secured.

Political will represents a much more formidable challenge. Sometimes capacity issues are in fact used to obscure the real issue of a lack of political will. If a government is truly against prosecution, no amount of capacity will overcome this, and this is part of the reason why the ICC is such a crucial institution. In this respect, **EK** regarded South Sudan as "an open question", with efforts to establish a hybrid court currently being "held hostage by the government".

In those cases where it may be possible to achieve the necessary political will, **the ICC can be an essential sparkplug for national accountability: "Guinea is the hope of how the ICC can play this role in moving accountability forward" at the domestic level**. Indeed, it was the preliminary examination that spurred Guinea's initial initiative to handle accountability. The jury is out on how this will unfold.

The ICC must remain available to conduct trials of the gravest crimes. **"We have come a long way from when trials for grave crimes were not an option …but we are also a long way from victims being assured access to justice for atrocity crimes".**

q&a

A brief sampling of comments on some points of interest from the floor.

Floor: Nigeria has been promising to bring justice to both sides of the conflict. However, the figures do not add up. How many people have been brought to the attention of the Complex Case Work Group, how many have been tried, how many are in detention, etc.? Is there a single case against military forces in the hands of the Complex Case Work Group?

GO: After challenging the arrest figures cited by her questioner, **GO** went on to explain that many suspects had been released in the course of profiling and investigation. At the time the Complex Case Work Group received its case load, there were over 5,000 case files: of these, approximately 1,500 cases were brought up for trial. A total of 257 convictions were obtained. In addition, a further 119 ongoing trials were taking place around the country because many cases had been referred from Kainji to the regular High Courts in states that had jurisdiction. As regards military and police personnel investigated, there had been a lot of items in the news but "no concrete evidence; only rumours and hearsay", with the result that it had been impossible to proceed to trial.

Floor: What is the position of the defence of the accused and equality of arms? Justice must not only be done: it must be seen to be done.

SR: It is essential to have an effective defence. Indeed, individuals from armed groups are often indigent. At the international level there has to be a defence,

which means that the necessary facilities and means must be available. At the national level, however, the position is a little more complicated: casting his mind back here, he recalled problems involving interference with witnesses, etc. Addressing a slightly different aspect, **SR** mentioned that some Rwandan cases had been transferred to Rwanda, and the defence attorney there had been criticised for not being sufficiently "assertive". **These were the types of things that had to be constantly tackled at a national level, particularly in terrorism cases, where "the accusation carries such enormous opprobrium that defence is rendered complicated".**

HBJ: Local prosecution of international crimes is necessary. The ICC cannot deal with all cases. **While local prosecution is desirable because it has great impact, it nevertheless faces many challenges, such as the need for appropriate laws, strong institutions, good investigation, witness protection and, above all, political will.** Even so, the requisite structures must be in place. Otherwise there could be a real danger of the international community using national systems as "a way of washing its hands". The assistance of the international community is required to underpin national systems in order to ensure that justice is done.

> *It is possible to achieve justice at this impossible time.*
>
> **Stephen Rapp**
> Former United States Ambassador-at-Large for War Crimes Issues in the Office of Global Criminal Justice

CLOSING REMARKS

Welcoming remarks

The day was brought to a close by Navi Pillay **(NP)**, Richard Goldstone **(RG)**, Hassan Bubacar Jallow **(HBJ)** and Bettina Ambach **(BA)** taking it in turn to say a few heartfelt words of gratitude to all those who had taken part -organisers, participants and panellists- and to the Minister of Justice in particular, for having taken the time out to attend and "explain the government's position".

NAVI PILLAY

AGJA member and Former United Nations Commissioner for Human Rights

NP said that each time she attended events such as the day's symposium, she felt "vindicated at having joined AGJA -one learns so much!" She confessed to feeling "energised by the meeting", and so, rather than dwell on the negative aspects of a possible South African withdrawal, she issued a rallying call, saying, **"let's go out there and change the message!"**.

> *"Let's go out there and change the message!"*
>
> **Navi Pillay**
> AGJA member and Former United Nations Commissioner for Human Rights

RICHARD GOLDSTONE

AGJA member and former prosecutor of the ICTY and ICTR

For his part, **RG** made the point that "AGJA's most important work is capacity building to improve the capacity of domestic prosecutions in the recognition that the ICC is the last step and not the first step".

HASSAN BUBACAR JALLOW

Chief Justice of The Gambia and Chair of the Africa Group for Justice and Accountability (AGJA)

In conclusion, **HBJ** not only hoped that the dialogue would continue, but said that "it needs to continue". In this regard, the example of that "little country", The Gambia, might be useful for South Africa.

WAYAMO FOUNDATION

AFRICA GROUP
FOR JUSTICE AND ACCOUNTABILITY

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