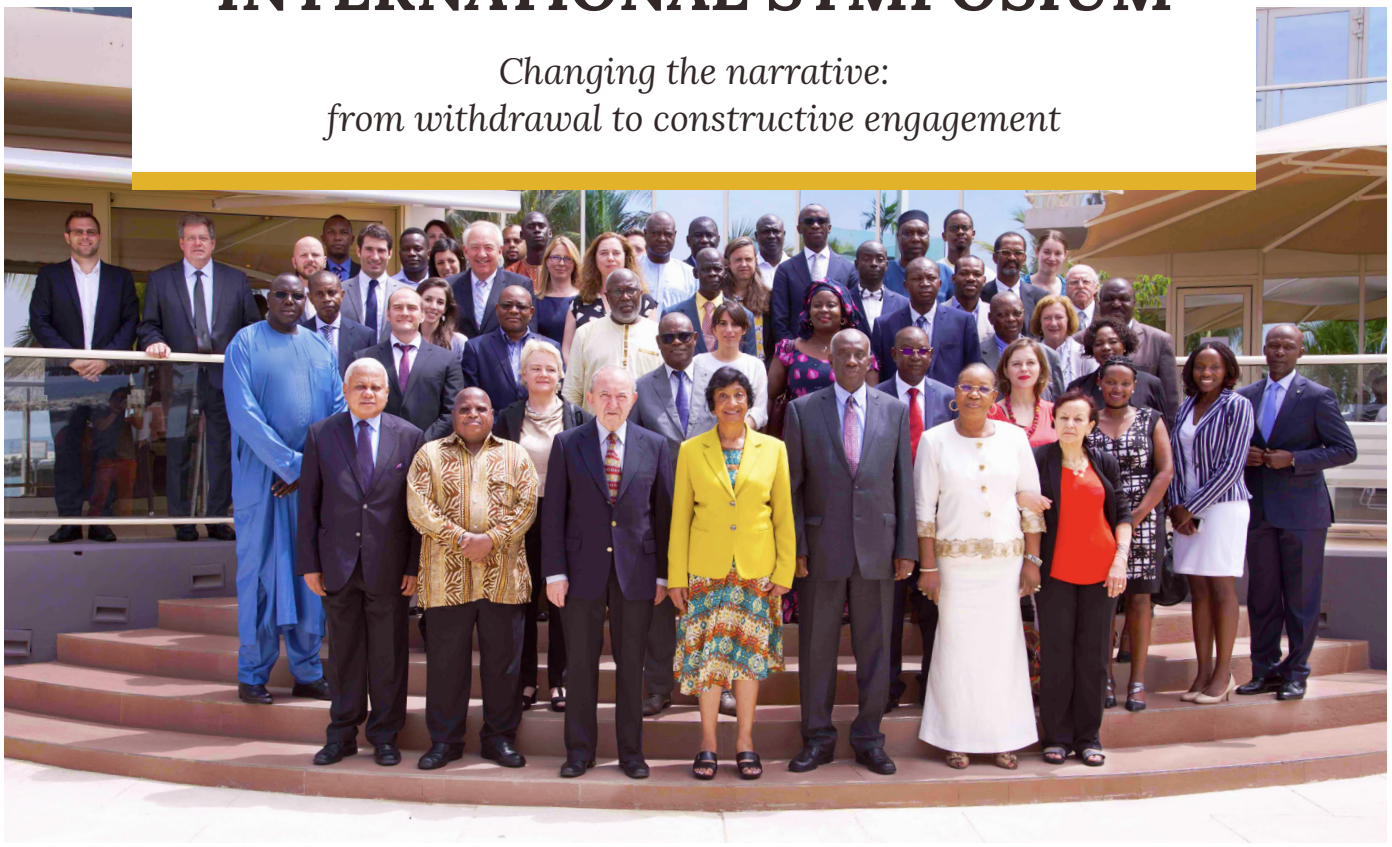
WAYAMO FOUNDATION

AFRICA GROUP FOR JUSTICE AND ACCOUNTABILITY

INTERNATIONAL SYMPOSIUM

Changing the narrative:
from withdrawal to constructive engagement



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TERROU-BI HOTEL
7 - 8 JULY 2017 | DAKAR, SENEGAL

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EXECUTIVE SUMMARY

Bringing together key stakeholders, renowned experts, and leading practitioners, the ***Wayamo Foundation*** *and the* ***Africa Group for Justice and Accountability*** (AGJA) *convened a public symposium in Dakar, Senegal, from 7-8 July, entitled* ***"Changing the Narrative – From Withdrawal to Constructive Engagement"****. The symposium covered the current state of affairs in the relationship between African states and the International Criminal Court, possible reforms to improve the ICC, the re-emergence of hybrid mechanisms to prosecute international crimes, regional efforts to combat impunity, the coming into force of the crime of aggression, the relationship between conflict resolution and justice, and other pressing topics.*

From 7-8 July 2017, Senegal's capital of Dakar was the scene of a public symposium entitled, "Changing the Narrative - From Withdrawal to Constructive Engagement". Convened by the **Wayamo Foundation** and the **Africa Group for Justice and Accountability** (AGJA), the symposium brought together a number of leading stakeholders, experts, scholars, and practitioners in order to discuss a range of topics, including the current status of the relationship between African states and the International Criminal Court (ICC), possible reforms to improve the Court and interpreting the African Union's (AU) ICC Withdrawal Strategy as a package of reforms, the role of hybrid mechanisms in prosecuting international crimes, combating impunity at a regional level, the coming into force of the crime of aggression, and the thorny issue of sequencing peace and justice.

Attending and participating in the learned and often lively discussions were representatives, past and present, from the **ICC**, **United Nations agencies**, **Kosovo Specialist Chambers**, **Extraordinary African Chambers in Senegal**, the **Mechanism for International Criminal Tribunals** (MICT), **International Criminal Tribunal for Rwanda**, **Central African Republic's Special Criminal Court**, NGOs such as **Amnesty International** and the **Institute for Security Studies**, and the **academic world**.

The sheer wealth of experience and knowledge in the room was further underlined by the number of dignitaries who chose to take an active part in the proceedings. These included former Prime Minister of Senegal, **Aminata Touré**, former Transitional President of the Central African Republic, **Catherine Samba-**

Panza, Chief Justice of The Gambia, **Hassan Bubacar Jallow**, Former Chief Justice of Tanzania, **Mohamed Othman Chande**, Permanent Representative of Liechtenstein to the United Nations, **Ambassador Christian Wenaweser**, former UN High Commissioner for Human Rights, **Navi Pillay**, former Chief Prosecutor of the United Nations International Criminal Tribunal for Rwanda and the former Yugoslavia, **Richard Goldstone**, and former United States Ambassador-at-Large for War Crimes Issues, **Stephen Rapp**. Ambassador Wenaweser acceded to taking part in a one-to-one conversation on the activation of ICC jurisdiction over the crime of aggression.

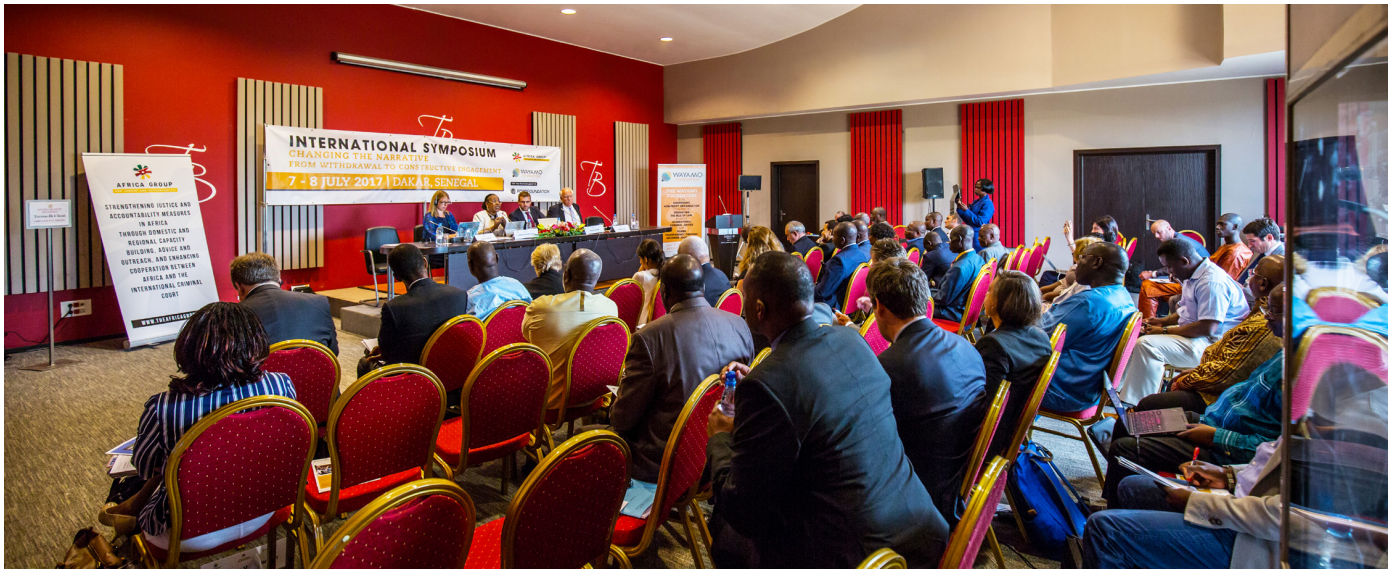
The two-day event was brought to a close by a panel of AGJA members. In addition to recognising the importance of Francophone countries, the Africa Group's Chairman, Hassan Bubacar Jallow, reported that, among other things, the Group intended to **send a mission to The Gambia** and to **monitor the situation in South Sudan**. The AGJA was committed to continuing its capacity **building efforts for East African investigators, prosecutors and judges**, as well as **Nigerian civil and military prosecutors**. For her part, Catherine Samba-Panza was pleased at the fact that the AGJA was continuing its **engagement with the Special Criminal Court of the Central African Republic**.

There was also recognition of the need to continue constructive engagement between international courts and African states. The opinion was voiced –and supported by a representative of the African Union- that the AU's ICC Withdrawal Strategy also provides proposals for reforming the Court and an opportunity for continued engagement.

Yet it was the victims of international crimes and human rights abuses who were the focus of many of the participants' comments. Richard Goldstone was "*delighted at the attention that had been paid to victims*" over the course of the discussions. This message was driven home by Justice Mohamed Chande Othman, who stressed the need to look at the "*gaps*" when addressing the subject of victims, and Navi Pillay who, referring specifically to violence against women and girls, wanted to see "*justice delivered holistically to all victims*". Perhaps the most moving testimony, however, came from AGJA member Tiyanjana Maluwa, who quoted a woman refugee in Dafur as saying:

> ***We want peace. If it is flying in the air, I am prepared to fly and catch it. If it is buried underground, I am prepared to dig to get it. If it is available in the market, I will find the money to buy it.***
>
> *Woman refugee in Dafur*

OPENING REMARKS



BETTINA AMBACH

Director, Wayamo Foundation, Berlin

Looking out at the packed room before her, **Bettina Ambach (BA)** began the proceedings by welcoming all those present to the Symposium on "*Changing the Narrative: From Withdrawal to Constructive Engagement*". After thanking the Ford Foundation for its generous support, she introduced her colleagues on the high table, former Prime Minister of Senegal, Aminata Touré, and Chief Justice of The Gambia and current Chair of the AGJA, Hassan Bubacar Jallow, and greeted the other six AGJA members present in the audience. There were people present from a broad range of institutions, including eight of the newly appointed members of the Special Criminal Court (SCC) in the Central African Republic (CAR) and its Special Prosecutor, Toussaint Muntazini. Indeed, a training session for this group was to be held in Dakar on Monday and Tuesday of the following week.

Why, **BA** asked, had the symposium been given its title? To understand the reason, one had to go back eight months, to the AGJA meeting in Arusha (Tanzania), which had coincided with Burundi's, South Africa's and The Gambia's announced withdrawals from the ICC. As matter stood now, however, The Gambia had reversed its decision, South Africa was seemingly uncertain, and only Burundi apparently remained set on its stated course. At the most recent AU meeting there had been no talk of withdrawal. "*So*", she suggested, "*let's look at constructive engagement, at what we can do improve the ICC from within, address legitimate concerns of African states and explore other international justice mechanisms aside from the ICC*" in the way of, say, hybrid courts, the SCC in Bangui, etc. In this regard, Wayamo had embarked on an initiative to draw up development guidelines for hybrid courts.

6 TOPICS COVERED AT THE SYMPOSIUM:

The current state of affairs in the relationship between African states and the International Criminal Court

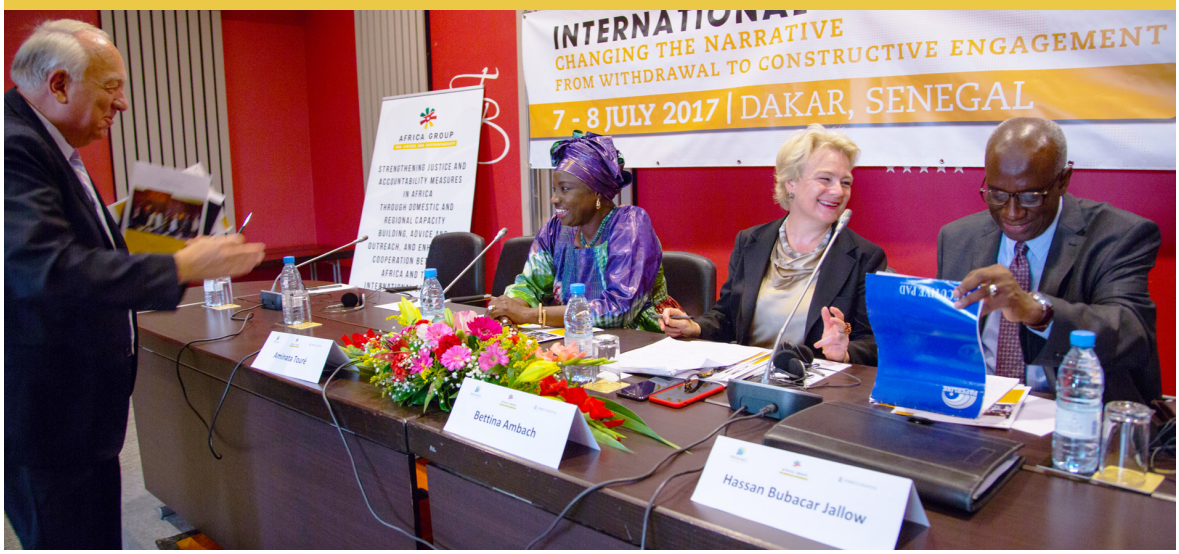
Regional efforts to combat impunity

Possible reforms to improve the ICC

The coming into force of the crime of aggression

The re-emergence of hybrid mechanisms to prosecute international crimes

The relationship between conflict resolution and justice

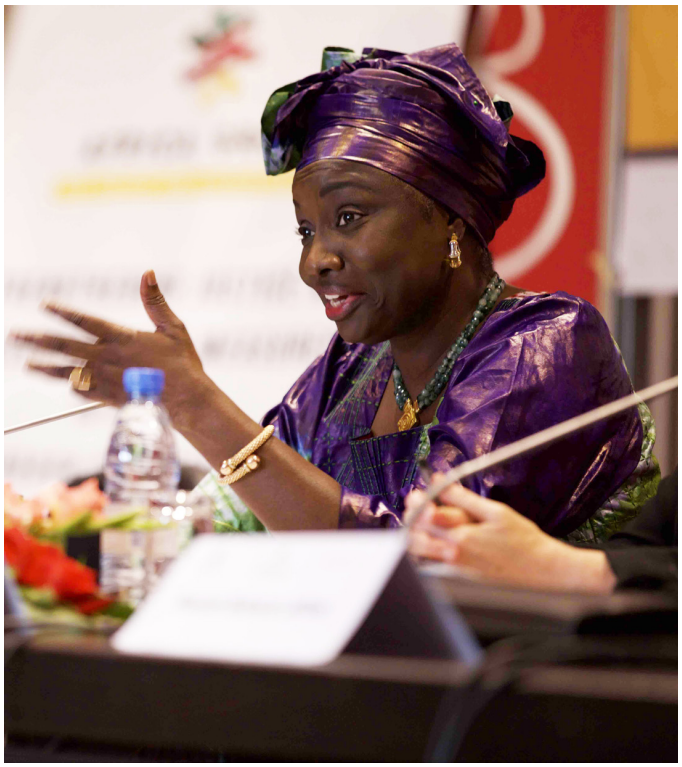


AMINATA TOURÉ

Special Envoy of the President and former Prime Minister of Senegal

Aminata Touré (AT) said that withdrawal from the ICC was a source of concern, though that in the case of the AU, it was not a binding measure. Indeed, Senegal had clearly indicated its desire to remain as a State Party. In her opinion, collective withdrawal would be a failure for any commitment to preserve and protect human rights. The coming two days would likewise also afford an opportunity to reflect on "*indigenous progress in advancement of human rights*", one example being the trial of Hissène Habré.

Extending the jurisdiction of an African Court would not be a bad idea, provided that such a Pan-African Criminal Court were seen, not as a substitution, but rather as an additional court. A further 15 ratifications were needed. An African Court of this nature would be an addition to the diversification of courts.



HASSAN BUBACAR JALLOW

Chief Justice of The Gambia, Former Prosecutor at the International Criminal Tribunal for Rwanda and International Residual Mechanism for Criminal Tribunals, and Chair of the AGJA

After extending a warm welcome to all and to his guest of honour in particular, **Hassan Bubacar Jallow (HBJ)** explained that the choice of venue had not be random: Senegal had been a leader in the human rights struggle and exploring new ways of ensuring accountability, as borne out by the Hissène Habré trial.

The AGJA was just under 2 years old. It was made up of a group of Africans concerned about justice and accountability on the continent, and was aimed at enhancing mediation efforts and acting as facilitators. Since its foundation, the AGJA had been engaged in advancing complementarity through capacity building and training, and encouraging dialogue between the ICC and African countries. The previous day it had held its 4th Strategic Meeting and had taken a number of decisions, including that of indicating its readiness to help in The Gambia with aspects such as the rule of law and accountability, in South Sudan, and in South Africa as regards its position vis-à-vis the ICC, to ensure that the country remained within the ambit of international criminal justice.

Complementarity was crucial in ensuring accountability for human rights violations. The danger inherent in any weak national justice system was that it made for impunity. Consequently, the discussions over the next two days would revolve around how such systems could be strengthened.

PANEL I

Moving the Ball Forward — From Withdrawal to Constructive engagement

MODERATOR

MARK KERSTEN

Munk School of Global Affairs, University of Toronto, Research Director, Wayamo Foundation

*Remarking that there was "never a dull moment", **Mark Kersten (MK)** observed that, despite the fact that the previous day's ruling in the "Bashir case" had found that South Africa was in violation of its obligations, the ICC had nonetheless decided not to refer the matter to the United Nations Security Council (UNSC). Even though this had widely been seen as lenient, an ANC spokesman had said that it justified South Africa's withdrawal from the Court. Such an attitude came in sharp contrast to the fact that 94% of Zambians had voted to remain a State Party to the Rome Statute. **MK** noted too that during the recent 3-day AU summit there had been no mention of the ICC.*

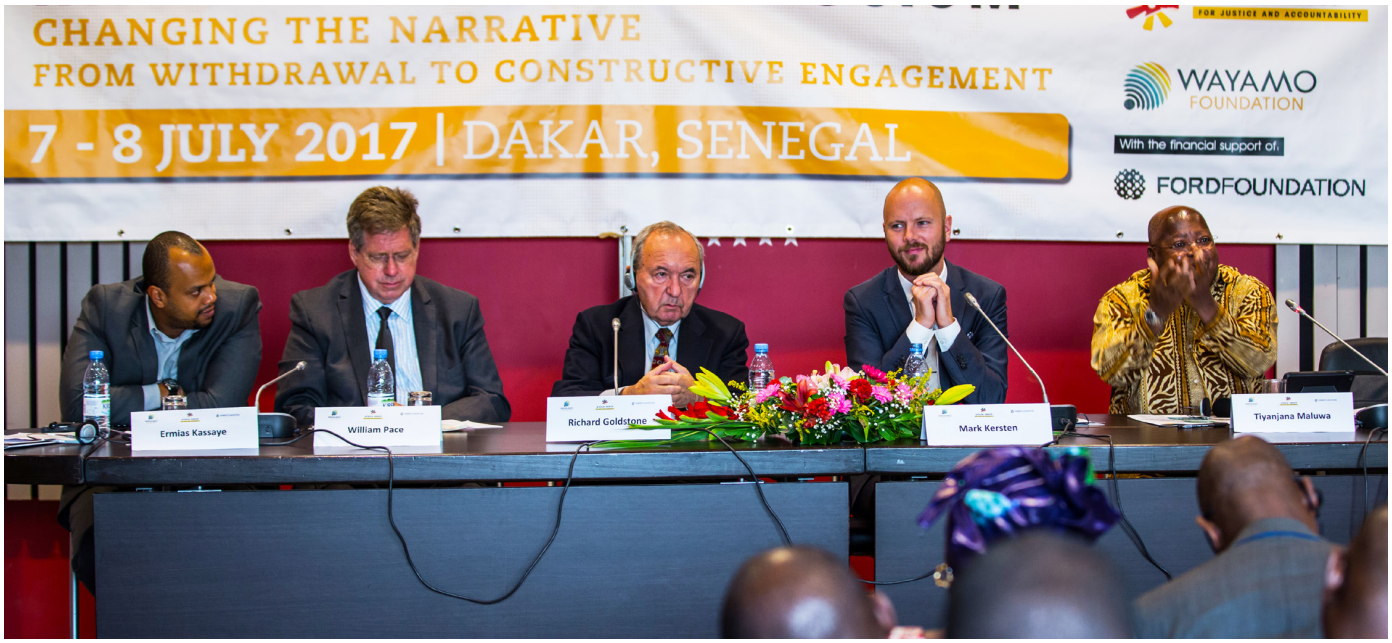
RICHARD GOLDSTONE

Former Chief Prosecutor of the United Nations International Criminal Tribunal for Rwanda and the former Yugoslavia and AGJA member

Richard Goldstone (RG) announced that he would be addressing two topics, namely, the UNSC and complementarity.

UNSC: There was a global problem in the form of the growth of nationalism, populism and the ensuing calls on national sovereignty. This was "*unwelcome soil*" for the ICC because, without the assistance of national governments, the ICC was a "*useless and impotent body*". This was illustrated by the Pre-Trial Chamber's (PTC) ruling in the South Africa/al Bashir case, in which the evidence against the latter was "*well known and notorious*". Even so, the PTC had decided not to refer the issue for the following reasons: referral to the Assembly of States Parties was not necessary because South Africa was engaging with the Court; and previous referrals to the UNSC had brought no result whatsoever. Indeed, the UNSC had behaved "*in a disgraceful way*" in respect of its own two referrals (Darfur and Libya), i.e., the ICC had accepted these but when the Court had been ignored by the respective parties, the UNSC had done nothing, thereby "*shaming itself and the international community*". Seen in this light, the ICC's decision not to refer the matter to the Security Council was understandable.

Complementarity: As intended, complementarity was becoming increasingly important. National judicial systems should do all they could to investigate war crimes domestically, in order to "*pre-empt*" the ICC. Furthermore, positive complementarity was important, and in this context, the efforts of the AGJA in holding workshops and training sessions were pivotal, a case in point being the two-day course that was to take place during the coming week. By welcoming capacity building, countries were taking the first step towards ensuring domestic accountability.



ERMIAS KASSAYE

Legal Researcher for the African Court Research Initiative working in support of the Office of the Legal Counsel of the African Union

The AU had been seized of issues relating to the ICC since 2009, when the AU had called on the UNSC to defer the proceedings initiated against a sitting Head of State. The Darfur referral had created a perception of strategic imbalance in the decision-making process, casting doubt on the independence, neutrality and fairness of the ICC, and leading in turn to interest in a comprehensive strategy that had come to be known as the "*withdrawal strategy*".

An Open-Ended Ministerial Committee on the ICC had been set up to develop strategies to:

- Implement the various decisions of the AU Assembly relating to the ICC;
- Follow up the AU's request for the suspension of the proceedings against Kenyatta and Ruto; and
- Engage with relevant stakeholders until AU concerns and proposals relating to the ICC were addressed.

EK felt that the term "*withdrawal strategy*" was misleading. The aim, among other things, was to ensure that international justice was conducted fairly and transparently without any perception of double standards, ensure reforms of the ICC, enhance the regionalisation of international criminal law, and encourage the adoption of African solutions for African problems. The strategy was three-pronged and sought to amend the Rome Statute, re-word part of the Preamble, and modify the UNSC's power of referral. He stressed that the collective element of the strategy was political rather than legal and sought to ensure leverage.

There had been no mention of the strategy at the recent Summit in recognition of some reversals, i.e., The Gambia's retraction of its withdrawal and the overturning of South Africa's withdrawal by the country's courts. However, there was a push for ratification of the Malabo Protocol.

TIYANJANA MALUWA

Legal Researcher for the African Court Research Initiative working in support of the Office of the Legal Counsel of the African Union

Picking up where **EK** had left off, **Tiyanjana Maluwa (TM)** explained that he wished to highlight a few points. In 2014 the AU had adopted the Malabo Protocol to establish a criminal division of the African Court of Justice and Human Rights (ACJHR). To date the Protocol had only been signed by 10 States, and not one had ratified it. Prior to the Protocol's adoption, the debate had been "*binary*", with the issue of the contribution to international criminal justice on the one hand and the issue of complementarity on the other. The predominant criticism levelled at the AU for embracing

this new policy was that it was both a political ploy to weaken the ICC and a knee-jerk reaction to the al Bashir imbroglio. However, said **TM**, the truth was a bit more complicated. The push for such jurisdiction dated back to the late 1970s when discussions among African States for the adoption of an African Charter on Human and Peoples' Rights were first initiated. He noted that at the time, there had been a proposal by the Government of Guinea to establish an African court with jurisdiction over international crimes, alongside the proposed human rights regime; however, the thrust had been towards prosecuting the crime of apartheid, which had been declared a crime by the United Nations. For a number of reasons, the proposal was not taken up, and it died quietly. Accordingly, the notion of an African court with international criminal jurisdiction was not all that new, and it was not simply a reaction to the al Bashir case, although there is no denying that the indictment of al Bashir resurrected the idea and gave it impetus within the AU.

Similarly, there was the problem of international treaties and conventions adopted by the OAU and the AU which had criminalised certain acts but had failed to provide for their prosecution. There was thus a need to establish a mechanism, and indeed that was precisely why the crimes of mercenarism, human trafficking and piracy had been designated as falling within the projected court's jurisdiction. Furthermore, the Constitutive Act gave the AU a right of intervention over some of the same crimes as those covered by the ICC, in part because at the time there had been a debate as to whether the AU should assume responsibility where member States, which had the primary obligation to prevent or prosecute these crimes, had failed to do so.

Not only did this "*hidden narrative*" need to be articulated but "*complementarity needed to be looked at in this historical context*".

BILL PACE

Convenor, Coalition for the ICC (CICC), New York

Reviewing the last 25 years of international justice, **Bill Pace (BP)** said that the Rome Statute and the ICC were unique and marked a political and legislative "*victory of historic proportions*" for democracies and civil rights organisations alike. Following two World Wars and the Cold War, the decade from 1990 to 2000 had been "*extraordinary*", an "*historic moment in time*". It had witnessed the vanquishing of apartheid and the rise of the AU, the Organisation of American States, the EU and the Office of UN Commissioner for Human Rights. However, the last 16 years had seen some backsliding and we were at "*an existential moment for multilateralism in world affairs*". Even so, there was hope to be drawn from the fact that the rule of law had been enormously strengthened. The coalition of which he was the Convenor, the CICC, was the largest movement for justice since the anti-slavery movement.

The UN General Assembly was the primary place for "*waging the battle*". The Rome Statute was a treaty of veto restraint and there was a need to ensure that the P5 members of the UNSC would continue to support the rule of law.

q&a

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

MK kicked off by asking some of his own questions, after which the discussion ranged through a number of points from the floor.

ICC and South Africa

MK: The lack of a referral to the UNSC had been seen as a kind of olive branch to South Africa to keep it in the fold. Was this enough? How far could the Court go to encourage South Africa?
RG: It certainly was an olive branch!
Indeed, the South African Ministry of Foreign Affairs had made special mention of the fact that there had been no referral to either the ASP or the UNSC. In his opinion, the ANC's spokesman's remark about it being the best reason to make a speedy exit from the Rome Statute, had merely been petulant. South African civil society was in favour of accountability for war criminals and their kind. When the South African Supreme Court of Appeal had ruled against the Government, the latter had withdrawn both its notice of withdrawal and its proposed Bill to repeal the domestic legislation incorporating the Rome Statute. The Court's decision had come as no surprise to the legal profession. **RG** called for the AGJA and similar groups to take the victims into account, e.g., in Darfur.

ICC and African Union: liaison office, Malabo Protocol

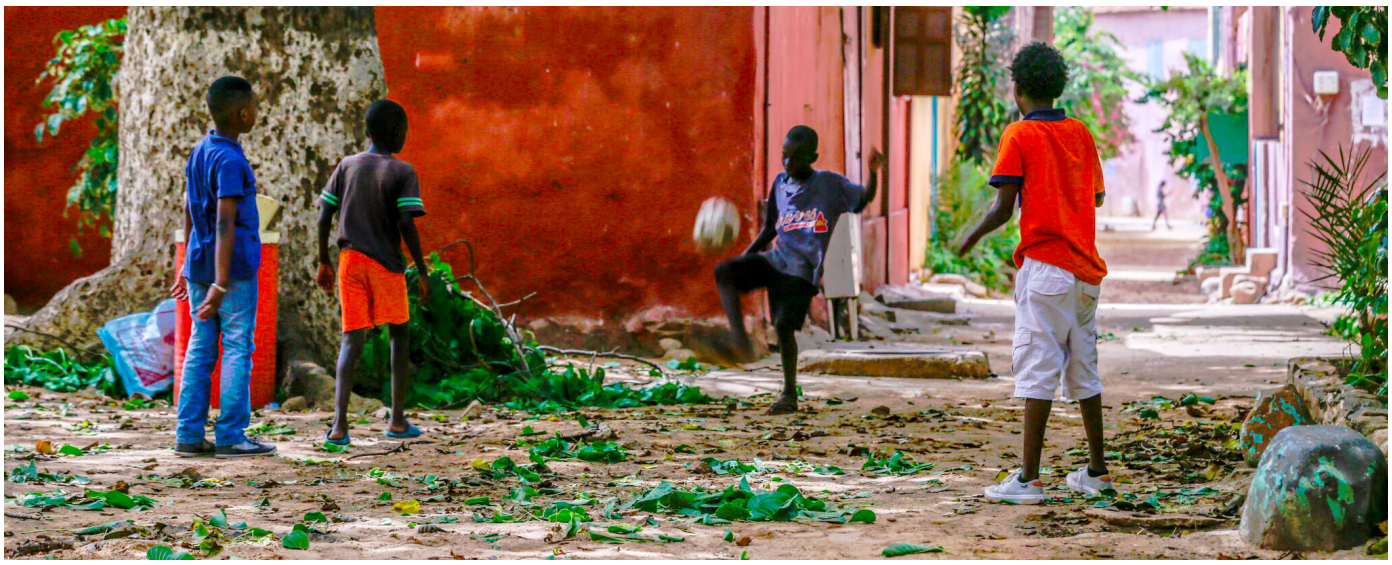
MK: What explained the silence surrounding the topic of the ICC at the last AU Summit, and could that silence be used to engage constructively?
EK: He had nothing to report about the ICC, particularly in view of The Gambia's roll-back and the stance taken by South Africa. He did, however, agree that the lull could be used to engage with the AU. Speaking from the floor, **Fatiha Serour** remarked that the question went directly to the panel title [*From Withdrawal to Constructive engagement*]. One needed to be frank and honest about the move towards withdrawal: there was, she felt, a sense of a double standard. This raised two points: firstly, was there really a will or desire for constructive engagement on the part of the AU?; and secondly, how was one to engage? Should this be part of a formal process or in some other form? The meeting should come up with some potential ways of achieving this. **Richard Goldstone** made the point that in the case of constructive engagement, one could not generalise. Instead each country had to be dealt with on its own merits. One had to "*diagnose the individual disease before diagnosing a remedy*", e.g., whereas the threatened withdrawals by The Gambia and Burundi were cases of leaders who were interested in protecting themselves, that of South Africa had been triggered by petulance at the country's perceived sovereignty being questioned when it came to allowing al Bashir to enter the country.

Aside from constructive engagement, further points included the matter of an ICC-AU liaison office and the Malabo protocol. On the subject of a liaison office, **EK** explained that there had been an attempt to set this up in 2010 but the al Bashir case had caused an impasse.

In answer to a question on the Malabo Protocol, **EK** confirmed that a State could withdraw from the ICC and yet be part of the Protocol. BP felt that it had been "*unfortunate*" that the AU had not gone through with human rights aspects of the court, and that it had been "*a great mistake*" to include Head of State immunity.

Head of State immunity: AU and ICC

MK: The way in which Head of State immunity had been addressed by the Malabo Protocol left the ICC as the only entity able to prosecute sitting Heads of State. Surely such logic was counterproductive?
TM: One should not assume that the States Parties to the Malabo Protocol would be the same as those to the Rome Statute. One had to consider whether or not the adoption of the Malabo Protocol might lead to a reconsideration of the notion of complementarity. Since the Malabo Protocol replicated the ICC crimes, he felt that there should be no problem leaving these to the ICC, thus leading to a situation which he had dubbed "*Rome Plus*". Why should one be afraid of the regionalisation of international criminal justice? After



all, regional human courts had been depended upon for development of human rights: the only difference was that, to date, it been the other way round for international criminal justice: we have started off with an international criminal court, and regional criminal courts might follow.

The ICC and the AU had both made mistakes. The ICC's insistence on having a liaison officer in Addis Ababa, when it had no such officer elsewhere, had played into the narrative that the ICC was focusing exclusively on Africa. AU governments felt marginalised vis-à-vis the UNSC and had imputed the blame to the ICC, when in point of fact, the ICC and the UNSC were two different things.

Aminata Touré commented that it was not just about constructive engagement but rather about ending impunity on the continent: the ideal hierarchy would be where no case was forwarded to the ICC. She would like to see universal jurisdiction being accepted. In the case of Hissène Habré, it had taken a single country to address the issue. Incorporation of universal jurisdiction across Africa would ensure that headway was made. **RG** returned to the aspect of universal jurisdiction a little later on in the discussion, noting that the combination of ratification of the Genocide Convention and ICC jurisdiction meant that national courts and the ICC had jurisdiction over genocide.

In answer to a number of questions from the floor, **TM** said that the provision for immunity for sitting Heads of State under Article 46A bis of the Malabo Protocol was unfortunate but that the Protocol would never have been accepted without it. Article 46 of the Protocol does not directly provide for complementarity with the ICC because the drafters had recognised that not everybody was a party to the Rome Statute, i.e., one could not have one treaty providing for co-operation with another treaty regime. However, **TM** also noted that Article 46L (3) empowered the African Court "*to seek cooperation or assistance of regional or international courts, non-States Parties or cooperating partners of the African Union*"; in his view, this potentially opens a window for some form of "*creative*" complementarity with the ICC.

While endorsing what **TM** had said as regards complementarity, **RG** stressed that there had not been a single ratification of the Protocol, "*just a lot of hot air about it!*" There was neither the political will nor the money and, as a result, it had become "*a political punching bag*".

The first session drew to a close, with a call from **EK** to the effect that AU policy on the sequencing of peace and justice had to be taken into account when implementing ICC rulings; and a more hopeful note from **BP**, to the effect that one tended to underestimate the effect that individuals could have on international justice, human rights and constructive engagement.

PANEL II

Change from Within – Building a Better ICC?

MODERATOR

ANGELA MUDUKUTI

International Criminal Justice Lawyer,
Wayamo Foundation

***Angela Mudukuti* (AM)**: *"The ICC was not perfect and so it was necessary to think of ways in which it could be improved. What could the ICC itself do?"*

DIDIER PREIRA

Former Deputy Registrar at the International Criminal Court

Didier Preira (DP) intended to use the values expressed in the Preamble to the Rome Statute in order to picture what a perfect ICC would look like. On the other hand, being a creation of fallible human beings the Rome Statute was of course fallible in itself, and so other standards or notions of perfection might be thought preferable. Ultimately, it boiled down to the commitment of states to fight impunity and what experience could be gained from the history of mankind.

A perfect ICC would be one where universality was respected voluntarily and where there was effective co-operation between States to allow the ICC to give effect to its decisions. If the principle of complementarity was properly implemented, the ICC would have achieved its goal and would thus become irrelevant.

The idea of perfection was not an end in itself but a process, an ideal standard of, say, impartial and fair trials, with due diligence to prevent delays affecting the victims. In addition, the ICC should have an awareness-raising objective.

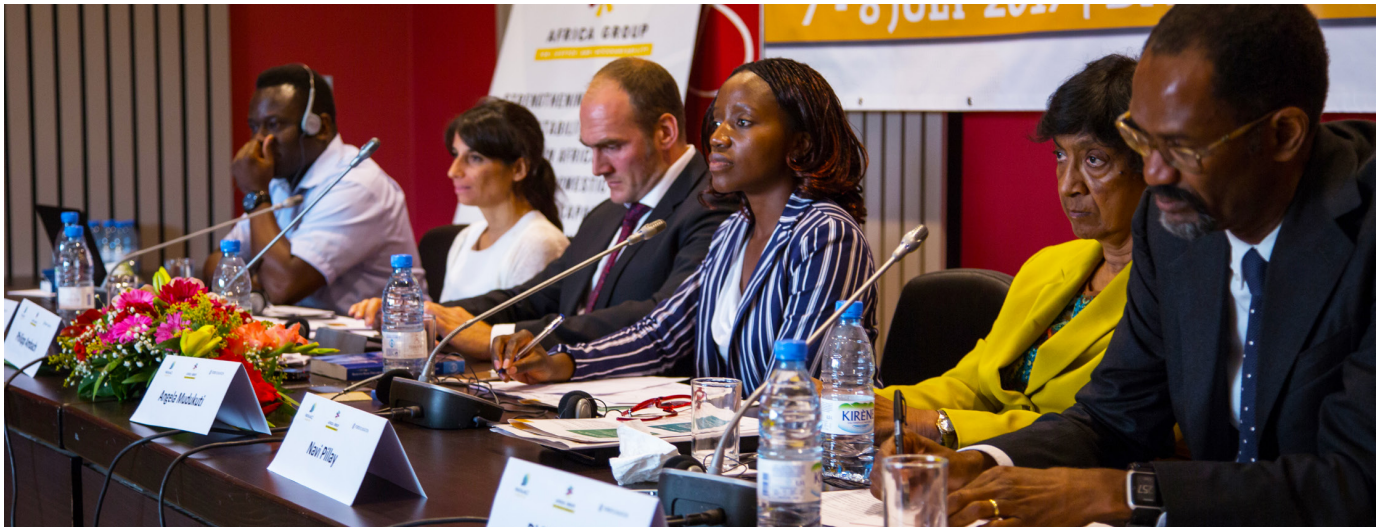
NAVI PILLAY

Former UN High Commissioner for Human Rights and AGJA member

Navi Pillay (NP) observed wryly that nothing in life was perfect, "*which was why we had the AGJA to seek perfection*". There were fake perceptions and fake propaganda about the ICC and it was troubling that people, and worse, students actually repeated such propaganda. Hence, the ICC had to engage in far more outreach to educate people: the Court should be focusing on the masses rather those who are working for it.

Reminiscing about the ICTY and ICTR, she pointed out that, at the time, judges had to work within rules and regulations drawn up by the UN Member States, and that this had inevitably led to a clash between the judges and those States. It was essential to bear in mind that judges had to remain true to principles. Indeed, the South African courts had come under attack from a population that did not understand this.

As to the claim that the ICC was targeting Africa,.one had to respond with facts about how the cases came to the court and what the reach of the ICCs jurisdiction was. This said, however, there had been other instances



where civil society had filed complaints and submissions had been sent to the Court, e.g., in the case of former UK Prime Minister, Tony Blair. In a similar vein, one had to ask what, if anything, the Prosecutor was doing about mass crimes in Palestine. The best solution was to seek universal ratification of the Rome Statute by way of support for the principle of no impunity for these crimes.

Lastly, **NP** acknowledged that Head of State immunity was a sensitive issue in certain States and that the AGJA had the responsibility to see how this matter could be addressed.

PHILIPP AMBACH

Chief of the Victims Participation and Reparations Section in the Registry of the International Criminal Court (ICC)

Philipp Ambach (PA) announced that he would be looking at changes from within from the perspective of performance indicators (PIs) for international and/or internationalised criminal courts.
Such a proposal raised two questions: firstly, why use performance indicators for international(ised) courts?; and secondly, how was one to apply them?

Why have performance indicators?
As to "*why*", PA argued that PIs could enhance transparency and accountability. He defined a performance indicator as "*a measurable value that demonstrates how effectively a company is achieving key business objectives*", whether in terms of overall performance (high level) or work processes and procedures (low level). The ICC was a "*new animal*", a new model of an international institution, inasmuch as it was a treaty-based permanent international court. As a result, many procedures, processes, policies and workflows were being applied for the first time. The ICC needed to adjust itself to steadily changing external circumstances on a "*rolling basis*", and had to ask itself, "*Are we doing things in the right way?*" Similarly, States

Parties demanded stronger efforts from the Court to render its proceedings more efficient and improve its performance. In addition to this, they also wanted to know the answer to the eternal question of "*How much bang do I get for my buck?*", so there was clearly also a budgetary component. From the Court's perspective, such an exercise afforded it a dual opportunity, i.e., on the one hand, to measure itself, and on the other, to touch base with and restore the trust of stakeholders. A "*lessons learnt initiative*" aimed at improving proceedings was thus followed by a shift in emphasis towards overall performance.

How to apply performance indicators?
While PIs for national courts were not a novelty, the problem was how to apply these to an international court, such as the ICC, with a very low number of cases, where every case was unique in terms of subject-matter, amount of evidence, etc., in other words, where there was little or no case-to-case comparability. Instead one had to develop indicators that expressed workload and connect these to time and resources. One would then have to measure in predetermined periods, set a benchmark (i.e., an average number of *x* issues decided in *y* time = 100%), and compare the Court's performance against this in terms of a moving party's evidence

(estimated items of evidence vs. actual), the number of witnesses scheduled and heard (estimated vs. actual), days in court (estimated vs. actual), and courtroom usage.

This would allow for an explanation of what had been done, for both internal and external use. Hence PIs could be said to have a double effect: internally they afforded control and transparency and could motivate; externally they fostered legitimacy through accountability and transparency.

The challenge lay in measuring an international court's performance where this depended on the co-operation of outside actors (arrests, evidence, physical movement, etc.), and its impact on different target groups, such as victims.

SOFIA CANDEIAS

United Nations Team of Experts on the Rule of Law/ Sexual Violence in Conflict

Sofia Candeias (SC) opened by observing that the record on sexual violence in conflict situations was "*not great*". Thanks to States and the civil society caucus, the adoption of the Rome Statute had been a very positive move, an "*incredible tool for fighting sexual violence*". It had introduced many safeguards, reflecting the work of *ad hoc* tribunals. In addition, there were institutional and evidentiary safeguards in the form of obligations of the prosecution, specialised staffing, and prioritisation. This all made for a "*very strong framework*".

However, the question was whether the ICC really put this into practice. In terms of numbers, the Court had a very good record, with the Office of the Prosecutor (OTP) having looked at sexual violence in 7 out of 8 cases (with the exception of Mali), with it being charged as war crimes, crimes against humanity and genocide. Nevertheless, an altogether poorer picture emerged when one looked at the "*real result*" of these charges. There had been what **SC** termed a "*very high attrition rate*". She then proceeded to cite statistics to show that in reality, "*it was not a very good record*". We needed to revisit this subject and "*rethink*" performance indicators and engagement.

A successful case had been the Bemba decision, where a war crime conviction had been secured on the count of rape. In short, "*it was a good day for fighting impunity for sexual violence*". Another aspect that made the case special was the fact that it had been an instance of command responsibility.

STEPHEN LAMONY

Senior Advocate for Africa with Amnesty International, New York

Stephen Lamony (SL) said that he would be tackling two issues, namely, amendments to the Rome Statute, and the OTP's new Prosecutorial Strategy.

Amendments to the Rome Statute

Amendments to the Rome Statute had to be proposed, adopted, and ratified in accordance with Articles 121 and 122, and adopted by a two-thirds majority vote. The Review Conference in Kampala had been seen as a filtering mechanism. Hence, the ASP had only forwarded the proposals for amendments concerning the revision of Article 124, the possible adoption of provisions for the crime of aggression, and the first of the proposals to extend the Court's jurisdiction to cover the use of certain weapons in non-international armed conflicts (NIACs).

An ASP Working Group on Amendments had been created as a mechanism to continue discussions on all of the submitted and any other future proposals. A number of States Parties had also submitted proposals to criminalise things such as the use of biological, chemical, nuclear weapons and anti-personnel mines, terrorism, and international drug trafficking. Much of the discussion had centred on Mexico's and Belgium's proposals. Items were being considered on a "*first come, first served*" basis.

OTP's new Prosecutorial Strategy

Building on the previous plan's achievements, the OTP's new Strategic Plan (2016-2018) would pursue a prosecutorial policy of:

(i) Performing in-depth, open-ended investigations, thus implying the need to consider multiple alternative case hypotheses and test case theories against the evidence (both incriminating and exonerating);
(ii) Being as trial-ready as possible from the earliest phases of proceedings, e.g., when seeking an arrest warrant and no later than the confirmation of the charges hearing;
(iii) Where deemed appropriate, implementing a building-upwards strategy, by first investigating and prosecuting a limited number of mid-level perpetrators in order to have reasonable prospects of securing a conviction for those most responsible;
(iv) Continuing to implement effective investigation and prosecution of sexual and gender-based crimes, and crimes against children, as well as adopting a child-sensitive approach; and,
(v) Working on a case-selection and case-prioritisation policy.

q&a

Angela Mudukuti posed some personalised questions and then took further questions from the floor.

UNSC-ICC relationship

AM: You mentioned that effective co-operation will greatly assist the Court. The ICC's work has been negatively affected by the politics and lack of co-operation at the United Nations Security Council. In designing a better ICC- do we need to change this or perhaps do away with the UNSC link to the ICC?
DP: In brief, UNSC referrals should come with the necessary funding.

OTP and sexual violence

AM: How can the ICC improve its investigation and prosecution of sexual violence? Does the new prosecutorial strategy go far enough in your opinion?
SC: A great effort was being put into training at the OTP level and this had been reflected in the new indictments. She felt that judges as well as prosecutors needed such training. It was important, not only to have prosecution for such crimes, but also "*to get back to the victims*", who needed acknowledgment and "*their day in court*". This might well require outreach.

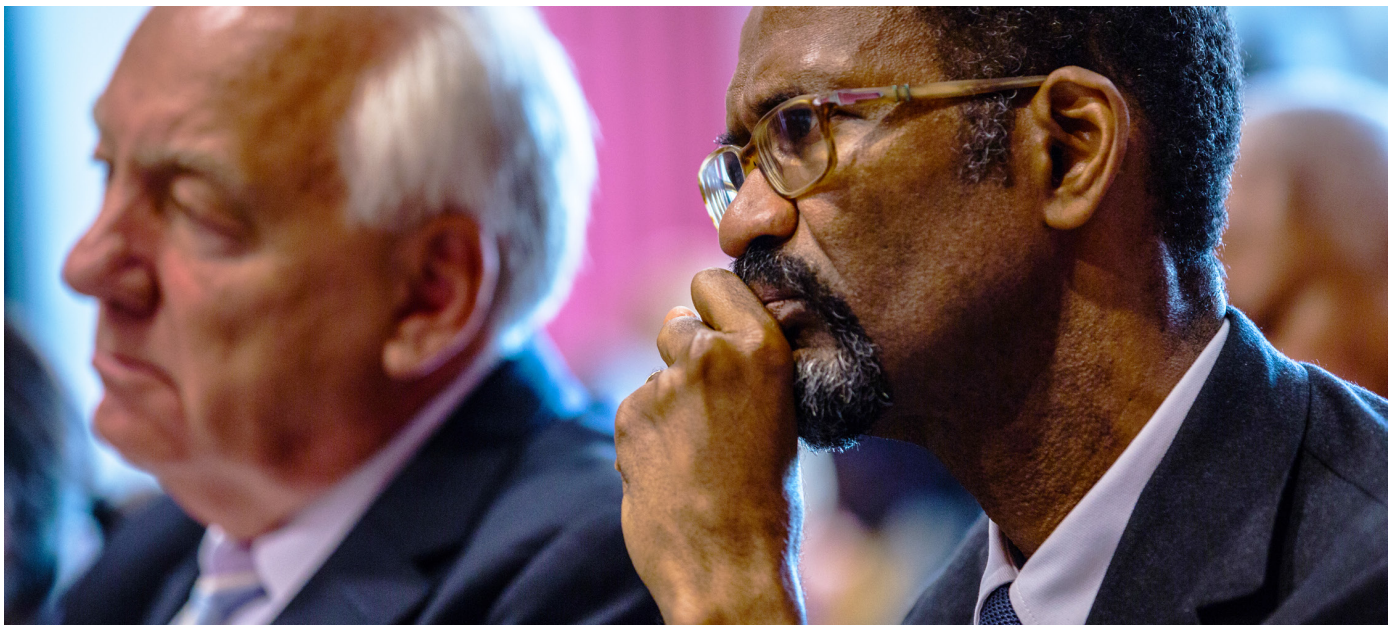
Co-operation and reverse co-operation

DP stated that in an ideal world the ICC should facilitate national jurisdiction. **NP** acknowledged that there were double standards when it came to the big powers co-operating or failing to do so. **PA** noted that the Strategic Plan included reverse co-operation as goal no. 9. **CS** agreed that reverse co-operation was a priority for the OTP, and that it was important to learn from *ad hoc* tribunals such as the ICTY and ICTR. Frankness about co-operation would contribute to the Court's credibility.

UNSC inaction

DP confessed that he failed to understand the UNSC's stance because, due to the architecture of the Rome Statute, the political aspect could have an impact on the judicial side, thereby putting the credibility of the Court and the effectiveness of the Rome Statute at risk.

DRC and **CAR**: sexual and gender-based violence
On the subject of mass rapes in the Democratic Republic of Congo (DRC), SC said that justice in the DRC was deficient but the truth was that the ICC would never



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

be able to address all cases and that the Congolese system had improved. Nonetheless she freely conceded that the Minova trial was "*not good enough*".

In the case of the CAR, there was special sensitivity for victims of sexual and gender-based violence (SGBV) but the fact that there was an ongoing conflict meant that there were huge security challenges. However, there was extensive documentation of SGBV crimes going back some 15 years, so witness protection could be planned.

Itinerant ICC (Article 3, Rome Statute)

DP felt that the questioner, Mbacké Fall, was "*quite right*" in his contention that the ICC could sit outside The Hague, and that, in his view, it would be ideal for trials to be held where the crimes had been committed, or alternatively, in neighbouring countries. Indeed, the ICC had already looked into moving its seat, partially or wholly, (the Lubanga case being one instance). **PA** observed that, although the notion of an itinerant court might be feasible, it would be extremely expensive; on the other hand, the possibility should be kept alive in order to bring proceedings closer to the crime.

ICC justice: complementary or competitive?

NP said that there was a perception that the ICC provided "*superior justice*" and that, despite all the criticisms, the threat of international justice did seem to have a deterrent effect, inasmuch as certain people did not appear to be quite so eager to travel abroad as they might have been in the past, citing former President's Bush apparent reluctance to step foot in Europe as an example. For its part, Kenya had been advised to hold national trials but the ICC had again been seen as a higher jurisdiction.

By way of a general comment, **SL** pointed out that the ICC was not perfect. An ongoing review was necessary, and African countries should therefore "*get involved in fora*", with the aim of improving the Rome Statute.

PANEL III

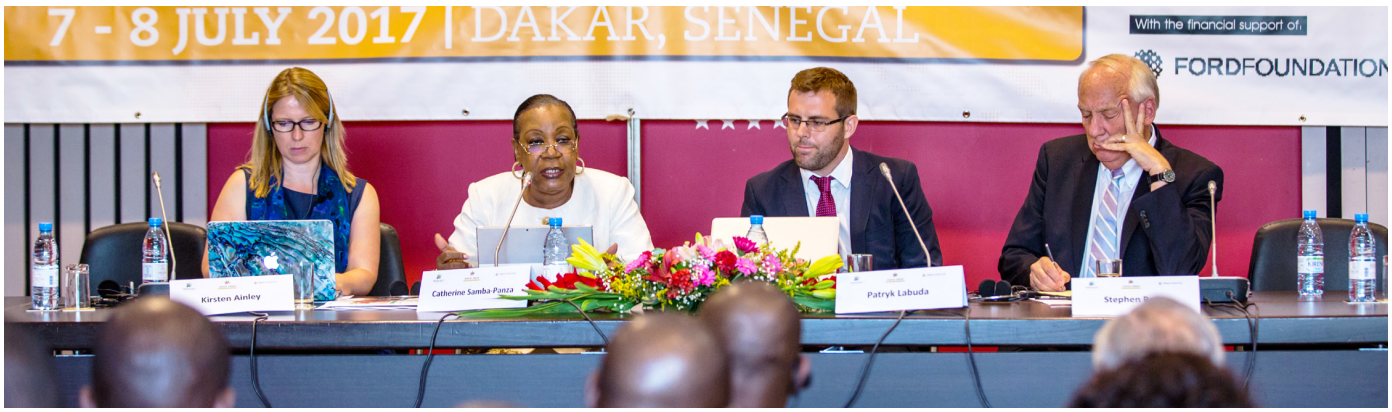
Complementarity: a holistic approach to international criminal justice

MODERATOR

PATRYK LABUDA

Ph.D. Candidate in International Law at the Graduate Institute of International and Development Studies, Geneva Academy of International Humanitarian Law and Human Rights

Before introducing his distinguished guests, ***Patryk Labuda (PL)*** *explained that the leitmotif running through the panel discussion would be a review of complementarity in the broad sense to see how national institutions could help in the fight against impunity.*



CATHERINE SAMBA-PANZA

Former Transitional President of the Central African Republic and AGJA member

Catherine Samba-Panza (CSP) said that she would focus on complementarity as exemplified by what was happening in the CAR. International criminal justice had started as a response to the perpetration of atrocities on a large scale. The first generation of *ad hoc* tribunals, the ICTY and ICTR, had been created by the UNO, not only to punish but also to contribute to reconciliation and peace. These two tribunals had been criticised for being too costly and too slow. Moreover, there had been a huge gap between the international judges and the local population, which had rendered the role of the tribunal counter-productive.

To remedy this, hybrid tribunals had been envisaged, where international judges would sit alongside a series of national judges who had not been implicated in the previous regime. This would speed up the process and make any verdict more legitimate and acceptable in the eyes of the population. Trying crimes where they had been committed allowed for the criminal justice system to be "*owned*" by the local authorities. Such hybrid tribunals would enjoy primacy over the national courts, and would apply both national and international law. However, the fact that such tribunals would sit where the alleged crimes had been committed meant that security would become an issue for staff and victims alike, especially since the situation was in flux.

Successful instances of the use of such mechanisms were to be found in Sierra Leone, Cambodia, East Timor, Kosovo, and notably, the African Extraordinary Chambers in Senegal. The Special Criminal Court in the CAR was just one more in this long list of internationalised tribunals. The CAR had been embroiled in a profound crisis since 2013, characterised by large-scale violence and thousands of victims of sexual crimes. There was a need for fair trials, both for the victims and to show the perpetrators that such crimes and such gross violations of human rights would not go unpunished.

The SCC was to be made up of 12 Central African and 11 international judges and would have hybrid jurisdiction. The Court would be anchored in the CAR procedural system with the possibility of filling any lacunae in the national law by resorting to international norms and laws. It would work in complementarity with the ICC, and would leave space for the ICC which had opened its own investigation. Indeed, this was the first time a hybrid court had been set up while the ICC was still active and while an armed conflict was still ongoing.

It was important that the SCC did not only administer justice but also served to overhaul and reform the country's judicial system.

KIRSTEN AINLEY

Department of International Relations, London School of Economics

Kirsten Ainley (KA) was collaborating with the Wayamo Foundation on a hybrid-tribunal research project, funded by the Rockefeller Foundation and the Institute of Global Affairs at the London School of Economics. The project had arisen from discussions at a Wayamo meeting in Arusha the previous year, at a time when new hybrid tribunals were being set up (in the CAR and South Sudan in particular). In the realisation that there was little consolidated knowledge on such hybrids, it had been decided to draw up guidelines based on lessons learnt.

"*Are hybrids significant?*", she asked: "*Yes, enormously!*" was her immediate retort. One of the most dramatic shifts in international politics in the last thirty years had been the increase in the use of international or internationalised criminal justice mechanisms, particularly in post-conflict states. Early mechanisms had included the ICTY and ICTR, and hybrid criminal mechanisms for East Timor, Sierra Leone, Cambodia, Bosnia and the Lebanon. These hybrids had featured varying combinations of international and domestic staff, operative law, structure, financing, and rules of procedure. The establishment of the ICC had not rendered these hybrids redundant. Indeed, there had been a resurgence, e.g., not only as seen in Senegal and the CAR, among others, but they had been proposed for South Sudan, Sri Lanka and the Ukraine as well.

Advantages

Hybrids offered a number of advantages over domestic forms of justice and ICC justice:

- International involvement could confer a level of legitimacy;
- Hybrids could raise external funds because they were not just domestic mechanisms within a national court system;
- They could be adapted to specific contexts, incorporate national laws into their mandate, try more cases than the ICC would be able to, and take place in States which have not ratified the Rome Statute; and lastly,
- Hybrids were often based in or near the scene of the crime(s), so justice could be seen to be done.

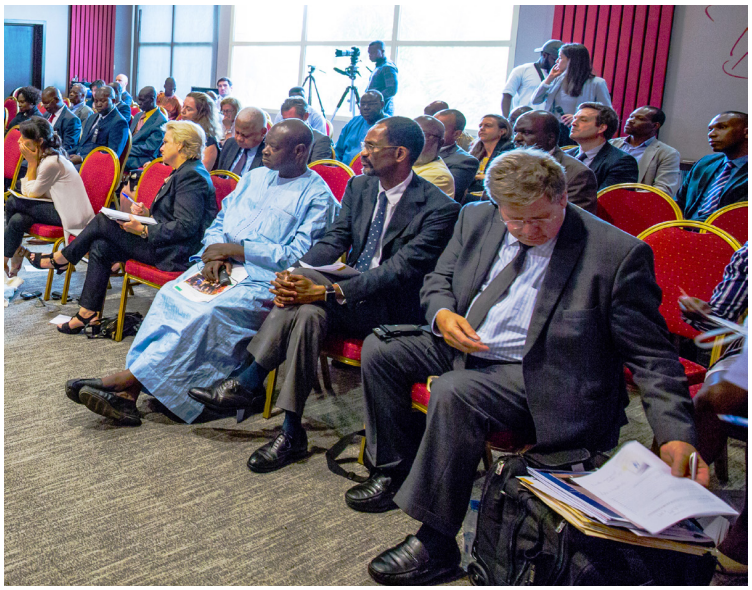
Disadvantages

However, they also had disadvantages, including:

- Accusations of politicisation in their practices and case-selection;
- Insecure funding streams; and
- Questions over the quality of trial practices and jurisprudence.

Furthermore, because hybrids were seen as a pre-ICC mechanism, there had been little research on their impact. It was difficult to gauge their success …or even whether they had been successful!

In fact it was difficult to define exactly what a hybrid was, since tribunals could be hybrid in terms of their establishment, their staffing and their funding, and the substantive and procedural law that they applied. They could be founded by partnerships between international organisations and State governments, by transitional authorities, or by national governments.



There were also various interesting examples of hybrid institutions that were not courts but had been designed to facilitate prosecutions, as in Guatemala, Honduras and Mexico. The International, Impartial and Independent Mechanism was an independent mechanism that had been set up by the UN with very high levels of interaction with parts of Syrian civil society to gather evidence. This showed that there had been a lot of innovative activity in this field.

KA was interested in learning from the participants about what had been learnt, particularly regarding abortive attempts to set up hybrids and "*red lines*", i.e., signals indicating that no attempt should be made to set one up. Particular pressures had been faced from donors, host States, States which opposed the mechanism, and other interested parties. She was interested in ascertaining the impact that hybrids had on societies: did they achieve reconciliation? How could one ensure that they had a positive impact? KA informed her audience that there was a website (hybridjustice.com) containing a comparison of past and present hybrids, and reminded them that she would be very keen on receiving their feedback.

STEPHEN RAPP

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

Stephen Rapp (SR) said that achieving justice involved a diversity of players and courts, e.g., Belgium's role in ensuring the trial of Hissène Habré or that of Spain in the case of Pinochet. This highlighted the underlying importance of courts exercising jurisdiction over these types of crimes. Thanks to the initiative of Liechtenstein (in the person of Ambassador Christian Wenaweser) and Qatar, December 2016 had seen the UN General Assembly vote of 105 to 15 in favour of adopting a Resolution to set up the International, Impartial and Independent Mechanism to Assist in the Investigation and Prosecution of Those Responsible for the Most Serious Crimes under International Law Committed in the Syrian Arab Republic since March 2011 (better known as "*the IIIM*" or "*the Mechanism*"). The IIIM's mandate was to assemble and analyse evidence of international crimes to a prosecution standard, in order to facilitate and expedite future proceedings in courts and tribunals. Cases were already in progress in Spain and in Berlin.

The IIIM is now developing its capacity to collect and collate evidence from groups and organisations that had already gathered materials; to conduct additional investigations itself; and to analyse the collected evidence and prepare evidence files for trial purposes. The Mechanism must pay particular attention to the responsibility of distant key actors and high-level perpetrators, in a way that makes use of state-of-the-art techniques to verify witness evidence. In addition, it should develop a program to protect witnesses until their evidence was required in courts with jurisdiction of the crimes, and these courts could take over the witness protection responsibilities.

The need to create such a Mechanism was primarily due to the UNSC's inability to refer the matter of Syria to the ICC. Secondly, the route to establishing a hybrid court usually required the consent of the sitting government,

something that would never occur in the case of Syria where the government itself was responsible for intimidating and terrorising its own population. These same blockages also would also have prevented an independent inquiry were it not for the avenue available through the UN Human Right Council in Geneva to create a Commission of Inquiry (CoI). This CoI has prepared excellent narrative reports on the violations but has not been able to obtain and preserve evidence that meets a criminal justice standard. The IIIM, on the other hand, can "*reach out in all directions*", bring in and vet material, and put linkage evidence together with crime-base evidence.

The Mechanism relies on voluntary contributions; it is currently being staffed and a Secretariat was being formed.

It is essential to build up a body of evidence for the day when justice could be done. "*You can't miss the opportunity to get evidence when you can!*" admonished **SR**.

q&a

Patryk Labuda now opened the debate to the floor, with some of the most penetrating questions coming from AGJA Member, **Fatiha Serour**, Ambassador **Christian Wenaweser**, and a representative of Amnesty International.

SCC and security

CSP acknowledged that all the questions were relevant because they touched on sensitive issues, particularly security. The CAR had been beset by security problems for over 20 years, and the situation was ongoing. It was therefore important to ensure that the SCC's legitimacy would be based on dialogue and grassroots consultations. Opinions had been canvassed from 16 districts and a forum then held in Bangui. The conclusion reached was that the country sought "*zero impunity*": it was not amnesty but justice that was wanted. Due to the weakness of the national judicial system, a special court was necessary. As transitional Head of State, she had thus had to sign a Memorandum of Understanding to allow the United Nations Multidimensional Integrated Stabilisation Mission in the Central African Republic (MINUSCA) to come into the country. The prevailing insecurity meant that evidence collection was difficult. However, offences and crimes were being mapped and NGOs were being encouraged to "*get close to the victims and obtain evidence for the SCC*". Securing witness testimony was a problem, owing to the continued presence of the perpetrators and the lack of capacity to arrest them, since many of the people concerned were warlords and were well equipped.

Even so, **CSP** thought it timely to establish a court while there was insecurity. Pacification was a long process, and in the meantime, the perpetrators had to be made aware that their crimes would not go unpunished. There was a "*vicious circle between amnesty and impunity*".

Peace and justice

KA: Although there was a belief that justice mechanisms could bring peace, there was no real evidence to

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

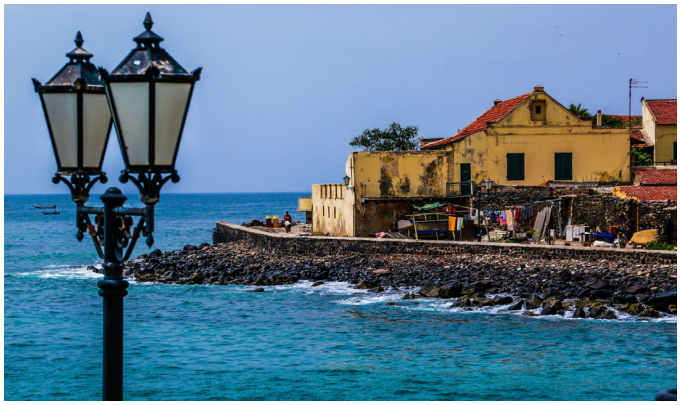
support this. Indeed, amnesties might be needed to bring peace. Social science involved the study of fluid situations, so that what was true in the past was not necessarily true in future. Colombia was a case in point, an example of a "*smart interaction between peace and justice*". The ICC had not intervened, and yet now there was a peace deal with the possibility of prosecutions for atrocities. If the ICC had acted on a principled basis, however, peace might never have happened. One needed to be politically astute when bringing justice and combating impunity.

SR commented that in Colombia there had been a good deal of engagement with the victims. It was essential that they understood the choices and that their interests were represented. The alternative of a "*political stitch-up*" would have been "*disastrous*".

IIIM and parties other than the Syrian government

SR: In response to concerns that the IIIM would concentrate solely on Syrian Government actions and disregard those of other parties to the conflict, he assured his listeners that civil society was active and that efforts to obtain documentary were quite advanced. It had been possible to bring such evidence out "*by the tonne!*" The IIIM had the necessary authority to work with such civil society organisations. Nonetheless, he conceded that the parties involved might be accused of "*having an axe to grind*". There were a lot of people co-operating in Syria, at great risk to themselves; because of this, an application had been made available which allowed for anonymous online transfer of files.

Speaking from the floor, **Christian Wenaweser** reassured the audience that there was enormous documentation of crimes committed by ALL sides and that ALL perpetrators fell within the scope of the IIIM. Nevertheless, there was a huge impunity gap. While the ICC might be the "*principle piece in international justice*",



it was not the only one, so "*options had to be creative*". As there was so much evidence and as there was no shortage of funds at present, he felt that the IIIM would have no need to go to Syria. "*The Mechanism*", he said, "*could be a trailblazer for other initiatives*".

Hybrid courts, SCC: funding

KA pointed out that hybrid courts did a different job to that of national courts. It was never a straight choice, yet such mechanisms should be held to high standards because they cost such an enormous amount of money to run. Funding could certainly pose a problem, as in Sierra Leone where there had not been enough left over for reparations.

CSP agreed that funding was an issue of concern when it came to the question of whether the victims would really be compensated. The challenge therefore lay in creating a sufficiently large trust fund for victims.

SR said that it was necessary to work together, in order to oppose the idea that courts had to be supported by voluntary contributions: he always cited Senegal as an example of a court that worked within its budget. There should be adequate funds for courts based on adequate pay scales; otherwise he foresaw problems.

CONVERSATION

The Road Ahead – The activation of ICC jurisdiction over the crime of aggression

A CONVERSATION BETWEEN

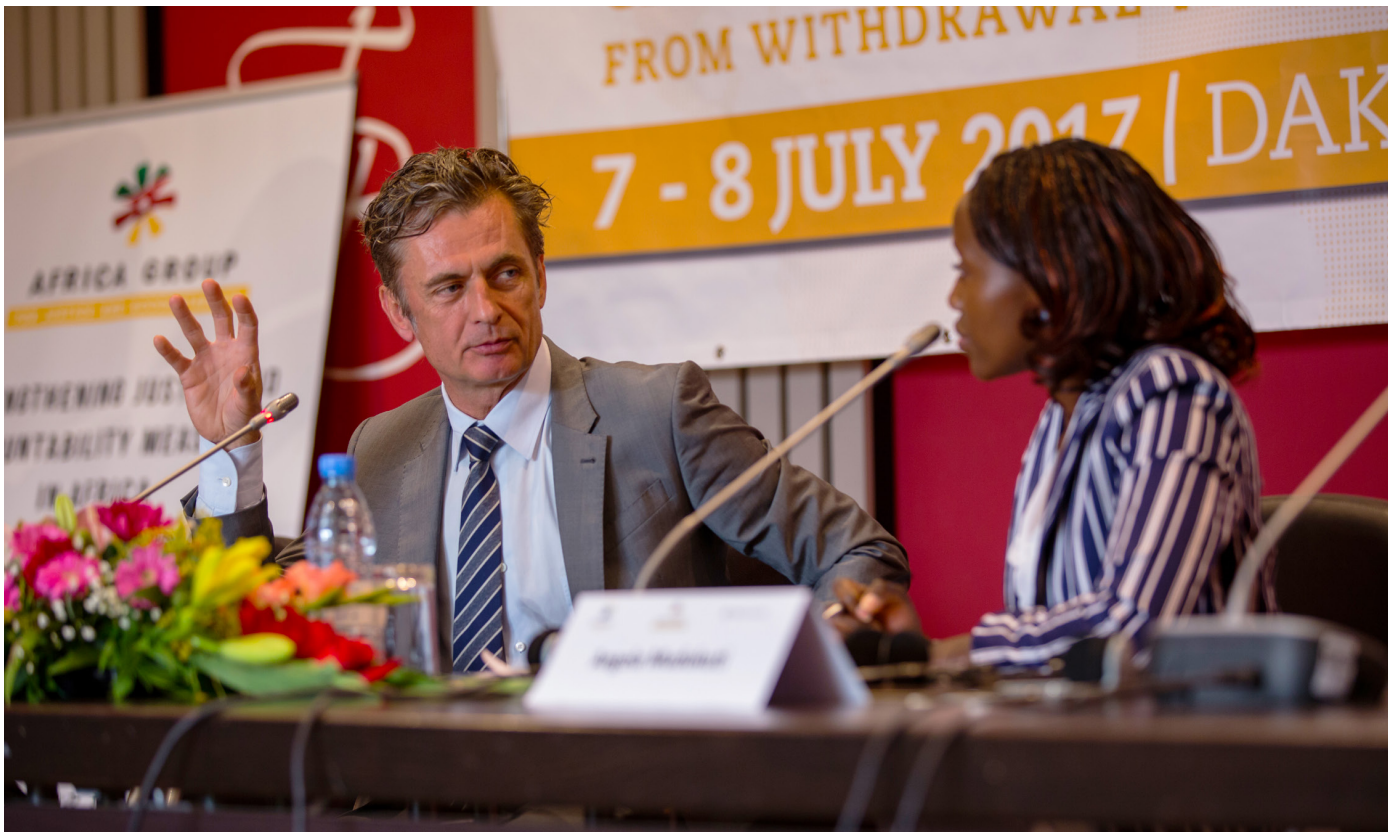
AMBASSADOR CHRISTIAN WENAWESER

Permanent Representative of Liechtenstein to the United Nations

ANGELA MUDUKUTI

International Criminal Justice Lawyer, Wayamo Foundation

In a break from the traditional panel format, the last session of the day took the form of a conversation, in which Ambassador ***Christian Wenaweser (CW)*** *fielded questions from* ***Angela Mudukuti (AM)*** *and the floor.*



AM: Firstly, how was one to define aggression?
CW: "*Aggression in legal terms is the most serious form of illegal use of force by one State against another*", said **CW**. A distinction had to be drawn between an act of aggression and the crime of aggression, inasmuch as individuals could be held criminally responsible for the act, an instance of this being the case of von Ribbentrop. As modern-day examples of both, **CW** cited the annexation of Kuwait under Saddam Hussein and Russia's annexation of Crimea.

AM: Had enough been done to ensure that States know how to activate the crime of aggression?
CW: States had had seven years from the Kampala Review Conference to now. This was quite enough for ratifying the amendments. There had been a great deal of awareness-raising, so, in short, "*Yes, enough had been done!*".

AM: Thirty-four countries had ratified the amendments but one country had opted out, i.e., Kenya. Would more countries follow suit?
CW: Firstly, this was a government decision which was not irreversible; and while it was of course possible that other States might opt out, there was no indication that this would happen "*in big numbers*".

AM: Initially there had been a lot of support but did he think that the crime of aggression would "*resonate with African leaders*"? Indeed, why did African States need the ICC to cover this, if they had their own mechanism "*in the pipeline*"?
CW: The decision to include the crime of aggression dated back to the earliest days when African countries had been very supportive. Personally, he did believe that it resonated with African States. The important thing was that there was accountability. Not every case had to be adjudicated before the ICC: this principle applied to the crime of aggression just as it did to other crimes. However to have the "*supreme crime*" included in the Rome Statute was crucial.

AM: UNSC involvement in the ICC had been perceived as selective justice. Was the UNSC's intrinsic involvement an obstacle?
CW: The UNSC's role in the crime of aggression had been conferred by the UN Charter. There had been a "*big battle*" in Kampala as to whether this competence

was or was not exclusive. Since exclusive competence on the part of the UNSC had been viewed as dangerous, the solution reached in Kampala was a key element in making it politically acceptable and safeguarding the ICC's independence.

AM: Coming back to the definition of aggression, could the use of force for atrocity prevention be considered a crime of aggression?
CW: Not every use of force amounted to an act of aggression: there had to be a "*manifest breach*" of the UN Charter. However, after a period of disengagement, the USA had rejoined the Kampala negotiations and voiced its concerns regarding the use of force in humanitarian interventions. As a result, a set of elements, known as the "*Understandings*" had been drafted to clarify the position, and the threshold was now a high one.

AM: Who would be subject to ICC jurisdiction over aggression?
CW: In contrast to the position with other crimes, the Kampala definition did not apply to non-States Parties. Neither did it apply to all States Parties, e.g., Kenya had opted out. There was a difference of opinion ("*the only point of non-convergence*" as **CW** phrased it) over the scope of application between States Parties. While everyone agreed that jurisdiction did not apply to all States Parties, there were different views on whether States had to make their desire not to fall under the Court's jurisdiction explicitly clear. He was of the view that the Kampala Amendments offered every State Party the option to opt-out of the jurisdiction, and that a declaration to this effect could be made and would have the intended legal effect. But he was aware that others held the view that the legal regime did not apply to all States Parties. Announcing that jurisdiction over the crime of aggression was limited to the 34 States that had ratified was "*not a good signal*" to send out.

AM: What could be done to prevent aggression?
CW: The world had been trying to do this for 70 years and that was precisely the reason for establishing the United Nations. The Kampala Agreementy were "*an adjunct to the UN Charter*". Only one part of the overall prevention strategy lay with the UN.

q&a

How to "sell" the Kampala amendments to States

CW favoured what he termed "*the rule-of-law argument*", i.e., clarity, having a clear definition agreed by consensus to be used at the UNSC and in national systems. Jurisdiction would follow ratification. States that believed in humanitarian intervention would then have this definition to guide them, and in the last instance, could always opt out if they so wished.

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

Humanitarian Intervention

Stephen Rapp (SR) rose to make a number of observations on the Kampala process and the US stance. The USA desired to make the ICC effective in pursuing atrocity crimes. Article 5 of the Rome Statute would be activated as a result of the process, and he very much respected **CW**'s courage in achieving this.

However, there was the matter of genocide: if the UNSC was blocked in such a situation and, in light of the Kampala amendments, countries were wary of being prosecuted, one might have less action, with States using the inclusion of the crime of aggression as an excuse for inaction. To this, **CW** replied that at the end of the day it was the Court that applied the law. Humanitarian intervention was controversial and supported by only a limited number of States, which had meant that it could not be written into the Understandings.

PANEL IV

Filling the Gaps — International Criminal Justice Beyond the ICC

MODERATOR

MOHAMED OTHMAN CHANDE

Former Chief Justice of Tanzania and AGJA member

***Mohamed Othman Chande* (MOC)** *introduced his panel as "real experts in the field" who would be identifying the gaps to be filled by the various bodies. While some courts had completed their mandates, there were other new mechanisms, e.g., in the CAR and Kosovo.*

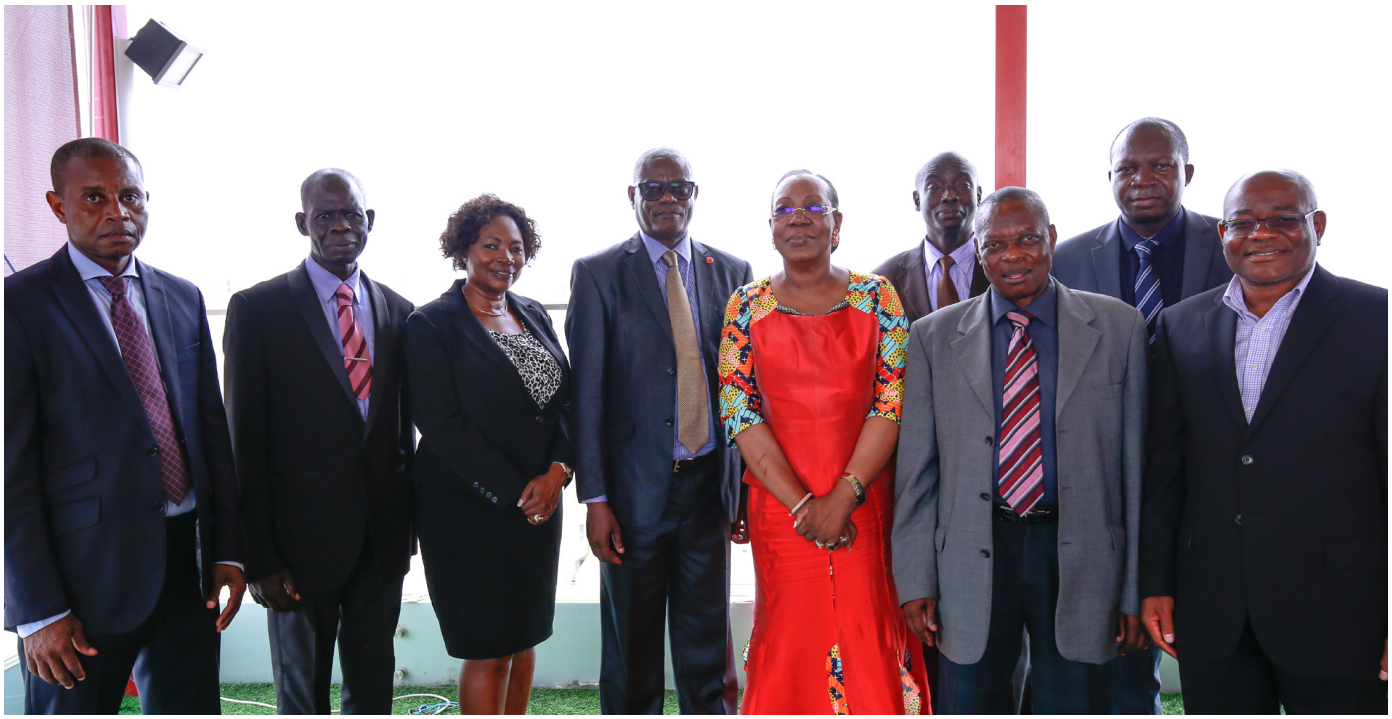
MBACKÉ FALL

Former Prosecutor of the Extraordinary African Chambers in Senegal

Mbacké Fall (MF) began by paying "*a special tribute*" to Bettina Ambach: right from the start of the work of the Extraordinary African Chambers in Dakar, Wayamo had organised training sessions on international criminal law in Nuremberg.

Although international, the Extraordinary African Chambers (EAC) were embedded in the national system of law. All four Chambers had not been founded simultaneously: the Investigation and Indictment Chambers had been the first to be established, followed by the Assise Chamber which had ultimately sentenced Hissène Habré to life imprisonment. Habré had filed an appeal. Another African judge from Mali had chaired the Court of Appeal, which acquitted Habré of the charge of sexual crimes. This showed that, as a unit, these four Chambers guaranteed that justice would be done.

There had however been problems. Habré had dismissed his counsel, thus obliging the Court to appoint a new defence lawyer, who then had 45 days to prepare his case. Secondly, there had been the need for judicial co-operation with Chad, since Senegal was not the main site of the alleged crimes. The Senegalese judges had been permitted to visit the country, hear what the witnesses had to say, and have sight of the evidence. There had been a great deal of damning evidence, so expertise had been brought in to allow the judges to form an idea of the gravity of the crimes.



GBERDAO GUSTAVE KAM

Former President of the Extraordinary African Chambers in Senegal

Gberdao Gustave Kam (GGK) attributed his appointment as President of the EAC to his experience in the international field as a judge on the ICTR. Revisiting the way in which the EAC had been designed, he explained that the challenge had been to "*copy and paste*" the international jurisdiction/common law edifice on a civil law system, i.e., to have a decision based on common law while at the same time applying procedure based on civil law. Under international law, judgements had to be reasoned, while under civil law it was the Registrar who drafted the ruling, and judges often did not have the opportunity to take notes and deliver a reasoned judgement. Consequently, they had been forced to concoct a way of doing this, by giving all videos and recordings for transcription. In essence, they had had to change the methodology and the procedure in order to have a satisfactory decision at an international level. What this had meant was that, instead of a few pages, the final decision had been 600 pages long and had taken 3 months to draw up.

Accordingly, one had to think ahead, and in the case of the CAR, this problem should be borne very much in mind.

FIDELMA DONLON

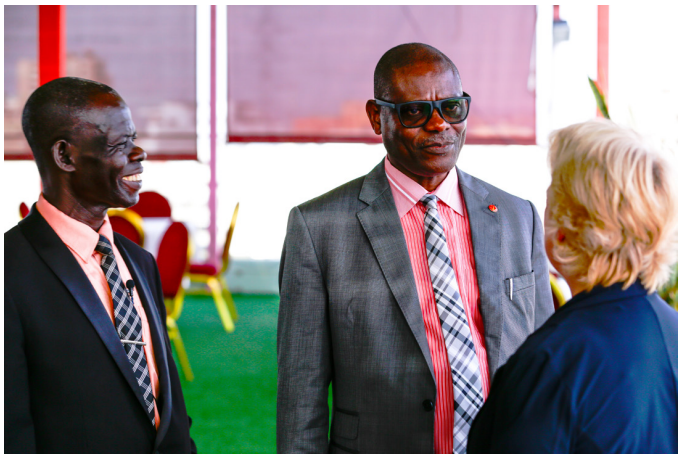
Registrar of the Kosovo Specialist Chambers

Fidelma Donlon (FD) said that the previous day had seen a number of gaps and challenges identified in the field of international criminal law: Aminata Touré had noted that a diversification of courts would be needed to fight impunity, and that it was important to avoid the perception that the ICC and other mechanisms were only targeting the weakest perpetrators; Stephen Rapp had indicated the challenges involved in finding and collecting evidence to prove serious violations of international humanitarian law by the most senior leaders; and Navi Pillay had insisted on the need for judges to apply law and principles and not act as politicians. Yet overall there had been agreement about the importance of national prosecutions and hybrid courts, either as a means to implement some form of positive complementarity or as an alternative to the ICC.

In this connection, **FD** intended to speak about a new model of international justice, namely, the Kosovo Specialist Chambers (KSC), a new internationalised tribunal created by Kosovo law and relocated to The Hague.

In 2008, Carla Del Ponte, the former chief prosecutor of the ICTY, had pointed to evidence that former senior leaders of the Kosovo Liberation Army had committed violations of international law during the conflict and been involved in organ trafficking after NATO bombed Serbia in 1999. As a result, the Council of Europe requested a Swiss Senator to investigate these allegations. His report produced evidence that offences had indeed been committed. In 2011, the EU established the Special Investigative Task Force to carry out a criminal investigation into the alleged war crimes and organised crime. In 2014, this Task Force reported the existence of "*compelling evidence*", and that an indictment could be filed against the individuals concerned "*once an appropriate judicial mechanism*" had been established.

The mechanism as established was neither UN-backed nor -funded, but was the outcome of an agreement between the EU and Kosovo to create Special Chambers at all levels of the Kosovo Court system, with international staff and the proceedings relocated to a Host State that could ensure a secure environment. In August 2015, the Kosovo Parliament passed *a lex*



specialis and a Constitutional amendment to incorporate the new entities into the legal order of Kosovo.

The jurisdiction of the Court extended from 1998 to 2000, thereby covering the period during and after the conflict.

Innovative elements in the law included the fact that the police within the Specialist Prosecutor's Office had the same authority as that given to Kosovo Police under Kosovo law, including the power to arrest. This might serve to protect the security and integrity of the investigation, and reassure persons who might otherwise be hesitant to come forward.

The establishment of the KSC was "*an example of how to take a step-by-step approach to building a court*", and could possibly be instructive for the IIIM and initiatives in South Sudan. Moreover, it was an example of how to build and fund an internationalised court that was not UN-based. Lastly, it introduced a new model of funding, i.e., not only was it the first international tribunal to be funded by the EU but it also had its own annual budget, thus avoiding the weaknesses inherent in voluntarily funded courts.

TOUSSAINT MUNTAZINI

Special Prosecutor of the Special Criminal Court in Bangui, Central African Republic

Toussaint Muntazini (TM) focused on the SCC in the CAR. The Constitutive Act had been passed during the transitional period and was supported by the incoming regime, which was a good signal and a sign that the necessary political will was present. The SCC was a case of a hybrid court that was in operation and functioning. By virtue of being integrated into the CAR's legal system, the court was acting according to the principle of complementarity, with the order of primacy being ICC, followed by SCC and the national criminal courts. The judicial system thus rested on three pillars. SCC jurisprudence would be used by the national courts and, by the same token, any training would trickle down to benefit the national system.

The SCC was a joint project between the CAR government and the UN. The initial stage would consist of:

- Support for investigations, prosecution and training;
- Assistance and protection of witnesses and victims;
- Legal assistance; and
- Public awareness-raising.

They were now in the process of operationalising the court, with the judges taking up their posts. There was funding for 15 months but the problem of sustained funding for the full five years of planned activity remained to be resolved.

ALFRED KWENDE

Former Chief of investigations, UN International Criminal Tribunal for Rwanda

Alfred Kwende (AK) stated that there was "*no point in inventing the wheel*", when one could learn from the successes and failures of other tribunals. The golden rule was, a good case needed a good case file, and this needed good evidence. Collecting evidence was beset by a number of challenges.

He listed some of these as being:

(i) Investigators might be either unavailable or not sufficiently qualified;
(ii) Having to work with interpreters entailed translating an entire culture;
(iii) The elements of crime were not known;
(iv) There were obstacles to co-operation between the host country, other States and international organisations.

At times host countries were unwilling to co-operate. There was little or no use in having a criminal procedure if the suspect could not be produced in court. In the case of fugitives from justice, the technique used was to issue a temporary arrest warrant pending evidence, but some States refused to co-operate or were compliant in shielding suspects. In the case of international organisations, such as the Red Cross, they often felt that such demands encroached on their territory and structure;

(v) Presence of a hostile environment, e.g., in Rwanda, investigators had needed an escort, which proved counterproductive when it came to reassuring frightened witnesses about confidentiality and their personal safety;
(vi) Lengthy lapse of time between the creation of the tribunal and evidence collection, which sometimes meant that no scientific evidence was collected due to staffing and funding constraints;
(vii) In the case of SGBV, collecting evidence was "*pathetic*" because, strictly speaking, nothing could be offered in return. Investigators walked a fine line between impartiality and interference, and were often tempted "*to put their hands in their pockets*";
(viii) The use of tracking teams came up against questions of sovereignty;
(ix) Witness tampering as a result of defence teams urging witnesses to recant, or the accused exerting pressure. AK reported that to combat these tactics, his team had resorted "*to planting microphones on prosecution witnesses*". If documentary evidence was lacking and there were no eye witnesses, "*you had no case!*"

Lessons learnt included the importance of team spirit and personal relationships, and acknowledgement of the fact that translators/interpreters were difficult to vet and handle; they often failed to remain objective and so the policy was to reconfirm evidence and/or testimony using new interpreters.

q&a

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

Before taking questions from the floor, **MOC** commented that he had the impression that there was "*tribunal fatigue*". Nonetheless, the fight against impunity could not be won by the ICC alone and so other models, including those described by the panellists, pointed to other possibilities.

Hissène Habré trial

Comment from the floor: In the Hissène Habré case, it had been necessary to show that Africans were able to hold a large-scale trial in accordance with international standards, using experts, video, etc., at the highest level. Similarly there had been a need to show that an African court could do the job effectively in a short period of time with limited resources. Hissène Habré had alleged that the verdict had been decided in advance but the Court had shown that justice could be served by stringent observance of the law.

GGK: As regards the decision to acquit Hissène Habré of the charge of rape and sexual violence, **GGK** explained that the Court of Appeal had deemed that the charge had not been referred by the examining judge to the Trial Chamber. Charges of this nature depended on the ability of the examining judge to get witnesses to speak up, something that came up against the twin barriers of local cultural taboos and the length of time since the events had occurred.

MF: Replying to a question on redress and reparations, **MF** said that there was a reparations fund for victims of up to US$5 million.

Kosovo Specialist Chambers: why internationalisation?

FD: The reason for internationalisation was that since 2000, efforts in Kosovo to hold people to account had met with serious problems. The EU and the Kosovo Government had therefore focused on finding a way of delivering justice in a secure environment, and had eventually arrived at the two-pronged solution of internationalisation and relocation. Turning to the matter of funding, **FD** felt that the model adopted

was "*doable*" for other countries, e.g., Syria. Lastly, she reiterated that the executive power of the police was extremely important when it came to reassuring witnesses.

SCC in the CAR

TM dealt with a number of points raised:

(i) The staff-selection process had been designed to ensure representativeness and diversity;

(ii) In matters of funding, it was fair criticism to say that, as compared to defence, relatively little funding had been allocated to justice; and,

(iii) While it was true that there was no specific law to protect victims, security measures had been implemented, which were based on the national law and the Rome Statute.

ITCR: witness protection, victims' rights

AK: The *ad hoc* tribunals had no witness protection programme, so measures had been taken at an investigation level. Sometimes they had only taken care of victims who were witnesses, thus leaving out a large proportion who were not going to appear in court. The prosecutor's office decided to form a witness management team, with witnesses being regularly visited and counselled, and anti-virals being supplied to SGBV victims. The negative side to this was that some individuals had sought to take advantage by pretending to be victims. "*We take care of potential witnesses*" was **AK**'s way of encapsulating the policy followed.

PANEL V

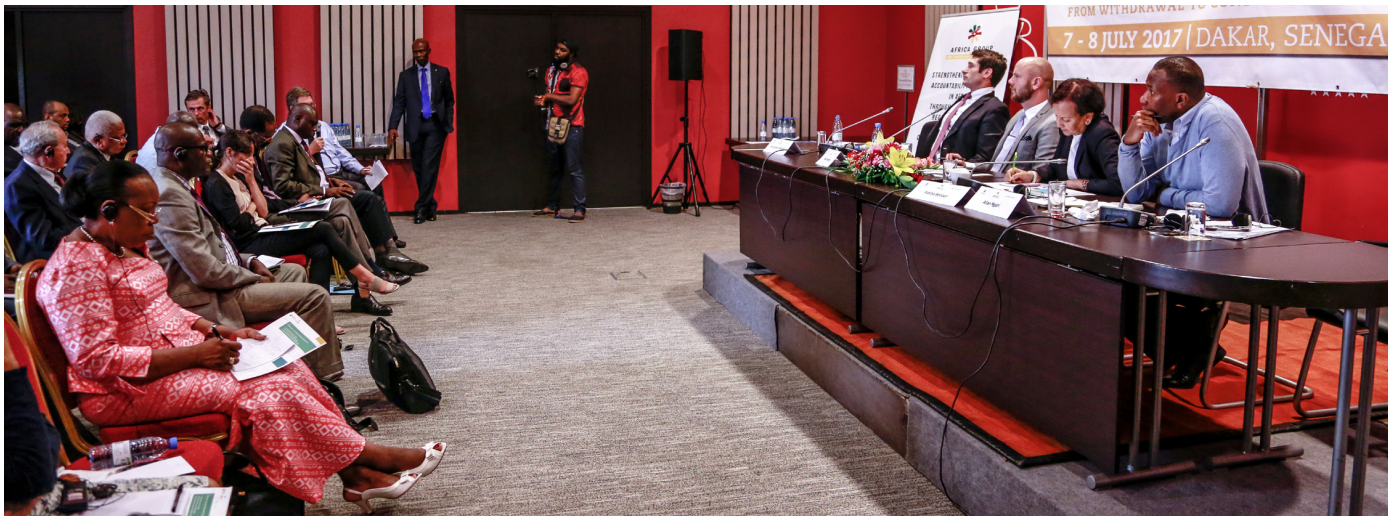
Peace and Justice — Finding a Balance

MODERATOR

FATIHA SEROUR

Director of Serour Associates for Inclusion and Equity and AGJA Member

***Fatiha Serour* (FS)** *described the balance between peace and justice as a subject involving sensitive "niggling" issues. One could not sacrifice one for the other, since they were connected, if not interconnected: one could "not take the heart from the body and expect it to function!"*



CHRISTOPHER MAHONY

Research Fellow at the Centre for International Law Research and Policy

Appearing in his personal capacity as a research fellow, **Christopher Mahony (CM)** stated that he would be speaking to the findings of the joint United Nations-World Bank flagship report on Conflict Prevention, which covered aspects such as transitional justice and the rule of law. Before conducting the study that informed the joint UN-WB report, there were no rigorous data on the relationship between transitional justice processes and the onset, persistence and recurrence of armed conflict. A total of 119 situations had been examined, and had included amnesty processes and the establishment of new constitutions and human rights commissions, and the like. Cross-national data had shown that prosecutions of high-level actors for atrocity crimes were associated with a 65% increase in conflict recurrence whereas middle- and low-level prosecutions were associated with a 70% decrease. When it came to using human rights as a basis for normative change, in many cases human rights had also underpinned institutional reforms, e.g., constitutional reforms: "*The instigation of new constitutions increased the likelihood that conflict would not recur by 60%*". In all these respects, however, it was more about "*how*", in that it was important that such initiatives should not be driven by external actors.

In view of these findings, the UN was looking at a "*more calibrated approach*". There was a need to go much further than immediate peace, and think about more distant horizons, taking in aspects such as arrangements that fostered political inclusion and environments for sustainable peace.

Horizontal inequality -perceived or real- was one of the principal drivers of conflict. It involved differences in access and opportunities across ethnic, regional and religious groups, which were a fertile ground for grievances. Perceptions were central to building up grievances, even when such perceptions were not supported by the facts. Prosecuting in post-conflict situations could thus prove counterproductive and merely serve to further heighten existing tensions. A far better-advised course was to resort to Truth Commissions and building up institutions over time before embarking on prosecutions.

MARK KERSTEN

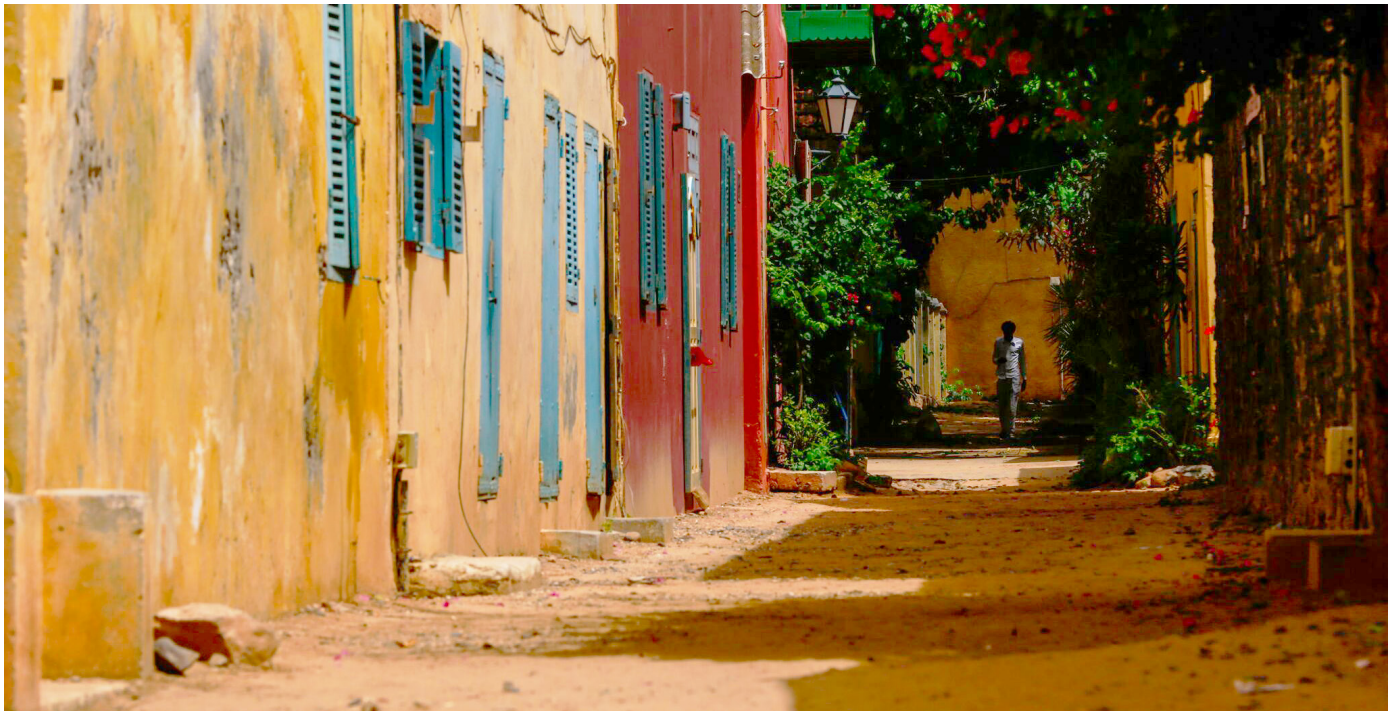
Munk School of Global Affairs, University of Toronto, Research Director, Wayamo Foundation

Mark Kersten (MK) said that we did not know enough about the relationship between international criminal law and peace. As yet, there was no real answer to the compatibility between peace and justice. As a result, we had what he termed "*the recycled claims of the peace-justice debate*", i.e., that a targets of international justice would only and invariably either respond by "*digging in their heels*" or they would be "*marginalized and deterred*". However, those who were "*non-targets*" of international justice were, perhaps counter-intuitively, actually the ones who typically commit to military and violent means to resolving conflict, since they perceived an ICC intervention against their adversaries as a "*stamp of approval*" and a legitimizing act for their positions and behaviour.

There had been "*a scaling back*" by the ICC in the case of ongoing conflicts. This might be due to "*reputational effects*" or merely to the fact that the Court did not really know what effects such initiatives had. A further reason for this reticence was the sheer difficulty of going in on the ground. He suggested that a possible avenue might be something along the lines of the work being done in Syria by the Commission for International Justice and Accountability (CIJA).

Moreover, this pause should be used "*to revisit*" the whole subject. Until now the approach had been based "*more on faith than on knowledge*".

MK's closing point was by way of a teaser. Referring to the UNSC's power to defer an investigation or prosecution under Article 16 of the Rome Statute, he said that very little thinking had gone into this question, and wondered if it might be time to think about drawing up guidelines.



ALLAN NGARI

Senior Researcher, Transnational Threats and International Crime Division, Institute for Security Studies, Pretoria

To illustrate the plight of victims, **Allan Ngari (ANG)** began by telling the poignant story of just one. In 2010, he had formed part of a victim consultation initiative in north-eastern Uganda and, on interviewing a prematurely frail-looking woman of 42, had been struck by the ease with which such victims shared their stories. At some point between 2001 and 2004, she had been accosted, assaulted, raped repeatedly and left for dead. Indeed, she had come round in the mortuary and had fled the following morning. According to her, people had run away from her, she had been rejected by her ancestors and had even been ostracised by her own husband. Worse still, in the bush, she had discovered that she was pregnant. The child of that gang rape had died.

It was difficult to see, said **ANG**, how one institution, such as the ICC, could possibly address the concerns of all victims. Admittedly there were other weighty topics, such as Head of State immunity, but the central issue was that such things should never happen again. That woman's story could be the story of anyone in the room. It was essential to ensure that victims obtained redress. Her attackers had been in uniform, yet current indictments solely reflected the crimes of the Lord's Resistance Army and not those of the Ugandan Defence Force.

In 2014, Germain Katanga had been convicted of crimes against humanity and war crimes but acquitted on counts of rape and sexual assault. There had been no reference to victims in that case. Similarly, victim participation was not addressed in the Malabo Protocol. Accountability in victim issues rested with States which had an obligation to ensure reparations. A victim-oriented approach to peace and justice was called for.

q&a

A plea for victim engagement and participation

FS invited **Brenda Peace Amito (BPA)** of Trust Africa to say a few words. With reference to the peace and justice issue, **BPA** asked whether one should really have to choose one to the exclusion of the other. After all, "*We should always remember who it is we are supposed to be serving!*" In Mali, they should think about sequencing, by seeking a sustainable peace first. Prosecutions would not help; and the same went for Côte d'Ivoire. Victims tended to continue living in camps for internally displaced persons, while governments concentrated on justice. Failure to engage with victims meant that "*we cannot serve their interests*". **FS** echoed **BPA**'s remarks, saying "*We must give victims a voice to express themselves: they know what they want*".

Peace agreements

In reply to a request from the floor by **Joseph Roberts-Mensah** for comments on what he called the "*UN's slavish approach to peace*" in trying to transfer the Sierra Leone model to South Sudan, **ANG** said that there was "*a lot of utility in peace agreements*" but it was the way in which they were implemented that mattered, South Sudan being a case in point. There was a "*lack of ownership*". The people had to drive the process if it was to work. Furthermore, funding was a key factor otherwise victims would "*end up with nothing*".

Peace and justice/Article16 Rome Statute

Speaking from the floor, **Bill Pace** observed that, when drafting the Rome Statute, the idea was not to create an ad hoc court but rather to create a permanent court that would do justice after settling peace. This had satisfied neither governments nor victims. **Ambassador Christian Wenaweser** said that one should start thinking about Article 16 less ideologically: seeing it as the "*work of the devil*" was the wrong approach. The Rome Statute was based on the assumption that someone would balance peace and justice, but the UNSC was not that body. Neither was it the ICC's job to balance peace and justice: "*Society needed more than a handful of trials*".

MK made a number of brief points.

- He said that he was sympathetic with the Ambassador's views. Then again, one had the "*flip side*", in that **Fatou Bensouda** had been quoted in the New York Times as saying, "*The road to peace goes through justice*". There had been a conflation of peace and justice. There was a need for a change of tone in the courts.
- The notion that peace negotiations were about peace was more of an assumption than a reality. Belligerants and negotiators might go to the table for a number of reasons other than a genuine desire for peace. There was "*no goldilocks zone*" for the ICC on peace and justice.
- International criminal justice had done nothing for Syria but Syria had done a lot for international criminal justice, so the UN model might be creative.
- On the subject of Article 16, he agreed that the AU's attempts to invoke it had been "*phony*" but insisted that there was "*an imbalance in the way we talk about its invocation*". No-one was going to accept a temporary respite, which often merely tempted parties to retain their ability to destabilise the country.

Study methodology

CM addressed some of the issues raised by the floor and specifically by **Kirsten Ainley**, **Patryk Labuda** and **Sofia Candeias**:

(i) He had neglected to note that the study was specific to domestic as opposed to international criminal justice, the reason being that there had not been enough data on the latter for study purposes;

(ii) For the selfsame reason, the study had not been able to analyse what effect prosecuting the crime of aggression might have had on conflict recurrence;

(iii) While the study had relied on the most comprehensive database available, namely, the

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

Uppsala Conflict Data Programme, he conceded that this only went back as far as the 1970s;

(iv) On the methodological complexity of deciding who a high-level perpetrator was, when it came to distinguishing between high- and mid/low-level prosecutions, he conceded that this was a "*good question*". Case selection was often a product of military self-interest, i.e., "*If you're not at the table, you're on the menu!*" In his opinion, domestic prosecutions were more open to case selection politicization;

(v) The methodology for identifying the victims was a real problem and needed to be enhanced;

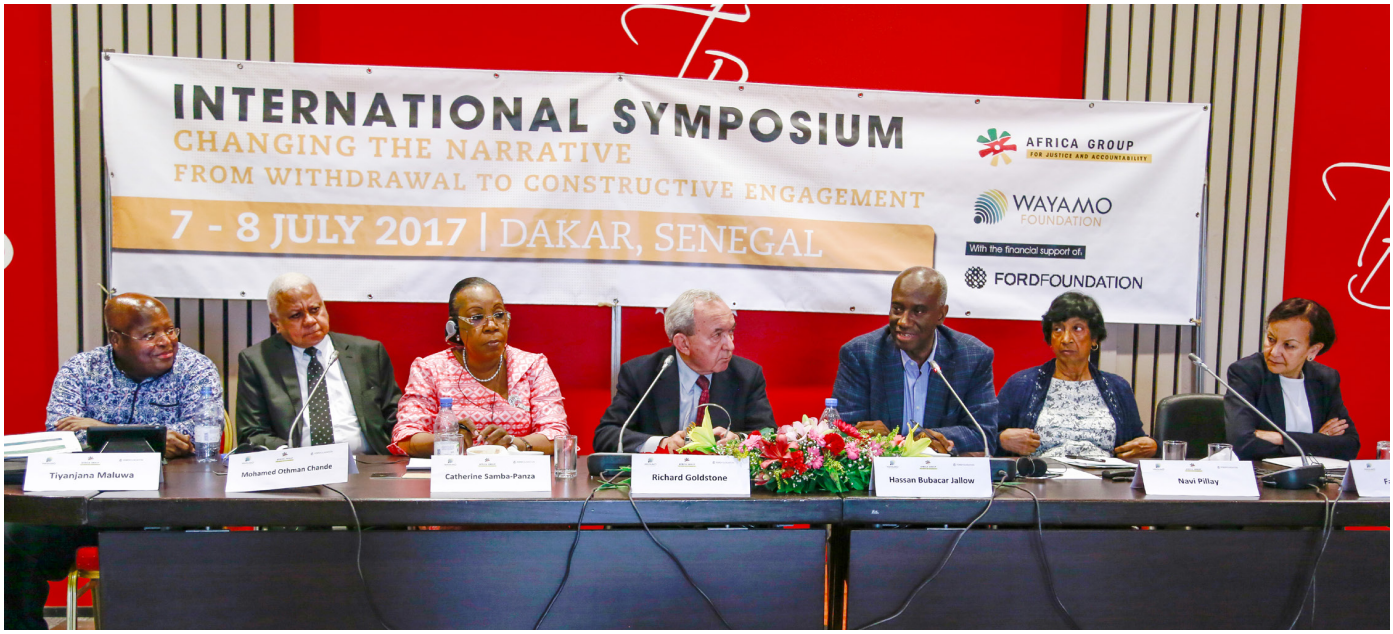
(vi) Lastly, on the subject of victim demands, to say that one "*had never met a victim who didn't want justice*" was far too generic a statement. One had to ask what was meant by "*justice*". On the one hand, there was no homogeneity across victim groups; and on the other, justice was not always criminal justice. What was the opposite of inclusion? Discrimination!, the unequal application of law to fact. That links to case selection politicization in point IV: we need to be careful with regarding hybrid courts - do we want to see justice more than we want to ensure that we do not promote discriminatory justice that deepens the grievances held by social groups that feel discriminated against?

Victims' trust fund

ANG agreed with **Philipp Ambach** assertion that there was a significant lesson that other courts could learn from the ICC's system with the Trust Fund for Victims, but to his way of thinking there was a problem with the way its mandate was couched in the Rome Statute. He felt that "*general assistance*" was more important than "*court order reparations*". An additional problem was the Trust Fund's ability to raise the funds it needed.

CLOSING REMARKS

by the Africa Group for Justice and Accountability



AGJA members (as shown from left to right above)
Tiyanjana Maluwa
Mohamed Chande Othman
Catherine Samba-Panza
Richard Goldstone
Hassan Bubacar Jallow
Navi Pillay
Fatiha Serour

In his capacity as AGJA Chairman, **Hassan Bubacar Jallow** introduced his fellow members and briefly reviewed the Group's scheduled activities during its stay in Senegal, which ranged from its own strategic meeting and the current symposium, to a workshop and a training programme. Among areas spotlighted for the Group's attention, he listed its intention to engage with the Gambia and South Sudan and to monitor the situation in Burundi. With reference to South Sudan, the AGJA had detected "*reluctance and foot-dragging*" in setting up the projected hybrid court, and intended to urge the South Sudanese Government and some AU States to implement it.

While the AGJA welcomed the establishment of the SCC in the CAR, it had heard of the challenges being faced and the fact that some lessons had apparently not been learnt, e.g., the issue of voluntary funding. The Group therefore urged the international community to fund the court over the long term.

In the case of the DRC, there was a manifest need for accountability for mass crimes. Relatively little had been done, especially with regard to SGBV crimes. Concrete and effective measures had to be taken to attend to the victims.

With reference to what he described as a "*wonderful symposium*", **Richard Goldstone** had "*two thoughts*": The first was to the affect that the Zambian plebiscite told an important story of civil society support for international justice. Secondly, he was "*delighted at the attention that had been paid to victims*" over the course of the discussions, since the stress was usually on law and prosecution. He would be going away feeling a lot more optimistic about international justice than when he had arrived.

Fatiha Serour said there were "*two things that are important for me and for us*":

(i) The past two days had been a "*great learning experience*" as regards just how genuine and how strong the participants' commitment was; and

(ii) "*We as the AGJA have a lot of work to do in facilitating and taking dialogue forward for a more constructive engagement, to ensure that people who breach human rights are brought to justice.*"

q&a

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

CAR

Catherine Samba-Panza was pleased at the fact that the AGJA had put the Special Criminal Court of the Central African Republic on its agenda. Although the justice aspect was now present in the CAR, the peace progress was actually questioning the very principle of justice and accountability. There had been a resurgence of violence, and the CAR Government's request to the UN to lift sanctions on certain people had been challenged by many on the ground that it amounted to impunity.

Francophone Africa

Replying to the contention that most of the AGJA members were English speaking, **Hassan Bubacar Jallow** not only recognised the importance of the Francophone countries, but said that the Group was fortunate in being able to count on the services of **Catherine Samba-Panza** and **Fatiha Serour**. By the same token, account would have to be taken of the Arabic-speaking nations.

Victims

However, it was the victims of international crimes and human rights abuses who were the focus of many of the participants' comments. This message was driven home by **Mohamed Chande Othman**, who stressed the need to look at the "*gaps*" when addressing the subject of victims, and **Navi Pillay** who, referring specifically to violence against women and girls, wanted to see "*justice delivered holistically to all victims*". Perhaps the most moving testimony, however, came from **Tiyanjana Maluwa**, who spoke of his visit to IDP camps in Darfur in 2009, as part of a team appointed by the AU to investigate the Darfur situation and make appropriate recommendations: the AU High-Level Panel on Darfur (AUHPD), led by former South African president Thabo Mbeki. The panel's report was submitted to the AU in October 2009. It was well received and highly commended by all stakeholders, but was now "*gathering dust*", as there had not been any follow-up actions to the concrete recommendations made, respectively, to the various players in the tragedy that is Darfur (the AU, the UN, the international community and the Government of Sudan).

As a graphic illustration of the problem, he cited two women, one who had told **Thabo Mbeki**, "*We don't want to hear from you. We want you to hear from us!*", and the other who had said, "*We want peace. If it is flying in the air, I am prepared to fly and catch it. If it is buried underground, I am prepared to dig to get it. If it is available in the market, I will find the money to buy it.*"

CLOSING REMARKS

by the Secretariat

BETTINA AMBACH

Director, Wayamo Foundation, Berlin

Bettina Ambach thanked the AGJA members, both for their presence at the symposium and for their continuing contribution to capacity building for East African investigators, prosecutors and judges, as well as Nigerian civil and military prosecutors. The Group members not only acted as resource personnel but were actively engaged in stakeholder diplomacy. The AGJA's efforts were directed at supporting complementarity and promoting the diversity of justice mechanisms. Indeed, the ICC itself had also shown a shift towards more meaningful complementarity (some would call it positive complementarity).

The Group's work would continue in the coming week with a workshop to draw up guidelines for hybrid courts, and a training session that would bring together staff from the EAC and the SCC in Bangui to exchange experiences, pool knowledge and benefit from lessons learnt.

She thanked the public and the participants, and declared the symposium at a close. ■

The Group members not only acted as resource personnel but were actively engaged in stakeholder diplomacy. The AGJA's efforts were directed at supporting complementarity and promoting the diversity of justice mechanisms.

WAYAMO FOUNDATION

AFRICA GROUP FOR JUSTICE AND ACCOUNTABILITY

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