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FOR JUSTICE AND ACCOUNTABILITY

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WAYAMO FOUNDATION

INTERNATIONAL SYMPOSIUM

AFRICAN JUSTICE MECHANISMS AND THEIR INTERPLAY WITH THE ICC

22 – 24 MARCH 2016
UNIVERSITY OF CAPE TOWN
CAPE TOWN | SOUTH AFRICA

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Front cover photo:
Judge Silvia Fernández de Gurmendi (L), President of the International Criminal Court listens to Elizabeth Evenson (C), Senior Counsel, International Justice Programme, Human Rights Watch, and human rights activist and lawyer Femi Falana (R), Member of the Africa Group for Justice and Accountability.
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Back cover photo:
Fatiha Serour, Director of Serour Associates for Inclusion and Equity and member of the Africa Group for Justice and Accountability. Ms. Ferour listents to a question from the audience along with fellow attendees at the symposium „African Justice Mechanisms and their Interplay with the International Criminal Court" in Smuts Hall at the University of Cape Town, South Africa.
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SMUTS HALL
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Max Price, Vice Chancellor of the University of Cape Town, welcomes symposium attendees.

MAX PRICE

Vice Chancellor, University of Cape Town

Given the international context, the deep historical scarring suffered by the South African population and the impact of the recent Al-Bashir incident on South Africa's position vis-à-vis the International Criminal Court (ICC), the holding of and choice of venue for the symposium were both appropriate and timely.

The University of Cape Town's (UCT) core goal was to be an international hub and meeting point for scholars and this conference spoke directly to that mission. The Vice Chancellor welcomed the formation of the Africa Group for Justice and Accountability (AGJA) as a bold initiative, and one in which civil society had a duty to participate. The impact of the debate would be felt on institutions and countries alike, and he wished to thank the Wayamo Foundation and his colleagues at UCT for organising the event.

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PENELOPE ANDREWS

Dean of the Faculty of Law, University of Cape Town

In her capacity as the Faculty's newly appointed Dean, Prof. **Andrews** welcomed the AGJA and those responsible for making the conference possible, particularly **Bettina Ambach** of the Wayamo Foundation and **Hannah Woolaver** of the Law Faculty. She also extended a warm welcome to all her distinguished guests, mentioning **Silvia Fernández de Gurmendi**, **Navi Pillay**, **Richard Goldstone**, **Stephen Rapp** and **Athaliah Molokomme** by name.

Prof. **Andrews** noted that in their respective ways, Al-Bashir, as "a text-book case", and the designation of apartheid as a crime against humanity had both contributed to International Law. Lastly, the ICC's judgement in the Jean-Pierre Bemba case was significant for two reasons:

- It built on Judge **Navi Pillay's** groundbreaking jurisprudence on sexual violence as a crime against humanity.
- It held Bemba liable for his militia's acts on the grounds of command responsibility.

She knew that the participants would be discussing these and other issues over the course of the next three days and wished them all the best in their deliberations.

Helene Budliger Artieda, Swiss Ambassador to South Africa.

HELENE BUDLIGER ARTIEDA

Swiss Ambassador to South Africa

Ambassador **Helene Budliger Artieda** brought a message of support and encouragement for the day's activities and for those of the ICC. The issues involved went beyond the purely legal. Switzerland was a strong supporter of both the Rome Statute and prevention of international crimes. It made every effort to support the Court and ensure its judicial independence and effectiveness.

That being said, the ICC was not the sole institution dealing with such crimes; nor should it be so, since this was the primary role of states. Her country fully endorsed the principle of complementarity, which was "the cornerstone of the Rome Statute". Senegal was an excellent example of how African states could address international crimes, and indeed had been the first nation to sign the Rome Statute.

The Wayamo initiative would serve to enhance co-operation at an international level. This brought her to another initiative — one backed by Switzerland — aimed at preventing the commission of atrocity crimes, i.e., the Global Action Against Mass Atrocity Crimes (GAAMAC) which had held its first international meeting in Costa Rica in 2014, following a collaborative engagement by six Member States (Argentina, Australia, Costa Rica, Denmark, Switzerland and Tanzania) and representatives of the United Nations and regional and non-governmental organisations.

Ambassador **Budliger Artieda** invited all stakeholders active in prevention at the local level to take part in this initiative.

The Symposium, she said, would make a positive contribution to the debate on African justice mechanisms and the ICC.

BETTINA AMBACH

Director, Wayamo Foundation

OPENING REMARKS

Bettina Ambach welcomed the public and confessed that she was impressed to see such a full hall. This event, which was hosted by the Wayamo Foundation, the Africa Group for Justice and Accountability and the University of Cape Town, had been made possible thanks to funding from The Netherlands, Switzerland, the United Kingdom, Germany and Finland. After thanking the University, and specifically Dean Andrews and Hannah Woolaver of the Law Faculty, **Ambach** gave a brief résumé of the twelve members making up the AGJA. Of these, eight would be present at the symposium.

She explained that in November 2015, the Africa Group for Justice and Accountability had come together as an independent body to support justice and accountability efforts in Africa and elsewhere in the world. Not only had it decided to hold its first ever bi-annual meeting in Cape Town but, in pursuit of its designated aims of capacity building and needs assessment, it had also held a high-level meeting of prosecutors and investigators, some of whom would be attending and/or taking part in the symposium.

The AGJA's mission was to support efforts to strengthen justice and accountability measures in Africa through domestic and regional capacity building, advice and outreach, and enhancing co-operation between Africa and the International Criminal Court.

The symposium was made possible thanks to funding from The Netherlands, Switzerland, the United Kingdom, Germany and Finland.

NAVANETHEM "NAVI" PILLAY

Former UN High Commissioner for Human Rights

STATEMENT ON BEHALF OF THE AFRICA GROUP FOR JUSTICE AND ACCOUNTABILITY

"The Africa Group for Justice and Accountability is an independent group of senior African experts on international criminal law and human rights law, including political figures, members of international and domestic tribunals, and human rights advocates. We came together in November 2015 to contribute towards strengthening justice and accountability in Africa.

The Africa Group for Justice and Accountability firmly believes that justice and accountability on the African continent as well as elsewhere is better served by positive engagement with and membership in the International Criminal Court.

We believe that certain issues that have adversely affected the relationship between the Court and some African governments can be resolved. Relevant parties can and should manage such issues by co-operating and engaging meaningfully as States Parties to the Rome Statute.

The AGJA encourages justice and accountability on the African continent and globally."

- **Dapo Akande (Nigeria)**
Professor of Public International Law, University of Oxford
- **Femi Falana (Nigeria)**
Human rights activist and lawyer
- **Hassan Bubacar Jallow (Gambia)**
Former Prosecutor at the International Criminal Tribunal for Rwanda and International Residual Mechanism for Criminal Tribunals
- **Richard Goldstone (South Africa)**
Former Chief Prosecutor of the United Nations International Criminal Tribunal for Rwanda and the former Yugoslavia
- **Tiyanjana Maluwa (Malawi)**
H. Laddie Montague Chair in Law, Pennsylvania State University School of Law
- **Athaliah Molokomme (Botswana)**
Attorney General of Botswana
- **Betty Kaari Murungi (Kenya)**
Independent Consultant on Human Rights and Transitional Justice
- **Mohamed Chande Othman (Tanzania)**
Chief Justice of Tanzania
- **Navi Pillay (South Africa)**
Former UN High Commissioner for Human Rights
- **Catherine Samba-Panza (Central African Republic)**
Former President of the Central African Republic
- **Fatiha Serour (Algeria)**
Director of Serour Associates for Inclusion and Equity
- **Abdul Tejan-Cole (Sierra Leone)**
Executive Director of the Open Society Initiative for West Africa

SILVIA FERNÁNDEZ DE GURMENDI

President of the International Criminal Court

KEYNOTE ADDRESS

Judge **Silvia Fernández de Gurmendi** began by thanking the Africa Group for Justice and Accountability and the Wayamo Foundation for extending an invitation to participate in what was an extremely pertinent and timely symposium on "African Justice Mechanisms and their interplay with the ICC". Furthermore, she thanked the Group for having held its first meeting at the University of Cape Town.

The symposium programme contained an impressive array of topics (ranging from ICC-Africa relations, international crime and human rights to transnational criminal law, the role of non-governmental organisations (NGOs) and Head-of-State immunity) of immense relevance to the Court in that they all formed part of an interdependent system of the rule of law.

As a court of last resort court, the ICC was an essential part of this system. It had been designed to complement, rather than replace, national systems when these failed to address the most serious international crimes, such as genocide, crimes against humanity and war crimes. Even when the Court intervened in a given situation, it would necessarily focus on a limited number of high-level perpetrators.

It was therefore clear that, in order to address mass atrocity crimes, there had to be a unified, comprehensive response through judicial and other methods, backed by strong political will to ensure accountability. Hence commitment to the rule of law, human rights and justice was required nationally, regionally and internationally.

The ICC had not been created to replace domestic courts, which continued to be at the forefront of the battle against human rights violations and international crimes. However, they were not alone in facing this task: the Rome Statute embodied the shared responsibility of the international community for addressing core international crimes. Through the concept of positive complementarity, the ICC sought to encourage domestic proceedings wherever possible and support the strengthening of national jurisdictions. She was therefore pleased to see the AGJA addressing these issues. The Court could help but it was not part of its mandate.

The preliminary examination stage afforded an important opportunity to discuss what could be done at a national level. The Office of the Prosecutor (OTP) was currently conducting preliminary examinations in the situations of Afghanistan, Colombia, Guinea, Iraq, Nigeria, Palestine and Ukraine. Indeed the ICC was ready to share its expertise on legal and other matters to help domestic jurisdictions, and had engaged in positive complementarity exercises. The Court had entered into partnership with the UN Office for Drugs and Crime to support the strengthening of national capacities for witness protection and sentence enforcement.

Other UN agencies and various regional and inter-governmental organisations could also play a role in facilitating efforts to address core international crimes through ad hoc and hybrid courts, such as the Extraordinary African Chambers in Senegal and Special Criminal Court in the Central African Republic.

The protection of human rights was a common goal for all, and although the ICC was not a human rights court as such, human rights permeated everything that it did. Events dealt with by the Court were often both human rights violations and international crimes. The position of victims in particular was paramount for human rights mechanisms as well as criminal justice. Retribution did not suffice. Punishment did not suffice.

The ICC system recognised that victims could not be treated only as witnesses. The Rome Statute provided for their right to reparations for harm suffered and their right to play an active part in the proceedings. The Court was starting to test the statutory reparations system with the assistance of the Trust Fund for Victims.

ICC President Silvia Fernández de Gurmendi, Wayamo Director Bettina Ambach, INTERPOL's Pierre St. Hilaire, and Africa Group for Justice and Accountability members Femi Falana and Tiyanjana Maluwa.

The timing of the ICC's move to its new permanent, purpose-built premises could not be better because it was facing unprecedented judicial activity. Only the previous day, the Court had issued its fourth judgement in the case of Jean-Pierre Bemba, the first to address the situation in the Central African Republic (CAR). Judge **Fernández** proceeded to list a number of ongoing cases, including:

- The Al-Mahdi case concerning the destruction of cultural monuments in Timbuktu (Mali)
- Ruto and Sang (Kenya)
- Bosco Ntaganda, Gbagbo and Blé Goudé (Côte d'Ivoire)
- Bemba et al., the ICC's first trial on allegations of obstruction of justice
- The Lubanga and Katanga cases were at the reparations stage
- There were also very interesting developments at the pre-trial stage, such as the case of Dominic Ongwen, one of the alleged leaders of the Lord's Resistance Army
- A new investigation had recently been opened in Georgia..

The Court was operating at full speed. There was every reason to believe that the workload was going to increase, and this would in turn bring greater challenges. As somebody had remarked, "Now that the Court is serious, many more people are starting to worry". Turning to the challenges, Judge **Fernández** said that two areas of particular importance were efficiency/effectiveness and legitimacy.

Enhancing the Court's efficiency and effectiveness was her main priority for her term as President. The ICC had to be able to provide high-quality justice in an independent, impartial and expeditious manner. Improving the efficiency and effectiveness of the Court was essential to maintaining and increasing the global community's confidence. The ICC was seeking to improve work methods, identify best judicial practices, and achieve greater harmonisation across Chambers and Divisions. It was trying to accomplish this without amending the legal framework, by reflecting the agreements reached in a Chambers Manual. The other organs of the Court were likewise involved in efforts to improve performance, e.g., a new OTP case-selection policy.

Efficiency and effectiveness also largely depended on external co-operation, and although this was forthcoming, much more was needed, including voluntary co-operation from states and organisations. Thirteen arrest warrants were outstanding and had been so for over 10 years!

More voluntary agreements were required on witness relocation, enforcement of sentences, hosting suspects or

accused on provisional release, and accepting acquitted persons. Better, faster action from states was needed in the tracing, seizing and freezing of assets, as was swift and full co-operation for access to evidence.

In addition, the Court faced the challenge of legitimacy. There was a perception that, despite its global mandate, the ICC exercised selective justice. In this regard, it was important to acknowledge the limitations placed on the Court by virtue of its being a treaty body. The Court could not intervene in any situation where crimes under its jurisdiction had been committed: it could open investigations only within the parameters of the Rome Statute, which usually meant that it was unable to intervene if the crimes in question had been committed in the territory of non-States Parties.

The only alternative was referral by the UN Security Council, which was a political body that might or might not decide to refer (sometimes regardless of the interests of justice), something that did not contribute to the ICC's being perceived as a neutral judicial institution. The only answer lay in signing and ratifying the Treaty, which was why the universality of the Rome Statute was such an important goal. It was essential for the legitimacy and effectiveness of the Court; in fact, it was "the battle of all battles".

An important step forward had been taken earlier in the year, when El Salvador acceded to the Rome Statute, making it the 124th State Party. Progress toward universality was unfortunately slow, yet it was fundamental to ensure that judicial action was not dependent on the Security Council's political decisions.

In this context it was important to work harder than ever to expand the Court's jurisdiction. To ensure general, non-discriminatory justice for all, the collective system of justice had to be reinforced. The answer lay in strengthening the system by enhancing participation: not only must States Parties be persuaded to remain in the system, but they must be persuaded to encourage others to join too.

In the hope that initiatives such as the symposium would contribute to strengthening awareness and support for the work of national and international tribunals including the ICC, she warmly welcomed the establishment of the AGJA. With its exceptional expertise the Group could provide intellectual input on how to strengthen the system. It was also good that the Group wished to serve as an example and a model for similar groups in other parts of the world.

QUESTIONS AND ANSWERS

WITHDRAWAL FROM THE ICC

▸ **What was the ICC doing to persuade the South African government against withdrawal?**

▸ **The President was to be commended on facing the challenge of withdrawal. "Rome was a club" and had created high expectations of the ICC but at the same time the Court needed space. While members, i.e., states, were quite entitled to withdraw, conversely it was the obligation of the other members to protect the Court.**

Judge **Silvia Fernández de Gurmendi** noted that for all that it might be detached from the system the ICC was ultimately no more than a court, and withdrawal was thus a sovereign political act. Moreover, the whole question of withdrawal was related to outreach, in that the ICC encouraged states to ratify the Rome Treaty through explaining and clarifying its work, and issuing policy documents.

Accordingly, the best way to convince states of the virtues of the institution was for the ICC to do its job properly, i.e., by delivering justice that was timely and fair, and ensuring a meaningful system of victim participation and witness protection. In essence, not only did the Court have to do its work – it had to be perceived as doing its work. She quite agreed that it needed space to do this.

Question from Charles C. Jalloh, Associate Professor at Florida International University College of Law.

SEIZURE OF ASSETS

▸ **What could States Parties and non-States Parties do to assist in the task of seizure of assets of defendants?**

Fernández noted that the ICC needed the co-operation of states when it came to identifying and freezing assets. The task was sometimes complicated by the fact that the assets sought were under a Security Council sanction.

ACCESSION OF EL SALVADOR

▸ **El Salvador had been the site of mass atrocities and impunity for decades and so the effort to convince it to ratify the Rome Statute had been singular.**

Fernández agreed that the El Salvador accession was "extremely important". Indeed, if the ICC had been created in the 197Os, Latin America would have become the centre of the Court's activities. This country's accession was the result of co-operation between it, NGOs, civil society and the ICC itself (e.g., she as President had been invited to visit the country).

SECURITY COUNCIL REFERRALS

▸ **Security Council referrals were problematic, e.g., Libya and Sudan.**

Fernández noted that Security Council referrals were necessary in cases where the ICC could not otherwise intervene. Sometimes it was the only way because it was unacceptable that there were instances that required intervention but the Court found itself "handcuffed".

PANEL I:

AFRICA AND THE ICC:
MISPERCEPTIONS AND REALITIES

The ICC-Africa relationship is often regarded with mixed, if not opposing, views. Against this background, what factors, both historical and political, as well as contemporary issues must be considered when assessing the ICC-Africa relationship? This discussion will address the often heard accusations that the ICC is a neo-colonial, anti-African institution and the argument that the AU is a "dictators' club". Finally, participants will debate about the significance of the decisions taken at the 26th ordinary summit of the African Union in January 2016.

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

INTRODUCTORY REMARKS
Richard Goldstone Former Chief Prosecutor of the United Nations International Criminal Tribunal for Rwanda and the former Yugoslavia

PANELLISTS
- **Elizabeth Evenson** Senior Counsel, International Justice Programme, Human Rights Watch, New York
- **James A. Goldston** Executive Director, Open Society Justice Initiative, New York
- **Charles C. Jalloh** Associate Professor at Florida International University College of Law
- **Tim Murithi** Head of the Justice and Reconciliation in Africa Programme, Institute for Justice and Reconciliation, Cape Town
- **Bill Pace** Convenor, Coalition for the ICC (CICC), New York

James A. Goldston, Mark Kersten and Charles C. Jalloh.

Judge Richard Goldstone, member of the Africa Group for Justice and Accountability.

Speaking on behalf of the Africa Group for Justice and Accountability, **Richard Goldstone** opened the panel on the Africa-ICC relationship by thanking the Swiss Ambassador for her support. There were too many misperceptions and too little attention paid to the realities of the relationship. Moreover, the debate had become too adversarial.

The number of African states that had ratified the Rome Statute had not changed but what had changed in recent years was the number of African leaders seeking to protect themselves from possible prosecution. Of nine cases, five had been referred by African countries: opposition to the ICC came from the elite, not from the victims.

Allegations of unfair international justice were nothing new he added, citing examples of his experience of Serbian complaints in the former Yugoslavia. Kenya had failed to create its own domestic court in the aftermath of the post-election violence of 2007/2008, and Uganda appeared to want to "switch international justice on and off" at will.

Even so, there was an element of "unacceptable unevenness". In the Kenya cases, the ICC had made a serious mistake in allowing the accused to return to Kenya and "roam around free". Instead, the Court should have arrested and detained them until trial, as had been done in Yugoslavia. Had Kenyatta been detained, for example, he would never have become President, something that had been ignored.

Changes in the South African position towards the ICC were "worrying". In principle, there should be no objection to an African court able to investigate and prosecute international crimes since this was in line with the Rome Statute and the principle of complementarity. However, he questioned whether there was the political will and whether the necessary funds would be forthcoming.

Even so, **Goldstone** stressed, any attempt to pursue justice and accountability should be welcomed.

„Of nine cases, five had been referred by African countries: opposition to the International Criminal Court came from the elite, not from the victims."

– Richard Goldstone

Coming from a peace-building background, **Tim Murithi** felt that the phrase "club of dictators" would have to be framed more carefully in the interests of dialogue. **Richard Goldstone's** accusation that Heads of State desired protection from prosecution was

accurate.

AU Member States had been concerned with the fight against impunity long before the ICC. There were four prisms of accountability, namely, legal, political, peace-building and moral-ethical. Taking the peace/justice dilemma, he noted that this actually "fudged" the issue.

While "no peace, no justice" was admittedly true, exactly the same could be said of the converse. The sequencing of peace and justice (i.e., which should precede which) was the crux of matter. The notion of positive and negative peace was something unknown to lawyers.

To avoid prosecutors viewing arguments in favour of the primacy of peace as a pretext for protecting perpetrators of international crimes, practitioners of international criminal law needed to speak to those engaged in peace building and conflict resolution.

Prosecuting warlords was not always appropriate; indeed, international criminal law could sometimes exacerbate conflicts and lead to "future deaths". Unless one looked at total reform of local government, one could not change systems; one would simple go "round in circles"

Finally, he spoke of the importance of geopolitics to the Africa-ICC relationship, and particularly, the role of the UN Security Council. Either the Security Council should be removed from the Rome Statute system or the current global governance system should be changed. Without this, he concluded, there might never be consensus on international criminal justice.

Charles Jalloh said that **Tim Murithi** had raised a number of problems and that focusing on the Security Council as an issue in the ICC-Africa relationship was appropriate. In fact, the Africa-ICC problem was actually more of an Africa-Security Council problem, and was embedded in issues beyond the ICC.

Furthermore, there was an issue of legitimacy in that the Security Council was fundamentally a political institution rather than one of principle. Just one of the problems of Security Council referrals was the exemption of citizens of non-States Parties, which violated the principle of equality of individuals and states before the law.

The ICC could be bolder in its relationship with the Security Council when it accepted referrals; within its mandate, the Court (as well as its supporters, i.e., states and civil society groups alike) should hold the Council to account.

Elizabeth Evenson explained

„African Union Member States had been concerned with the fight against impunity long before the International Criminal Court."

– Tim Murithi

Tim Murithi, Head of the Justice and Reconciliation in Africa Programme, Institute for Justice and Reconciliation

Bill Pace, Convenor, Coalition for the ICC (CICC), New York.

that her organisation's aim was to prevent misperceptions and provide journalists with an accurate picture. The news of an African Union (AU) vote to leave the ICC had been promoted by Kenya, and it was difficult to establish whether these kinds of threats or reports of an imminent Africa-wide withdrawal from the ICC were "bluster or real".

Admittedly, there was an AU agreement to engage with the ICC and there might well be a provision for a strategy to disengage. However, this decision did not necessarily reflect the views of all African states, and a number of them had since expressed support for the Court. Although it was bit "like reading tea leaves", instead of being complacent, one should take the threat seriously.

Jim Goldston spoke of precedents to the Africa-ICC relationship, pointing out that history, in the shape of the Yugoslavian experience, could be instructive, inasmuch as the same allegations of bias and selectivity had been levelled there, and even the Nuremberg and Tokyo tribunals had been characterised as "victor's justice".

Often this sort of criticism came from leaders or people who might be targeted. However, it also had to be acknowledged that some criticism of the ICC was not entirely unfounded and that it did not only come from self-interested parties. Some of those raising concerns were among the most courageous human rights actors in Africa and elsewhere, while others had been involved, at great personal risk, in efforts to have African states ratify the Rome Statute.

The Security Council was embedded in the Rome Statute system, and the fact that permanent Council Members were not ICC States Parties but could nonetheless affect the Court's actions was problematic. Similarly, there was also room for improvement in the Court's own operations. This meant that, while some criticisms were a predictable consequence of what the Court was doing, others warranted reflection.

Then again, Africa did not hold a monopoly on allegations of ICC bias and inconsistency. The underlying problem here was perhaps one of accountability and justice per se, e.g., the same type of double standard was to be seen in European attitudes to the European Court of Human Rights.

Touching on the relationship between the USA and the ICC and how this affected the ICC's relationship with Africa, **Bill Pace** noted that President Bush and the USA's opposition to the Rome Statute had only ceased after the Iraq War. The Rome Statute was enormously important, and the picture of the ICC as an institution dispensing retributive justice was mistaken. Advocates of the Court had originally sought a fully independent ICC.

Indeed, in today's world no such statute could ever be approved/adopted: instead, it would almost certainly protect Heads of State,

Elizabeth Evenson, Senior Counsel, International Justice Programme, Human Rights Watch, New York.

there would probably be "opt-out clauses", the complementarity regime would be weaker, and so forth. The question was whether we were going to get a world of "rule of law" as opposed to "rule by law".

Taking up the subject of preliminary examinations, **Tim Murithi** said that despite their being predominantly outside Africa, the fact that virtually all official investigations (with the exception of Georgia) were on the African continent, posed a problem.

Again, the speed with which the Libyan investigation had gone from a preliminary to a full-blown investigation was another cause for concern. The ICC was, in fact, a political actor, one that emerged from a geo-political negotiation and which operated within extremely volatile political contexts. Admittedly self-referrals by states were often by presidents referring their adversaries to the Court, yet Security Council referrals and proprio motu cases were equally embedded in politics.

The Security Council's decision to refer Libya and Darfur, though not Syria, was yet further evidence that the ICC was political. The establishment of an African Court of Justice and Human Rights was purely geopolitical and the AU was playing "exactly the same game as the five permanent members (P5) of the Security Council."

At this **Bill Pace** intervened: the fact that the Security Council failed to treat the ICC as a judicial tool was no reason for us to see it in the same light. Far from allowing it to be used for political purposes, advocates of the ICC should instead protect it as a judicial institution. The ICC was not a court controlled and set up by the P5 but one set up by small- and medium-sized countries, including South Africa. The real question was whether opponents of the ICC wanted any justice done at all.

Drawing a distinction between environment and comportment, **Jim Goldston** said it was one thing to acknowledge that the ICC was embedded in a political situation and quite another to deny that it was endeavouring to implement the rule of law. Those outside the Court, such as civil society organisations, were free to help the Court in its judicial mission.

As a supporter of the Court, **Charles Jalloh** observed that lawyers tended to be afraid of politics. The ICC was a judicial institution as well as an international organisation in a Westphalian order but at least there was recognition that the Security Council's role was a problem for the Court and that improvements in that relationship had to be made. The Court should use its mandate despite the possibility of "push-back". **Bill Pace** made the point that no matter how politicised referrals might be, real crimes were nevertheless being committed.

In discussing the role and responsibility of civil society organisations for the ICC-Africa relationship, **Elizabeth Evenson** said that NGOs took responsibility for shaping some of the narrative but that the real responsibility fell to states. Although there had been a degree of suc-

cess, working with governments was far more difficult and success had been "sparse". Perhaps the AGJA might have something that civil society organisations did not have when it came to exerting influence. It was easier to shape reporting than to get a true sense of what the public was thinking.

Disagreeing with **Tim Murithi's** dismissive attitude towards the AU's push for an African Court, **Charles Jalloh** said that there had been a long history of Africa wanting to deal with African problems, dating back to apartheid. The potential development of a new chamber within the Africa Court of Justice and Human Rights, to prosecute international crimes rested on three points:

- Such a chamber would prosecute all ICC-concerned crimes as well as 10 additional transnational crimes of particular concern to African states (including drug trafficking which was one of the original impetuses for creating an international criminal court). This is what he dubbed "ICC-Plus". The ICC created a benchmark upon which regional systems could build.
- It would release pressure on the ICC because ultimately the ICC would not be able to meet all the victims' expectations.
- There remained the question of whether African states would be willing and able to find the necessary funding.

Lower-level individuals would be prosecuted in national systems, middle-level individuals in regional systems, and those bearing greatest responsibility at The Hague.

DISCUSSION

Moderator **Mark Kersten** asked all panellists to think of one thing that the ICC could do to improve its relationship with Africa and one thing that African actors could do to improve that relationship.

Jim Goldston: The ICC should continue doing what it did best, i.e., conducting effective investigations, prosecutions and trials across Africa and elsewhere. States, for their part, should follow the law, specific examples here being Kenya and South Africa.

Elizabeth Evenson: The ICC should think of itself as a judicial institution, not have a political agenda and continue engaging with African states and leaders. Groups like the AGJA should use their influence to engage with governments.

Tim Murithi: The OTP could do much to show its awareness of highly political contexts. The AU should not use any regional court "to entrench Head-of-State immunity. He hoped that a preliminary examination of Syria would not concentrate on only one of the parties. Lastly, the AGJA should be global in nature.

Bill Pace: As the fourth organ of the Court, the ASP needed to take on the important task of reform. The Security Council veto should not be used where war crimes were concerned. NGOs and progressive parliamentarians should support and protect human rights and international justice defenders on the continent.

Charles Jalloh: The Court could be more open to the creation of this African chamber through the principle of positive complementarity. Ideally, the ICC and AU should have liaison offices in Addis Ababa and The Hague respectively.

Q & A

Comments on some points of interest from the floor:

- **Positive complementarity and capacity building**

Elizabeth Evenson: Positive complementarity was not popular with States Parties, which criticised the cost involved. It was only done on an ad hoc basis, which was realistic, e.g., capacity building had become an essential part of the hybrid/ad hoc court exercise. In this respect, the ICC could do more. **Jim Goldston** agreed that capacity building was crucial. However, the ICC was overtaxed and unable to devote itself to the task, though states could do more if the political will was present.

Charles Jalloh said that, while complementarity was indeed the answer, capacity building was not the Court's job. On a more specific note, BP felt that positive complementarity was important when it came to building the necessary capacity to resist being silent about impunity.

- **Victims**

Elizabeth Evenson: The ICC had to put victims at the centre and bring them in to participate, so as to engender a sense of justice.

- **Peace and justice**

Charles Jalloh: There was a great deal of misunderstanding about this issue. It had been construed as meaning that justice was sacrificed for the sake of a political solution. However, this was simply not true: justice was merely held in abeyance. After all, no statute of limitations applied. In this connection, it should be remembered that Mandela had refrained from prosecuting.

PANEL II:

AFRICAN COURTS AND INTERNATIONAL CRIME DIVISIONS

The Hissène Habré trial before the Extraordinary African Chambers in Senegal, the Special Criminal Court in the Central African Republic, the African Court on Human and Peoples' Rights in Arusha, and International Crime Units in Rwanda, Kenya and Uganda.
What do such institutions and trials mean for justice and accountability in Africa? What do they mean for the ICC-Africa relationship? Of equal, if not greater, importance, what do such trials imply for the victims of injustice and the African public? Are these "African (judicial) solutions to African (impunity) problems"?

MODERATOR
Patryk I. Labuda Geneva Academy of International Humanitarian Law and Human Rights

INTRODUCTORY REMARKS
Abdul Tejan-Cole Executive Director of the Open Society Initiative for West Africa, Dakar

PANELLISTS
- **Netsanet Belay** Africa Director, Research and Advocacy, Amnesty International, Johannesburg

- **Ottilia Anna Maunganidze** Senior Researcher, Office of the Executive Director and Transnational Threats and International Crime Division, Institute for Security Studies, Pretoria

- **Simo Väätäinen** Witness protection consultant; Former Chief of the Victims and Witnesses Unit at the ICC and STL; Member of UN Team of Experts to conduct an assessment of the Special Criminal Court in the Central African Republic

Ottilia Anna Maunganidze Senior Researcher, Institute for Security Studies, Pretoria.

Abdul Tejan-Cole, member of the Africa Group for Justice and Accountability.

With a recently heard admonition, "You NGO lot don't do much to acknowledge what the AU and Africa has done", ringing in his ears, **Abdul Tejan-Cole** began by recognising that the AU placed a great deal of emphasis on justice, accountability, reconciliation and peace.

In addition, Africa had led the way in terms of the different types of courts established, a process that was, moreover, ongoing. Similarly, Africa had to be credited with its role, not only in the Rome Statute, but also in terms of referrals to the ICC.

Despite all these commitments, however, much remained to be done: there were too many gaps and too many victims. Not until the last victim in Africa had seen justice done, could the exercise be called a success. African governments and institutions had to be urged to close the gap between "paper" and reality.

As had been said in the previous panel, the ICC could not do it all: and indeed it was not expected to do so under the Rome Statute, which provided that the ICC was to act only where states were unwilling or unable to do this themselves.

Therefore, there was a need to look at strengthening national judicial institutions and systems to deliver "independent, fair and credible justice" within the context of complementarity. When prosecuting nationally, however, immense challenges remained, in the form of bias, the legal and procedural framework, retroactivity, and questions of national or international customary law.

Due to these challenges, eyes had turned to regional options. There was a degree of cynicism about African solutions, with these being perceived as an endorsement of impunity.

Against this, it had to be stressed that real commitment had been shown by the Habré case: funds had admittedly come from outside yet the man had been tried. Secondly, the ECOWAS Court based in Abuja was the leading court in terms of human rights and had been responsible for a "brilliant judgement" upholding the legitimacy

„There is a need to look at strengthening national judicial institutions and systems to deliver "independent, fair and credible justice" within the context of complementarity."

– Abdul Tejan-Cole

of trying the Habré case in Senegal.

This was why he liked the term, "Rome Treaty Plus", coined by **Charles Jalloh**. While having an African court was in no way synonymous with impunity, it nevertheless had to be credible. He was not so much worried about the specific type of court but rather about the matter of accountability.

After paying a brief tribute to Ugandan Senior Principal State Attorney and Prosecutor of the International Crimes Division, Joan Kagezi, a "true champion of international justice and human rights", who had been so tragically assassinated, **Ottilia Anna Maunganidze** went on to say that the primary responsibility for dealing with crime — whether or not international — lay with the state, in order to ensure that justice was "properly served". If that in fact happened, there would be less focus on "far-off institutions".

After all, the crimes had been committed in Africa against Africans. The idea that nation states should address crime predated that of complementarity. Noting the need for frameworks to deal with international crime, **Maunganidze** stated that it was, however, not enough to have courts on paper: they had to work in practice.

Discussing the administration of justice in Africa at three levels, continental, sub-regional and national, **Maunganidze** remarked that in 2014, the AU had incorporated a criminal law section within the ambit of the envisaged African Court on Justice and Human and Peoples' Rights.

Similarly, the AU Constitutive Act called on its Member States to address international crimes. According to **Maunganidze**, developing African justice systems was a key to peace. Indeed, justice is seen as a key cog in the peacebuilding process. This justice takes various forms, including retributive and restorative justice. Importantly, peace and justice were thus not mutually exclusive. To many, both peace and justice were needed

At a sub-regional level, note should be taken of the following:

- The ECOWAS Court's role in Habré's trial in Senegal.
- The East African community's shift towards including a more comprehensive human rights mandate.

However, political will and financial support were needed to deliver rather than avoid justice.

At the national level, some issues worth noting were:

- A key element in the South Sudan peace process, and a "huge concession" on the part of the AU Commission had been the agreement to make no allowance for immunity.
- Kenya, which, at the time, had an ongoing case before the ICC, had chosen to establish an International Crimes Division in line with that adopted by Uganda.
- With a view to prosecuting cases arising from the 1994 genocide, Rwanda had formed its own International Crimes Unit.
- South Africa had a Priority Crimes Litigation Unit (PCLU) in the National Prosecuting Authority that dealt with international crimes. The PCLU directed investigations, which were mostly led by investigators from the Directorate for Priority Crimes Investigations.

If one recognised the need to hold perpetrators of international crimes to account, there was no need to "choose" which mechanism to support: it was possible to support domestic, regional and international mechanisms at the same time.

Moderator Patryk I. Labuda, Geneva Academy of International Humanitarian Law and Human Rights.

Keriako Tobiko, Director of Public Prosecutions, Kenya.

KENYA

It was at this juncture that **Patryk Labuda** invited the Kenyan Director of Public Prosecutions, Mr. **Keriako Tobiko**, to say a few words.

Tobiko: Kenya had been one of the first countries in Africa to sign and ratify the Rome Statute. The country's new 2010 Constitution had domesticated the principle of customary international law and done away with Head-of-State immunity.

The retrospectivity of international crimes had likewise been addressed. Kenya was an ICC situation country with three cases before the Court.

Turning to the issue of post-election violence, **Tobiko** explained that of a total of 6,000 cases, 5,000 had been investigated under the ordinary penal code and 1,200 had been taken to court to be tried domestically. A national task force had reviewed 5,000 dossiers (as well as opening them to the ICC for investigation) and decided that there was insufficient evidence on which to proceed to prosecution.

However, no state could ignore victimisation and dispossession, and so the President had issued an apology and established a fund for reparations and settlement of claims.

The DPP had set up a special unit of 10 purpose-trained prosecutors but to date no prosecutions had been undertaken under the implementing legislation of the International Crimes Act. A highly specialised skills set was required and training was thus of the essence: as it was, this embryonic unit faced challenges in the form of skills, competences and resources. The police force was in the process of setting up a specialised division, as was the judiciary.

Kenya was "a friend of the ICC" but the ICC was solely intended to handle select cases. Returning to a question posed earlier in the day, **Tobiko** wondered how the establishment of an African Court would fall within the concept of ICC complementarity.

„Kenya was 'a friend of the ICC' but the ICC was solely intended to handle select cases."

– Keriako Tobiko

Netsanet Belay, Africa Director, Research and Advocacy, Amnesty International, Johannesburg.

Q & A

Comments on some points of interest from the floor:

Forum shopping

Pausing just long enough to remark that he was "encouraged to hear that Kenya was a friend of the ICC", **Patryk Labuda** went on to make the following observation: the panellists had emphasised that there was no conflict between international, continental, regional and domestic levels, yet he was nonetheless concerned about standards of justice.

Might there not be a danger of victims engaging in "forum shopping"?, especially bearing in mind the different budgetary structures of the various tribunals.

Ottilia Anna Maunganidze: With regard to the question of justice, some people in the Democratic Republic of the Congo felt that the ICC's sentence in the Thomas Lubanga Dyilo case was "too short". Their measure of justice was more about whether the sentence was commensurate with the offence. One had to ask more in-depth questions about whether justice was being served, in that "serving justice" had to be seen through the population's — and not their neighbours' — eyes.

Subsidiarity and complementarity

Aside from **Labuda**, another member of the public expressed the concern that "we might be allowing people to shop around".

Maunganidze said that there was an emphasis on exhaustion of local remedies, with the African Court seen as the last resort. Where there was no recourse at the national level and this was then sought from the African Commission, that could not really be called "shopping around". Then again, often it was not the victims who were "doing the shopping" but their lawyers.

Southern African Development Community (SADC)

To a questioner who confessed feeling "a little ashamed" at what had happened with SADC and who wondered whether something along the lines of ECOWAS could perhaps be the solution, **Maunganidze** said that the change in SADC's mandate had effectively opened the door for southern Africans to access the African Commission directly in the absence of a sub-regional court.

Independence of judges

Replying to a member of the audience who had made the point that judicial officers in most African countries were government appointees, **Netsanet Belay** noted that, while the Malabo Protocol made provision for 16 judges in three chambers, there was a possible conflict between the Articles of the Protocol. Consequently, he was somewhat concerned at "who gets to decide which judges sit in which chambers".

Maunganidze agreed that the appointment of judges at a national level was controversial in many countries (indeed, when judges had been prevented from attending a SADC Tribunal Strategic Meeting in 2010, she knew at once that "the days of the SADC Tribunal were numbered").

Simo Väätäinen, Member of UN Team of Experts to conduct an assessment of the Special Criminal Court in CAR.

Next, Member of the UN Team of Experts to conduct an assessment of the Special Criminal Court (SCC) in the Central African Republic **Simo Väätäinen** outlined the challenges confronting the Court and the implication for victims.

Väätäinen said that the creation and success of the SCC was absolutely crucial, not only for the CAR but also as a potential model for other countries.

The history of the CAR was filled with injustice and impunity. Since gaining independence in 1960, it had been ruled by military dictators for all but nine years. Abuse of power and violations of human rights had become institutionalised and endemic.

A culture of impunity had prevailed, with amnesty used as a tool to shield powerful figures, the military and the security forces from criminal liability. As a consequence, the CAR had become one of the least developed countries in the world.

This had led to a situation in which national criminal justice system institutions were weak, lacked skilled practitioners and enjoyed limited public confidence.

During the latest round of conflict, alliances had been drawn along sectarian, inter-ethnic, inter-tribal and inter-religious lines, with the presence of external intervention (e.g., Sudan, as well as fighters from Chad).

All parties — the Séléka, anti-Balaka and armed forces — had been involved in serious violations of international humanitarian law and gross abuses of human rights (including rape and other gender-based and sexual offences and violations). Thousands had been killed and there were over one million internally displaced persons or refugees; in fact, one in four inhabitants was either a refugee or an internally displaced person.

The country's transitional government and the UN had agreed to establish the SCC to investigate and try serious violations of human rights and international humanitarian law. The ICC was also investigating in the CAR, with the verdict in the Bemba trial having been announced just the previous day. Nevertheless, the ICC could only cope with a handful of cases and would thus be concentrating on the top echelons. Supplementary proceedings would obviously be required to address the remainder; hence, the establishment of the SCC, a national court with international involvement.

Väätäinen had been part of the team sent to the CAR to look into the proposed court's budgetary needs. It had drawn up a report containing a detailed structure, staffing levels, operating expenses and the like. Based on that report, a project document for the court's establishment was currently under consideration in Bangui.

Setting up the SCC would require sustained political commitment from the national government, the UN and Member States. Given the necessary political will, particularly on the part of the incoming President (who had at one stage indicated the need to prioritise reconciliation and disarmament), the question would become one of funding and technical implementation.

While one could draw on 20 years of experience in setting up national/hybrid courts, there were

still some major challenges to be overcome, namely:

- As with the ICC itself, efficiency and effectiveness were crucial. The SCC needed to be effective and efficient in establishing the rule of law.

- Selection of key personnel, both magistrates and internationally recruited staff, had to be merit-based.

- An advance team of key individuals was to be deployed as soon as possible. These had to be competent, experienced persons who would take ownership of the SCC-creation process.

- Selection of cases for prosecution and trial would call for mapping and analysis to choose the most representative cases. There were obvious synergies and mutual interest with the ICC.

- An outreach programme was needed to prevent the SCC being isolated from its true constituencies on the ground.

Ultimate success would depend on competence and funding.

Next, **Netsanet Belay**, Africa Director, Research and Advocacy at Amnesty International outlined the legal and institutional implications of the Malabo Protocol.

The Protocol on Amendments to the Protocol on the Statute of the African Court of Justice and Human Rights had been adopted in June 2014 and, while several other important legal instruments had also been adopted at the same Assembly, he would be referring to the former as the "Malabo Protocol".

Full comprehension of the Malabo Protocol required understanding of three interrelated instruments. These were the Protocol establishing the African Court on Human and Peoples' Rights, the Protocol establishing the African Court of Justice (which had not been operationalised), and the Protocol on the African Court of Justice and Human Rights (ACJHR), aimed at merging the African Human Rights Court and the African Court of Justice into a single court.

The adoption of the Malabo Protocol itself was a culmination of a protracted and complex process, and had been expedited by external developments. Chief among these had been the indictment and issue of an ICC arrest warrant against President Al-Bashir of Sudan, and the indictment and trial before the ICC of President Uhuru Kenyatta of Kenya, and his deputy, William Ruto.

In essence, therefore, it was the European perception of universality that had spurred the AU to give serious consideration to the creation of a regional criminal court. Despite the need to make the real motivation behind it clear, the Malabo Protocol was nonetheless a "step in the right direction".

When it came to the question of how the Protocol was to be operationalised, **Belay** made three key recommendations:

- Member States were not to rush to judgement but should carefully study all the implications and concerns of signing or ratifying the Malabo Protocol. Similarly the AU had to draw up an honest assessment of the costs involved.

- Both the immunity clause and definition of terrorism needed attention. The immunities granted to AU heads of state and other senior officials should be repealed, and official capacity should be no bar to the ACJHR exercising its jurisdiction. Similarly there was a lack of clarity about what was meant by "senior state officials". Lastly, the limits on the range of civil society organisations able to access the ACJHR had to be revised.

- The African Human Rights Court had to be strengthened.

The implications were that there were a number of progressive aspects, including the extensive and ambitious range of crimes, with ACJHR being given jurisdiction to try 14 different crimes comprising both international core crimes and transnational organised crimes.

This was important bearing in mind the link between the two. Indeed, the Protocol included rape as an act of genocide. However, the definition of terrorism was far too broad and raised concerns about repression of political opposition, human rights defenders and the legitimate exercise freedom of expression, association and assembly.

On the other hand, concerns remained as to capacity and the number of judges needed. What in fact would it take to run the Court?, asked **Belay**.

At 2015 staffing levels (a work force of 1309), the ICC had been allocated a budget of EUR 139 million in 2016. The Hissène Habré trial alone had cost approximately EUR 8 million.

It was therefore plain that, without the assistance of donors, the AU would not be able to finance the operations of the ACJHR. Moreover, the experience of the African Commission and African Court showed that it was very difficult to get the AU to provide the requisite resources to enable effective functioning. This was a problem.

Charles C. Jalloh, Associate Professor at Florida International University College of Law.

Q & A

Comments on some points of interest from the floor:

▸ Extraordinary African Chambers within the Senegalese courts, a model to be pursued? Or was there a problem with setting up a tribunal to try a particular person?

Ottilia Anna Maunganidze: Establishing a court to deal with a particular person was problematic and raised the question of whether the court was geared to conviction or acquittal. Hissène Habré had already been tried in absentia in Chad and so the choice of an extraordinary African Chamber was apposite. It was not clear in what circumstances a regional or continental court would serve as a court of appeal (perhaps precisely because the drafters had wished to avoid this issue!).

▸ In the CAR there was no funding for the legal system. Where then did the value lie? Was it in rebuilding that system or in setting up a special tribunal? Where should money go when victims had to be considered?

Netsanet Belay: The African Court was an expensive venture requiring a multimillion-dollar budget which the AU clearly did not have, yet it "kept on building institutions".

Simo Väätäinen said that the budget for the Habré trial had originally been estimated at 30 million euros, "so eight million sounded like a bargain". It was a good investment since it marked a departure from past practices. He saw no contradiction between investing in local legal systems or in a special criminal court, since the creation of the latter allowed for knowledge transfer and training.

▸ Possible confusion surrounding the Malabo Protocol

The confusion created by the Malabo Protocol was such that Botswana, for instance, had not signed it and had "stayed with the Rome Statute". While there was certainly a role for regional mechanisms, there was a problem of perceptions, e.g., that such mechanisms had been set up as courts of appeal.

Netsanet Belay: The AU had adopted an "all or nothing option" and, as a result, the court would remain defunct. The entire subject should be opened up to debate.

Charles Jalloh demurred and attempted to clarify what had really happened when the Protocol had been signed, stressing that some truly progressive standards had been introduced.

Belay agreed as regards the progressive amendments but insisted that the fact that it was a "merged court" made it essential to understand its history. He repeated that states should think very seriously before ratifying the Protocol, that no proper, thorough cost assessment had been drawn up, and that the AU had not made a genuine commitment.

PANEL III:

HUMAN RIGHTS IN AFRICA: PROGRESS AND REGRESSION

Do recent developments represent advances in the protection of human rights on the continent? Which developments should be of particular concern? Beyond prosecution, what responses and mechanisms can and should be employed to further advance human rights and address shortcomings in Africa?

MODERATOR
Joseph Roberts-Mensah Africa Director, Wayamo Foundation, Accra

INTRODUCTORY REMARKS
Navi Pillay Former UN High Commissioner for Human Rights

PANELLISTS
- **Femi Falana** Human rights activist and lawyer, Lagos

- **Tiyanjana Maluwa** H. Laddie Montague Chair in Law, Pennsylvania State University School of Law; Former Associate Dean for International Affairs, School of Law & Director, School of International Affairs

- **Fatiha Serour** Director of Serour Associates for Inclusion and Equity, London

AGJA member Tiyanjana Maluwa, Moderator Joseph Roberts-Mensah, AGJA's Femi Falana and Fatiha Serour.

Professor Tiyanjana Maluwa, member of the Africa Group for Justice and Accountability.

On the subject of human rights, **Navi Pillay** said there had been both advances and setbacks in Africa. There was no country with a perfect human rights record. The current focus was on implementing recommendations and, while there was a degree of willingness to co-operate in the process, the necessary political will was not always present.

However, it also had to be said that violations were in no way limited to Africa. For instance, old laws that countenanced beating and traditional practices such as witchcraft were still in place in the Caribbean. In general, human rights violations were often flags that alerted to and preceded some imminent conflict, a prime example of which was Syria.

Commissions of enquiry performed a valuable job of fact-finding, talking to victims and civil society organisations, and subsequently issuing recommendations, even in countries like North Korea. Such recommendations might extend to specific laws that needed changing.

However, no commission had been permitted to enter Syria (though in that particular case the chairman had been allowed in). In some instances, she had ensured that commissions included retired judges, such as **Richard Goldstone** and, in the case of North Korea, Michael Kirby, whose findings had led to sanctions being imposed.

The only remedies available were recourse to the Security Council, which had no enforcement powers of its own, and by way of last resort, military intervention. Member States had to realise that in situations such as Syria, investigations had to target the crime base and not just the violations.

Femi Falana: If one looked at the position in the 197Os and 198Os, one might well believe that there had been progress in human rights. The crisis in Uganda under Idi Amin had marked a turning point. Subsequent to that, however, the OAU Conferences had considered whether to "worship non-intervention or defend human rights", and the history of human rights had never been the same since. The African Commission, sitting in Gambia — ironically, a country with one of the very worst human rights records — had made a number of

„In general, human rights violations were often flags that alerted to and preceded some imminent conflict, a prime example of which was Syria."

– Navi Pillay

Fatiha Serour, member of the Africa Group for Justice and Accountability.

recommendations. When the African Court on Human and Peoples' Rights had been set up, it had initially been viewed as the solution but the fact that a declaration was required by any given country prior to the Court being allowed access to it, had served to negate this.

Admitting to frustrations with both the AU and the Commission, **Falana** said that the only "light" was the ECOWAS Court, which had made tremendous progress in enforcing human rights in West Africa. Even Gambia, which had initially refused to appear, had acceded to come before the Court. Yet, only a handful of Member States had shown willing to comply with its judgements.

Nonetheless, for the majority of people there had been no progress: there was freedom of expression for the elite but the rights of the poor had been honoured in the breach. Poverty had to be addressed because failure to do so would lead to terrorism and unrest.

That was why the provisions of the African Charter on Human and Peoples' Rights should be used by governments to protect and control their national resources. Similarly the Charter should be used to enforce the right to primary education: governments had to be confronted.

Tiyanjana "Tiya" Maluwa noted that there had been a regression in the protection of human rights from the stance of the AU, which had failed "to live up to the expectations" created some 16 years ago when it had been established.

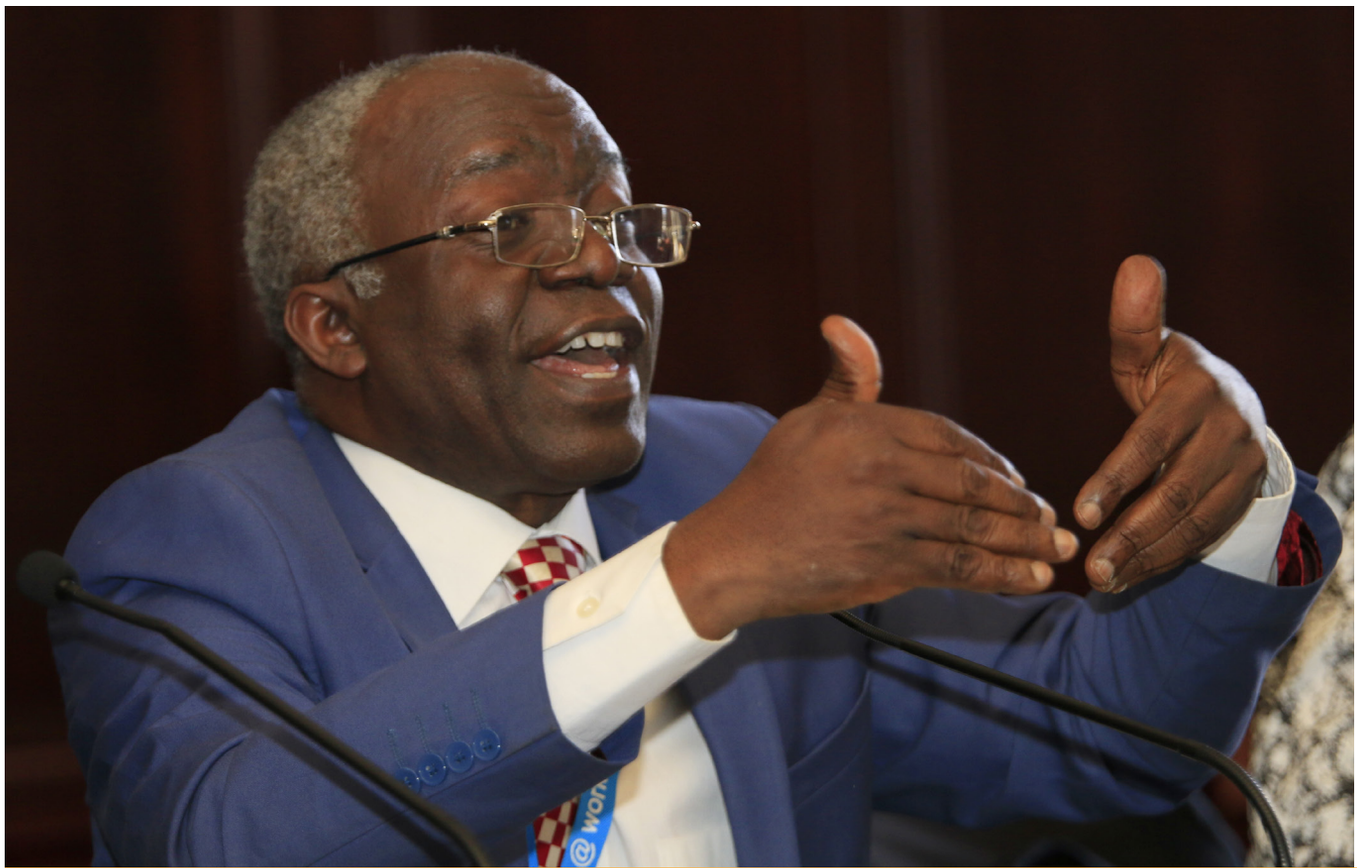
As one of the drafters, he had shared in those same hopes and expectations. The new organisation had been seen as an opportunity to do something different: it was the institution's role to intervene in states which had fallen short of their primary responsibility.

Indeed, an OAU side-meeting in Lome in 2000 had delivered a report on the Rwandan genocide, the failure to address it and the lessons to be learnt. The UN Security Council was seen as having failed to meet its obligations.

After the UN's failure to act in Rwanda, and in the face of opposition from Egypt which felt that it was a challenge to the Security Council, Article 4(h) was included in the Constitutive Act of the African Union, whereby the AU was given the right "to intervene in a Member State pursuant to a decision of the Assembly in respect of grave circumstances, namely: war crimes, genocide and crimes against humanity".

There had been a number of situations in which Art. 4(h) could have been -but had in fact never been- invoked, e.g., Dafur, Sudan. Similarly, in the case of Burundi the initiative to intervene had come to nought, and had ultimately resulted in a delegation of five heads of state being sent to the country.

In other words, the apparent promise of normative progress had been negated and one could therefore not talk of real progress.



Femi Falana, member of the Africa Group for Justice and Accountability.

Fatiha Serour noted that as a development and peace-building practitioner, the whole subject of human rights was "in her guts". Structures alone were not enough: she would speak "through the eyes and ears of victims of human rights violations".

There was no need for rules, provided that people were prepared to "stand up on moral grounds" and form "a critical mass", "a compelling force", a veritable "wall". Equal rights looked "good on paper, she said, but what happened when there was a dichotomy between stating support and then implementing mechanisms that violated those same rights, e.g., where the authorities responsible acted in violation of victims' rights?

In South Sudan, the CAR and Somalia all the reports had been damning but very little had been done in practice to support the victims. The Human Rights Watch report on Somalia was a case in point. The very troops which had been sent to protect rights, had actually violated them. Victims had been raped and journalists imprisoned for reporting. Laws often did not serve any purpose because they did not serve justice. Hoping and waiting for the results of recommendations was the lot of the victims. She would not rest until perpetrators were held to account.

Neither immunity nor impunity was acceptable.

DISCUSSION

Joseph Roberts-Mensah asked the panellists for their thoughts on two points:

- **What developments were of most concern, and why did Africa want to blame others?**

Tiyanjana Maluwa: Of most concern to him was whether states were living up to their commitments.

Femi Falana: In the 1960s, the founding leaders had taken the economy very seriously. Now however, the influence of the International Monetary Fund and the issue of enforced poverty had to be challenged.

Fatiha Serour: Blaming others was always easy. The truth was that African leaders became caught in the desire to hold onto power. Corruption, in turn, led to interference with policies and an unequal distribution of resources.

Foreigners might well be attracted for geopolitical reasons and/or by greed but it was leaders, motivated by personal interests, who allowed this state of affairs to exist.

One had "to call a spade a spade".

Question from James A. Goldston, Executive Director, Open Society Justice Initiative, New York.

Q & A

Comments on some points of interest from the floor:

▸ The Burundi decision – how had things changed on the ground?

Tiyanjana Maluwa: There had been much debate on the nature of the conflict, i.e., whether it had simply been a constitutional dispute or had been threatening to become a "grave circumstance". Similarly the scale of the conflict had not been immediately apparent: only now was there acknowledgement of the existence of mass graves.

The AU had used the UN as a "convenient excuse to step back and suggest joint interventions". At this point, so-called elections had taken place, with the result that the AU had to ask itself if it was going to become engaged in "regime change". Other national presidents in much the same position were obviously reluctant to intervene. In summary, it had not been a lack of a normative framework but rather countries' unwillingness which had accounted for the failure to act under Art. 4(h).

To **Femi Falana's** way of thinking, much of the blame had to be attributed to regional leaders, in the case of countries such as Niger and Burkina Faso.

▸ Bleak picture – constructive insights, lessons learnt, recommendations?

To the charge that the panel had painted a bleak picture, **Fatiha Serour** replied that "only bleak pictures could get results". What had to be done? Addressing poverty would go to form a critical mass to challenge the system.

Empowerment through education would ensure trust in the system, something that was glaringly absent today. A lot more had to be invested in civil society to ensure that elected officials were held accountable. People were a powerful force for change and had to be endowed with the necessary capacity to think before voting.

Femi Falana: Poverty and ignorance were the root cause of movements like Boko Haram. Civil society need to be mobilised to combat corrupt leaders.

PANEL IV:

INCREASING IMPORTANCE OF TRANSNATIONAL CRIMINAL LAW IN AFRICA AND ITS LINKS TO CORE INTERNATIONAL CRIMES

Is Transnational Organised Crime becoming part of the remit of International Crime Units across Africa? This panel will address the challenges in the collection, sharing and use of evidence in the prosecution of international and transnational crimes, the evolving nature of organised crime in Africa and its policy responses, and the difference between transnational crimes and core international crimes and how a transnational crime could "become" a Rome Statute crime.

MODERATOR

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

PANELLISTS

- **Philipp Ambach** Special Assistant of the President, International Criminal Court
- **Charles Goredema** Centre of Criminology, University of Cape Town
- **Jemima Njeri Kariri** Senior Researcher, Transnational Threats and International Crime Division, Institute for Security Studies, Pretoria
- **Pierre St. Hilaire** Director Counter-Terrorism, INTERPOL

Pierre St. Hilaire, Director Counter-Terrorism, INTERPOL.

Philipp Ambach began by noting that to distinguish between international and transnational crimes and identify the overlaps between the two, it was necessary to see why so-called core international crimes were "international".

This was firstly because such crimes were deemed to involve the worst violations arising from wars between states; and secondly because they were defined in international conventions that invoked universal responsibility to protect: (a) peace and security; and, (b) human rights (e.g., crimes against humanity).

For this reason, one had to look at the relevant international instruments, such as the Geneva Conventions. Under the terms of the Rome Statute, the ICC had been mandated to cover the crimes of most serious concern to the international community as a whole.

This, in turn, meant that core international crimes "trumped" national laws, and that it was the duty of states to prosecute such crimes or help others to do so.

In contrast, while transnational crimes also had a cross-border effect, effective jurisdiction was purely national. These were predominantly committed by private persons for monetary gain.

Transnational organised crimes were defined as any crime committed in more than one state, or committed in one state but substantially prepared, planned, directed or controlled in another, or committed in one state but involving an organised criminal group engaged in criminal activities in more than one state, or committed in one state but having substantial effects in another, and included offences such as smuggling, trafficking, cyber crime, illegal arms trade and terrorism.

A number of elements of transnational crimes were to be found in the sub-crimes of core crimes such as crimes against humanity, though additional grounds of proof, e.g., evidence of a "widespread or systematic attack", would be required to substantiate the latter.

Concepts such as "ecocide" could likewise be found in the Rome Statute but within the context of armed conflict. In the case of "terrorism" this was akin to the "crime of terror" envisaged by international law, though here the presence of armed conflict was again necessary.

As there was no general definition of terrorism, it had not yet "crossed the threshold". Similarly, other transnational crimes such as drug and arms trafficking and mercenarism had also predated the Rome Statute, yet there were doubts as to their possessing the necessary degree of gravity to qualify for international status.

Such links were important because one type of crime funded another, thereby making it necessary to differentiate between and yet simultaneously connect the two.

Conventions afforded an opportunity to solidify and codify certain transnational crimes but states had to agree on the definitions of such crimes and the respective modes of liability.

However, one had to beware of the "arduous procedure" entailed in amending the Rome Statute, which meant that incorporating new crimes might not be practical, let alone feasible.

Charles Goredema began by noting that Cape Town afforded one the chance of observing transnational organised crime at first hand, whether on the street or from newspapers!

Having worked in support of one or two regions of INTERPOL, he could say that the key lay in understanding the issues raised by the most serious forms of transnational crime, the parties involved, their interconnections and the scale of operations, etc. The greatest weakness was that the information was "pathetically incomplete".

Aside from the many gaps, there was no consensus as to what was to be done with the information. This was of course a huge advantage to the criminals, and had led them to move from traditional forms of crime to those not requiring a physical presence, e.g., cyber crime.

On the other hand, it also had to be acknowledged that global criminal law and transnational crime investigation tools had developed through conventions, protocols, task-force recommendations and the like.

Goredema listed the persisting challenges as:

- The ability of criminal networks to adapt to changing environments by changing their modus operandi. One method had been to align with the political and economic elites, e.g., aspiring and emerging politicians/bureaucrats who might be short of resources, and could "end up in the lap" of organised crime networks, which would inevitably demand some type of quid pro quo.

- In South Africa, economically-motivated crime by networks that connived and/or collaborated with officials was illustrated by the case involving the late Police Commissioner, Jackie Selebi.

- The use of proceeds of crime to undermine institutions and compromise their integrity, which contributed in turn to the fragility of states, since it affected trust, credibility and ultimately, investment.

- In some urban environments, such as Cape Town this had led to parallel systems of authority. Some communities did not trust the legitimate public authorities, with the result that these authorities could no longer rely on the communities that they were supposed to serve to help in

Jemima Njeri Kariri, Senior Researcher, Institute for Security Studies, Pretoria.

combating organised crime.

- Corporate criminality, whereby syndicates increasingly used corporate entities to facilitate "illicit financial flows", generated by activities such as the smuggling of precious minerals and wildlife products from Africa.

Jemima Njeri Kariri limited herself to reinforcing the interconnectedness of cross-border crimes.

The spread of globalisation and the fact that criminals were more dynamic and elusive had resulted in a situation where crimes which had not been previously connected, were now connected, e.g., the link with terrorist groups.

The way in which some transnational crimes had become fully international had created a fertile ground for this interconnectedness, with the same criminals often being involved in both types of crime, e.g., money laundering fuelled terrorism and this was in turn linked to arms and drug trafficking.

Another instance of this same phenomenon was how wildlife poaching had financed militia forces like those of Kony and Al-Shabaab. Illegal mining had fuelled, and was continuing to fuel, international crimes in the DRC.

Corruption not only siphoned funds from their intended destinations, but also made for the porousness of borders. Any response to the problem would necessary entail finding the root causes.

Pierre St. Hilaire began by saying that things were "not looking good" on the international co-operation front.

The United Nations Convention against Transnational Organised Crime (UNTOC) had been a response to criminals' ability to "shrink the world". Its definition of transnational read as follows:

> "..an offence is transnational in nature if: (a) It is committed in more than one State; (b) It is committed in one State but a substantial part of its preparation, planning, direction or control takes place in another State; (c) It is committed in one State but involves an organized criminal group that engages in criminal activities in more than one State; or (d) It is committed in one State but has substantial effects in another State."

Having a single, agreed definition enabled signatories to use the convention and share information; somewhat wryly, he noted that certain "sexy" terms had become fashionable, such as "holistic", "whole-of-government" and "whole-of-nations" approach. Paradoxically, this new culture of information-sharing was in a way due to the culture of not sharing that had so long been an integral part of the Cold War.

Nonetheless, said **St. Hilaire**, French outrage at the November 2015 attack in Paris and the formation of a joint investigation

team had been ineffective in the face of the previous day's terrorist attack at Brussels Airport. Inexplicably, participation in the team had been limited to just the two countries, despite the involvement of other countries, such as Spain.

This "barrier of silence" between governments had to be destroyed.

In much the same vein, he noted that harmonisation of laws was another priority, e.g., the lack of it enabled individuals to engage in Jihad recruitment activities in countries where this was not a punishable offence. Similarly, ivory poaching should be made a serious offence under the Convention.

A true "whole-of-nations" approach would require serious commitment from policy makers, investigators and prosecutors to share information across borders.

„A true "whole-of-nations" approach would require serious commitment from policy makers, investigators and prosecutors to share information across borders."

– Pierre St. Hilaire

Lastly, on the subject of mandates, **St. Hilaire** warned that a narrow mandate could be a hindrance and prove counterproductive, e.g., a specific mandate to stop piracy in the Indian Ocean had narrowed activities to such an extent that charcoal smuggling, known to be one of Al Shabaab's main sources of finance, had been ignored.

DISCUSSION

Before opening the debate to the floor, Moderator **Mark Kersten** asked each of the panellists a question:

▸ **How was one to secure the co-operation needed to target those most responsible, e.g., the Asian market in the case of ivory poaching?**

Pierre St. Hilaire: It took a network to defeat a network, and this included civil society and the military. In recent months we had seen how the need for such a network had involved a company like Apple, in the case of encryption technology. All actors were needed to participate on a transnational scale, possibly by starting at a national level and then moving to a regional and ultimately a global level. By way of example, he alluded to tusks being moved from Uganda via Kenya to the United Arab Emirates and thence to Sri Lanka.

▸ **What of Ocampo's view that there was a need to criminalise terrorism in the strict sense, with the culprits seen as criminals rather than as enemies?**

Jemima Njeri Kariri: We had come a long way from the traditional position of "fighting a war" and should use the criminal justice system to fight terrorists as criminals.

It was pertinent here to have a human rights response rather than reacting by wanting "to smash" the opposition. Dealing with enemies only created further enmity. Crime was not always an issue of poverty; greed and lust for power were also important driving forces.

▸ **Would it make sense for the investigation and prosecution of transnational crimes to be linked to that of international crimes?**

Charles Goredema: The answer to the linkage of the fight was "partly yes and no". The question was whether such linkage would make a real difference in terms of success, i.e., a tangible difference in terms of access to useful information and more effective procedures.

Goredema was of the opinion that this would not be the case because the most formidable challenges would not necessarily disappear. The danger was that countries which benefited would only "pay lip service". Moreover, he knew of no regional African court that could deal with transnational organised crime.

▸ **In a "chicken and egg" situation in which it was difficult to pinpoint the exact link, was there any investigation of international crimes that was not somehow linked to transnational crimes?**

Philipp Ambach: Transnational elements had not yet been part of an investigation into international crimes. This could be of use in certain forms of liability such as aiding and abetting, an example possibly being that of illicit diamonds fuelling the crimes of core perpetrators. However, one would have to prove individual responsibility. Furthermore the victims would not be covered.

Ambach felt that, theoretically speaking, the African Court of Human Rights might have jurisdiction at a regional level over transnational crimes. The inclusion of such crimes under the Rome Statute would be problematic in cases where the pattern of an international crime was not in evidence.

Q & A

Comments on some points of interest from the floor:

▸ Could corruption be seen as a crime against humanity inasmuch as it diverted funds where lives might otherwise be saved?

Philipp Ambach: A legalistic response would be to see if it could be somehow subsumed, though there would be a problem from a legal point of view. Displacement of civilians could conceivably amount to an international crime provided that the necessary *mens rea* were present.

▸ Capacitation of national jurisdictions to fight transnational and international crimes together? Use of a single jurisdictional model to address transnational organised crime? Divest ICC and invest in African courts instead?

Philipp Ambach: The creation of any court always came down to money, in order to ensure independence. Too much work without the necessary resources was counterproductive. Personally, he would opt to keep things the way they were.

Charles Goredema: Transnational crime affected countries differently and so one could not have a single model, the only possible answer was to look at the best mechanisms adopted by countries similar to one's own.

While **Jemima Njeri Kariri** believed in specialised units at a national level where prosecutors could confer, she saw the regional level as being more problematic.

When it came to working together, **Pierre St. Hilaire** referred to strict versus loose mandates and explained how Frontex's mandate had been expanded to share information with INTERPOL. National problems, he said, tended to surface at an international level.

Question from AGJA member Athaliah Molokomme.

Philipp Ambach, Charles Goredema, Mark Kersten and Jemima Njeri Kariri.

PANEL V:

VICTIMS AND REPARATIONS

What do victims of international crimes want? What is the responsibility of states to victims? How can reparations be provided to victims and survivors of international crimes?

MODERATOR

Kelly-Jo Bluen Project Leader for International Justice, Institute for Justice and Reconciliation, Johannesburg

PANELLISTS

- **Stephen Lamony** Head of Advocacy and Policy on UN, AU and Africa Situations, Coalition for the ICC (CICC), New York
- **Yasmin Sooka** Executive Director, Foundation for Human Rights, Johannesburg
- **Mia Swart** Professor of International Law, University of Johannesburg

Moderator Kelly-Jo Bluen, Project Leader for International Justice, Institute for Justice and Reconciliation.

Mia Swart, Professor of International Law, University of Johannesburg.

Kelly-Jo Bluen began by noting that the venue of the symposium offered a profound moment (and place) to be talking about reparations, namely, in the light of the Bemba conviction and the Rhodes-must-fall movement, and the broader question of the pervasive structural and racial inequalities, something that was still slow-moving in terms of reparations and redress, even after the fall of apartheid.

Bluen explained that the panellists would be addressing different aspects, with **Mia Swart** focusing on the viability of the ICC reparations scheme, **Stephen Lamony** on the substantive mechanisms around reparations, asset freezing and forfeiture, and **Yasmin Sooka** on the challenges to reparations, and reparations within the wider context of non-recurrence.

Mia Swart began by presenting on the viability of the ICC reparations scheme.

She noted that one had to guard against self-evident truths, such as "providing reparations to victims was an obvious good"; instead, one had to be critical and ask whether the reparations scheme was a coherent and viable system.

Much had been said about the innovative approach whereby the ICC was allowing victims to participate and was catering for reparations. Mentioning both the Lubanga and Bemba decisions, **Swart** went on to remark that the matter of reparations was also an important debate in the South African context.

The ICTY and ICTR had not addressed reparations in their respective statutes and this had given rise to the suggestion a trust fund for victims should be created. However, she asked, was it really the role of an international criminal court to provide reparations? Was this indeed the correct forum?

The challenges of legitimacy (selectivity being a key concern in reparations) and effectiveness (no Congo victims having yet received reparations) mentioned by ICC President Fernández were thrown into sharp relief by the subject of reparations; conflation of prosecutorial and reparatory roles created tensions within the ICC regime which were difficult to resolve.

„Was it really the role of an international criminal court to provide reparations? Was this indeed the correct forum?"

– Mia Swart

Did the ICC's reparations manda-

Yasmin Sooka, Executive Director, Foundation for Human Rights, Johannesburg.

te affect the objectivity of the judges?, i.e., did the prospect of reparations create pressure to convict in view of the nature of the atrocities committed, when technically speaking reparations could only be legitimately decided by the trial chamber after and were dependent on a conviction (something which might, in itself, be seen as debatable).

Another equally delicate area was the relationship between the guilt of the accused and the scale of the reparations to be awarded. In the "realm of mass atrocities" such questions could not be scrutinised enough.

The Trust Fund for Victims had to decide on the principles for reparations, and had gone to situation countries and recommended the building of schools, educational programmes, rehabilitation, etc.

Yet no money had been paid out to individuals, thereby raising the question of whether reparations had to be solely symbolic/collective and/or individual. Needless to say it was the latter in which victims were most interested. One should not assume that collective reparations could satisfy victims and "do the trick".

A further fundamental tension in the ICC regime was that its Trust Fund for Victims also had a general assistance mandate, whereby it could exercise a discretionary power to compensate victims in situation countries.

The link between the Trust Fund's two functions was not clear. Then again, what happened if a victim was not "lucky enough to be the victim of a specific accused party", e.g., Lubanga? More thought was required. Selectivity in reparations payments could lead to even more trouble.

All this had to be taken into consideration when simplistically saying that reparations were "good" per se.

Lastly, the ICC was taking far too long in implementing reparations orders. South Africa too could not create expectations and then continue to fail to meet them. More had to be done to make the ICC reparations system "meaningful".

In his presentation **Stephen Lamony** outlined the substantive mechanisms around reparations: asset freezing and forfeiture.

After a brief historical review of the Krupp case, **Lamony** said that, while there were not too many precedents of seizure, predating the ICC, Chapter VII Article 41 of the UN Convention had made provision for imposition of economic sanctions, as had been seen in the case of Charles Taylor.

Article 77 2(b) of the Rome Statute provided that, "in addition to imprisonment", the Court might "order a forfeiture of proceeds, property and assets derived directly or indirectly from that crime, without prejudice to the rights of bona fide third parties", and Art. 93(k) required states to co-operate in the identification, tracing, seizure or freezing of the proceeds of crime.

Similarly, Art. 57(3) required sta-

Stephen Lamony, Head of Advocacy and Policy on UN, AU and Africa Situations, Coalition for the ICC (CICC).

tes to take protective measures for the purpose of forfeiture and Art. 109 envisaged the enforcement of fines and forfeiture measures. For its part, ICC Rule of Procedure and Evidence 212 covered information on the location of persons for the purpose of enforcement of fines, forfeiture and reparations.

As **Mia Swart** had rightly pointed out, one of the current challenges was the delay in the award of reparations to victims in the Lubanga case.

Another point of importance was to ensure that the Trust Fund for Victims was in fact used to make reparations to victims on the ground and/or for providing legal assistance in cases where the accused, e.g. Lubanga, was found to be indigent.

Even so, guilty parties were required to provide for voluntary reparations, which could take any form including a apology, public or confidential. Where an accused, such as Bemba, had assets, however, these could be frozen and allocated to pay legal fees.

Under Art. 93 (k), requests for co-operation were made under seal to protect the victims. This had been done in the case of the DRC and Portugal, but when it came to Kenya, the Kenyan government had acted in breach of this requirement and made public submissions. Three months later the Kenyatta case had been dismissed.

Lamony ticked off the following challenges to asset forfeiture and seizure:

- As the ICC President herself had observed, some individuals were already under Security Council sanctions, which meant that a greater degree of liaison and co-operation with the ICC was required.

- A need for co-operation with states, to ensure the confidentiality of submissions.

- A need for a sustainable source of funding for the Trust Fund for Victims to prevent it from being totally reliant on contributions.

- A need for the ICC to have capacity for the tracing and freezing of assets and conducting financial investigations.

- A need for sufficient information to determine the liability of the accused.

- National jurisdictions needed a legal framework for co-operation to prevent guilty parties divesting themselves of ownership of assets.

Lamony's recommendations included that states be encouraged to sign voluntary agreements with the ICC for tracing and seizing assets, and that information be shared within the framework of anti-corruption conventions.

In her presentation, **Yasmin Sooka** outlined the challenges to reparations, and reparations within the wider context of non-recurrence.

She noted that we had come a

long way. It had taken 20 years to reach a convergence of norms across various branches of international law, which had consolidated the right of victims to reparations both at an individual level and as focused on the notion of state responsibility.

This had culminated in the adoption by the UN in 2005 of the Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law, highlighting the importance of domestic reparations for victims of armed conflict. Indeed, its preamble explicitly noted the need "to identify mechanisms, modalities, procedures and methods for the implementation of existing legal obligations under international law".

One reason that reparations had remained on the global agenda for international justice had primarily been the fight for human rights and worldwide civil society activities.

Naturally one could not undo the effects of violence on victims but firstly there had to be acknowledgement of what had been done, and secondly, there was the issue of what could be done about the damage and suffering caused.

The challenges included the questions of legal frameworks, implementation, resources and political will. Despite the good work of the Truth & Reconciliation Commission, the government had taken 18 years to come to grips with collective reparations but was still ignoring what victims actually wanted.

The change reflected in the Rome Statute in terms of the participation of victims and the matter of reparations had partially been due to the criticisms levelled at ad hoc tribunals for concentrating on the perpetrators and ignoring the victims.

Sooka noted that admittedly there were "teething problems" but one should nevertheless celebrate the landmark judgments at the ICC in the Lubanga and Bemba cases. Transitional justice mechanisms had been another avenue of entry for reparations. In many cases these reparations programmes had been ambitious and had left victims dissatisfied. Hence, the twin challenges of implementation and making resources available were still very much present.

Reparations had to be transformative and it was here that the guarantee of non-repetition or non-recurrence came into play.

One area where reparations had been "a little weak" was gender-based and sexual violence. Despite Security Council Resolution 1325 on women and peace and security, a global study undertaken the previous year, Security Council Resolution 1888 in 2009, the Nairobi Declaration in 2007 on Women's and Girls' Right to a Remedy and Reparation, and the pivotal study conducted in 2010, it was a well-established fact that women and children were the main victims of armed conflict and suffered continued social stigma. Yet it was precisely here where reparations had been weakest.

In respect of regional instruments, **Sooka** noted that the previous year had seen the 3rd judgement on reparations in the African Court.

Returning to the topic of the guarantee of non-recurrence, **Sooka** said that one usually spoke of "never, never again". This was about institutional reform, vetting, the rebuilding of institutions and how to restore the trust of citizens in the state, i.e., the right to be treated as a normal citizen regardless of race, creed and colour.

Kenya was an example of judicial vetting programmes which had led to Willy Mutunga, a human rights lawyer, becoming the country's Chief Justice. When all said and done, the guarantee of non-recurrence was really about impunity and accountability, namely, ensuring that those bearing the greatest responsibility for international crimes should be put on trial and prosecuted.

In South Africa, in a case involving abduction and a death squad, where amnesty had not been granted, it had taken 18 years to bring the party concerned to trial!

In a case involving French peace keepers in the CAR, the French government had owned up to its responsibility but the victims had not been represented. This raised the question of justice and access to justice. If one assumed reparations to be a state responsibility, then whose job was it to ensure victims' access to such reparations?

In Sri Lanka, over 40,000 civilians had been killed in the 30-year civil war. Thanks to the work of former UN High Commissioner for Human Rights, **Navi Pillay**, and former Ambassador-at-Large **Stephen Rapp**, among others, there had been an enquiry and a joint resolution. This had taken the action of civil society who continued to believe in the international judicial framework.

One had to continue believing and not despair!

„One could not undo the effects of violence on victims but firstly there had to be acknowledgement of what had been done, and secondly, there was the issue of what could be done about the damage and suffering caused."

– Yasmin Sooka

Q & A

Comments on some points of interest from the floor:

Undue delay

To **Fatiha Serour**'s comment that victims needed to see their claims attended, **Mia Swart** responded that the pace of justice meant that by the time reparations were awarded, child victims might very well no longer be children.

Stephen Lamony said that the length of time had already become an issue which frustrated many victims.

However, **Bill Pace** felt that there were inevitably going to be problems at the beginning and he called for patience: these things took decades, a factor that actually went to strengthen them. On a somewhat different tack,

Yasmin Sooka added that, over time, the perspective of many victims underwent a change and their expectations turned increasingly to monetary reparations in preference to other types of compensation.

Capacity

On the question of capacity and capacity building, **Mia Swart** wondered whether judges were equipped to work out the formula required for awarding reparations.

Yasmin Sooka felt that courts were "grappling with the problem, that judges did not necessarily have to be experts, and that there was room for being creative. As shown by the South African Truth & Reconciliation Commission, experts could "be brought on board". The victims themselves should be consulted, e.g., in Burkina Faso the court had awarded reparations in line with family needs.

Identifying the victims

Mia Swart: One tended to speak of victims broadly but, not only did they have to be linked to the crime, they also had to be clearly identified. Furthermore, there was the related question of indirect victims, e.g., the family.

Question from the audience.

Asset tracing

Pierre St. Hilaire made the point that asset tracing was a recurrent theme and that the solution might be to look into the financial side as part of any core-crime investigation.

Yasmin Sooka observed that in the context of corruption, as in Libya, Tunisia, etc., asset tracing was a key element. It was not just a matter for lawyers but was a multidisciplinary field.

Type of reparations

Fatiha Serour said that it was important to engage with the victims in order to ascertain the precise nature of the reparations required: it was not always about money.

Mia Swart agreed that one could never compensate people for damage and suffering in the context of international crimes. Nevertheless, the German, post-war, holocaust reparations system might serve as a model because, ultimately, "in poor countries nothing compensates like cold hard cash".

PANEL VI:

THE ROLE OF NGOS IN INTERNATIONAL CRIME INVESTIGATIONS

Non-governmental organisations can play a crucial role in the investigation and prosecution of international crimes at both a domestic and an international level. NGOs have collected evidence of allegations of international crimes and worked to institute domestic and international proceedings concerning international crimes. This panel will discuss the different roles that NGOs can and should play in the investigation and prosecution of international crimes, as well as the possible dangers of such NGO involvement.

MODERATOR
Hannah Woolaver Senior Lecturer in Public International Law, University of Cape Town

PANELLISTS
- **Angela Mudukuti** Legal Officer for the Southern Africa Litigation Centre, Johannesburg

- **Stephen Rapp** Former Ambassador-at-Large for War Crimes Issues, Office of Global Criminal Justice, Department of State, United States of America

Angela Mudukuti, Legal Officer for the Southern Africa Litigation Centre, Johannesburg.

Stephen Rapp, former Ambassador-at-Large for War Crimes Issues, U.S. Department of State.

Hannah Woolaver began by noting that civil society had played an important role in international justice, sometimes in the face of pressure and even danger. It was thus an opportune moment to consider its role in ending impunity in international crimes.

Speaking as someone who had come to diplomacy after many years of working as a prosecutor, **Stephen Rapp** began by saying that he knew from experience that one of the prosecution's problems was often that of having strong evidence.

During his years as Ambassador-at-Large, he had actively engaged with the ICC and felt that the Court's investigative unit had been too small from its very inception.

It took an immense amount of evidence to prosecute successfully. Indeed, his old personal rule of thumb in national prosecutions had been to have twice as much evidence as was needed; and in international prosecutions he would increase this to three times as much! Where then could one find the investigative capacity to address victims' concerns when there were budgetary constraints to consider, as well as vulnerability of witnesses to pressure?

Turning to the situation in the CAR, he said that the ICC would be hearing a case against a number of warlords but that would of course not suffice; and, in view of the parlous state of the national judicial system, a special penal court was to be set up, thanks to the efforts of human rights groups, among others.

By virtue of its constitutive statute, this special court would be sharing evidence with the ICC. One could not rely on this but if it did prove successful, it would be "the triumph of hope over experience". The answer thus lay in sharing evidence but this in turn raised the question of where such evidence was to be obtained. Commissions of Enquiry were excellent but did not collect the sort of documentary evidence required, and even where they did, the possibilities of sharing such evidence were restricted by confidentiality rules. So what could one rely on? Many NGOs' focus was on advocacy; moreover, they were often not in a position to share the evidence.

However their contribution could be invaluable, said **Rapp**, citing one key expert witness who had testified in 11 of the Rwanda hearings! Without her testimony, Arusha would have been a failure.

Other examples included the Habré case, which had been an inspiration because it had shown how important it was to have strong documentary evidence, even 10 years after the event. This had comprised not merely narrative but also solid evidence, with notes written in the President's own hand.

New developments included the ongoing effort to collect evidence (including videos which appeared fleetingly on the Internet before being taken down) for eventual prosecution in Syria and possibly Iraq, which involved some 135 people, double the number in the ICC's unit.

Despite some complaints about "privatisation" of evidence-collection, it had to be said that the evidence was being gathered in a way that enabled it to be transferred to law enforcement agencies.

Yasmin Sooka was herself involved in a similar endeavour in Sri Lanka, targeting sexual violence and torture, sometimes post-conflict. Statements had been carefully taken and corroborated in what was an ongoing investigation.

These kinds of efforts were increasingly essential but had to adhere to the highest standards in order to be of use. It was important that such exercises were conducted with and for the victims of these crimes.

In her presentation, **Angela Mudukuti** highlighted that Civil society organisations (CSOs) played an indispensable role in the quest for justice and protection of human rights.

The recent victory in the Al-Bashir case had shown how civil society could make a difference. However, should CSOs be doing investigations for international crimes if they did not have the requisite skills? Were they doing more harm than good, if they undertook investigations that were then not credible or found to be flawed in a court of law? Were they re-traumatising witnesses, etc?

The reality on the ground was that the authorities mandated to investigate these crimes could often not be trusted to do so, or simply lacked the necessary resources, skills and capacity. This was why many CSOs found themselves "filling that gap".

She intended to focus on the domestic angle. In the spirit of complementarity, justice was often better served at the domestic level. The South African Litigation Centre (SALC) aimed to strengthen domestic judicial systems and use them. She would draw on two cases involving international crimes that the SALC had brought before domestic South African courts.

- The so-called Zimbabwe torture case involving crimes against humanity (torture) "perpetrated in Zimbabwe by Zimbabweans against Zimbabweans".

  Universal jurisdiction had imposed an obligation on South Africa to investigate these crimes. The SALC had collected detailed evidence (affidavits from witnesses and victims, plus corroborating medical/legal evidence) and compiled a detailed dossier, requesting the South African authorities to open an investigation.

  Denial of the request had resulted in the case going to the High Court, the Supreme Court of Appeal and, finally, the Constitutional Court, with the SALC winning each time, eloquently illustrating the fact that litigation had been required to secure an investigation.

- The Simelane case: Simelane had been a courier for the armed wing of the African National Congress, who had been betrayed, abducted, tortured and "disappeared" in 1983.

  The amnesty had covered her kidnapping but not her torture/murder. Despite being liable to prosecution for failure to disclose, 33 years had gone by without her murderers being prosecuted, and Simelane's sister had thus sought the SALC's help.

  In 2015, the SALC had filed papers to compel the authorities to make a decision to either prosecute or not prosecute, or alternatively, open a judicial inquest. In 2016, the authorities had finally announced their intention to prosecute the suspected culprits for Simelane's kidnapping and murder.

These two cases had highlighted the need for the SALC, which did not conduct investigations, to supplement the docket by hiring a private investigator, Mr. Frank Dutton. Similarly, in business and human rights issues, the SALC had again recognised its shortcomings and resorted to a corporate investigator.

CSOs thus needed:

- To be cognisant of their weaknesses and strengths -their areas of expertise- and be ready to outsource tasks where they did not have the requisite skills, by engaging the services of private professional investigators and others, such as those who provided psychological support for victims and witnesses when taking statements.

- To be more creative and make better use of existing technology for the purpose of preserving and storing evidence.

- To be engaged in capacity building of the legally mandated institutions -police, prosecutors and lawyers- so that failure to investigate was not due to lack of skill or ability.

„The reality on the ground was that the authorities mandated to investigate these crimes could often not be trusted to do so."

– Angela Mudukuti

In summary, CSOs were instrumental in the process of securing accountability for international crimes. Credible, strong evidence was crucial, "otherwise the case would fall apart".

Q & A

Comments on some points of interest from the floor:

▸ First responders: contamination of evidence and witnesses

Richard Goldstone felt that without the "push" from civil society there would have been no ICC, ICTY or ICTR but he was nevertheless concerned about evidence being contaminated as a result of amateurish evidence gathering and/or preservation methods. This was a huge area for training.

Stephen Rapp agreed that not only was caution required in this respect, but there was the additional problem of using first responders who were reluctant to endanger their perceived neutrality: a protocol was being worked on. Furthermore, there was the fact that a prospective witness might very possibly be in danger from regime followers in the diaspora.

Angela Mudukuti pointed out that the danger of contamination extended beyond the evidence, and extended to witnesses who became traumatised after being unprofessionally interviewed and were then unwilling to go before a court.

▸ Building up a case

On the matter of "credible, strong, sound evidence" in the case of the use of gas by both parties in Syria, **Fatiha Serour** asked how such evidence could be built upon "to take it to the next step".

With respect to chemical weapons use, **Stephen Rapp** said that there was no question about the regime being responsible for the use of sarin gas or about ISIS having deployed mustard gas, and that hopefully the joint investigative mechanism could be used to build a case.

▸ Guatemala as an example

Underscoring the power and critical role of civil society, **James Goldston** cited the example of the UN-backed mechanism which had achieved an extraordinary breakthrough in impunity in Guatemala, leading to indictments. This was thanks to the tireless work of human rights organisations. Equally laudable efforts in the fields of civil-society advocacy, documentation and litigation had been seen in Chechnya and Cambodia.

Stephen Rapp agreed entirely; the partnership between the International Commission against Impunity in Guatemala (CICIG) and civil society had been a resounding success. Though not set up for that exact purpose (its mission had been to target corruption and organised crime), the Guatemalan exercise had been a true success and was a model to replicate and follow.

▸ Civil society organisations: the dangers, external and internal

There was a general consensus that CSOs faced dangers from many sides: curiously, even their own effectiveness could bring them into disfavour and leave them open to immense stress and pressure.

Indeed, there were many countries where NGOs were viewed with suspicion or even as being subversive. Then again, the evidence might be there for the taking, yet such organisations had to face the internal clash between their dual mandate of human rights advocacy on the one hand, and preparing case dossiers for eventual prosecution on the other.

▸ Amicus briefs

These could be valuable in bringing information to judges' attention felt **Stephen Rapp.**

▸ The eternal question; what difference will it make?

Stephen Rapp: Collecting evidence was of use because there was always the likelihood that the cases in question would be heard at some point in the future, e.g., after transition, and would stand as a precedent and a warning. Evidence gathering of this nature created pressure to prosecute.

Comment from AGJA member Judge Richard Goldstone.

PANEL VII:

IMMUNITY OF HEADS OF STATE UNDER INTERNATIONAL LAW

How can the AU resolution exempting serving Heads of State from prosecution be reconciled with the duty to render justice for atrocity crimes? This panel explores the ongoing controversy over the scope of immunity under international law, and in particular whether Heads of State enjoy immunity from prosecution for international crimes.

MODERATOR
Patryk I. Labuda Geneva Academy of International Humanitarian Law and Human Rights

PANELLISTS
- **Dapo Akande** Professor of Public International Law, University of Oxford
- **Christopher Gevers** Lecturer, School of Law, University of KwaZulu-Natal
- **Max du Plessis** Associate Professor, University of KwaZulu-Natal; Advocate of the High Court of South Africa
- **Dire Tladi** Professor of International Law, University of Pretoria; Special Adviser to the Minister of International Relations and Co-operation of South Africa; Member of the UN International Law Commission

AGJA member Dapo Akande, Max du Plessis, Moderator Patryk I. Labuda, Christopher Gevers and Dire Tladi.

Professor Dapo Akande, member of the Africa Group for Justice and Accountability.

Dapo Akande began by noting that one could not have foreseen that Head-of-State immunity would become such a big issue with the ICC.

In a situation where the ICC had issued or was considering issuing an arrest warrant for a Head of State, the question of its jurisdiction raised two sub-questions, namely:

- Whether Heads of State were immune in proceedings at the ICC itself.
- Whether foreign Heads of State were immune from the national criminal jurisdiction of a state asked to co-operate with the ICC.

(In an aside, **Akande** noted that both of these scenarios were totally different to the position of immunity in purely national proceedings unconnected with the ICC, where a Head of State would enjoy immunity)

Issues essential to both of the above questions were: firstly, whether the Head of State in question was the head of a State Party or non-State Party to the Rome Statute; and secondly, Articles 27 and 98 of the Rome Statute, which addressed points (i) and (ii) above respectively.

The question of immunity before the ICC itself was easy to answer. Under Art. 27 there was no such immunity.

„The question of immunity before the ICC itself was easy to answer. Under Art. 27 there was no such immunity."

– Dapo Akande

In a case where the Head of State was that of a non-State Party to the Rome Statute, one school of thought said that the principles of customary international law would apply, under which Heads of State enjoyed no immunity from international tribunals.

However, the ICC pre-trial chambers seemed to have "backed away" from that position in later decisions, a stance he shared. In contrast, however, it was clear that there was no Head-of-State immunity for parties to the Rome Statute; similarly, he felt that there would be no immunity for non-parties in a Security Council referral (inasmuch as such non-parties would be treated in the same way as parties to the Statute).

The greater problem thus lay in the secong situation, namely, that of Head-of-State immunity at the national level, as exemplified by the Al-Bashir case in South Africa.

The position was complicated due to the interpretation of Art. 98. Had Head-of-State immunity been removed at the national level? The Rome Statute was not crystal cle-

Professor Dire Tladi, Special Adviser to the Minister of International Relations and Co-operation of South Africa.

ar but **Akande** saw the best interpretation as being that Art. 27 had removed immunity at BOTH levels in the case of States Parties to the Rome Statute.

Most domestic statutes implementing the Rome Statute had taken that view, one which he considered correct. The reason for this was that otherwise Art. 27 would be redundant, because the ICC had no enforcement arm of its own and had to rely on the co-operation of states to make the necessary arrest, i.e., if Head-of-State immunity were deemed to exist, it would render this impossible in every instance, thus resulting in a vicious circle.

This line of reasoning was similar to that applied by the South African Supreme Court of Appeal in its decision of the previous week.

The question that remained was that of Heads of State of non-States Parties to the Rome Statute, especially in the case of a Security Council referral. According to **Akande**, the position was that Head-of-State immunity had been waived/removed, not (in his view) because of the obligation to co-operate, but because referral, by definition, rendered the Rome Statute — and, by extension Article 27 — binding on that state.

This was because the Court could only operate, i.e., could only have jurisdiction, under this particular Statute. The South African decision had not gone that far, however, but had based itself solely on the South African implementing legislation.

The Supreme Court seemed to have suggested that the implementing act would deprive Heads of State of their immunity even in non-ICC cases, though he was not in agreement with the latter conclusion.

Dire Tladi noted that he agreed with the general framework of the scheme applicable to immunities. As **Dapo Akande** had explained, there were two separate questions with two different answers: the first was immunity before the ICC; and the second was immunity before domestic authorities. There was a view, which the High Court had seemingly endorsed, that Art. 27 immunity applied to both.

It was interesting to note that the ICC pre-trial chambers themselves had taken different postures, ranging from one extreme to another. Personally he saw nothing in the Statute to justify either the DRC pre-trial chamber's or **Akande's** differentiation between States Parties and non-States Parties.

Article 27 applied to all officials, and merely regulated the relationship between the accused (an individual), and the Court (an institution), and nothing more. The question of immunities did "not come into play".

As **Akande** had also said, there was no customary international law position removing immunities before international courts. Neither was there a rule of customary international law requiring such immunity.

The rules relating to immunities were developed in an inter-state context. Moreover, if customary international law was based on practice, there was simply no practice removing immunities before international courts. This would in turn suggest that there were no rules relating to this under customary international law.

The question that then arose was where did one find the rule? The

Max du Plessis, Associate Professor, University of KwaZulu-Natal, Advocate of the High Court of South Africa.

answer was, in the instrument establishing the court!, namely, Article 27 of the Rome Statute in the case of the ICC.

As a matter of treaty interpretation, **Akande's** interpretation that Art. 27 removed immunities even at the domestic level for States Parties struck him as correct. It was not a matter of pragmatism; one had to resort to the rules of interpretation as found in the Vienna Convention.

However, he rejected the "redundancy argument" because: (a) this was not a rule of interpretation; and (b) even if it were, he could not see how the Article was thereby rendered redundant. Such an interpretation would suggest that the ICC's sole purpose was to prosecute individuals with immunity.

Secondly, application of Articles 27 and 98 to the Head of a non-State Party was foreseeable under a properly drafted Security Council referral.

To his way of thinking, the DRC pre-trial chamber had given an expansive interpretation to the Security Council resolution which had referred the situation in Sudan to the ICC. The Court had construed the requirement to co-operate as a requirement to waive immunity. Such an interpretation was not justifiable.

Furthermore, the very states that had adopted the resolution did not share the interpretation. Hence to give the wording an interpretation that was not accepted by the drafters themselves was problematic.

In addition, **Dire Tladi** did not agree that the mere adoption of a resolution of referral had the effect of placing Sudan in the position of a State Party.

All such a resolution accomplished was to grant the ICC jurisdiction, and while referral certainly meant that the Rome Statute applied, by the same token it meant that Article 98 also applied. Accordingly, any obligation imposed on a State Party to co-operate would be limited by the rules governing immunity.

Lastly, the South African Supreme Court of Appeal decision had been a strange interpretation of the host country agreement between South Africa and the AU, and one which, according to **Tladi**, the Court had no need to make.

In his presentation, **Max du Plessis** reflected on three important points arising out of — or despite — the judgement.

Firstly, **du Plessis** reflected on the rule of law. There had been much academic debate about immunity but it overlooked a number of important facts.

At the time when the Pretoria High Court had been faced with Al-Bashir's presence in South Africa, it had already issued an order for him to remain in the country until the case had been concluded but this order had been flouted with the assistance of South African government officials. That was the first rule-of-law fact.

Additionally, whatever the scholarly, academic debate about customary international law, there had been a pertinent court decision in the shape of an order issued by the pre-trial chamber of the ICC.

The order issued against South Africa on the eve of Al-Bashir's visit had stated that South Africa

knew what was happening, knew that, in the ICC's considered opinion, Al-Bashir was in no way protected by customary international law, and that Al-Bashir had been stripped of immunity.

Regardless of what academics might or might not think, for the purpose of this specific case, both the South African court and the ICC had decided that he had no immunity. This meant that two court decisions had been expressly flouted.

Secondly, **du Plessis** reflected on accountability.

Though the focus in the debate had been on Al-Bashir's accountability, this missed a new, very different level of accountability. In the face of what had happened, the High Court considered the South African government's argument "risible". The Supreme Court, for its part, found that the government or its lawyers had misled the court as to whether Al-Bashir had been in the country, and had clearly facilitated Al-Bashir's departure.

It called for a review of the lawyers' conduct by the professional bodies. What had occurred, said **du Plessis**, was tantamount to making the government an "accomplice after the fact to genocide". This message should be firmly sent out to those who think they can assist such types of offenders to escape scot-free.

Finally, **du Plessis** reflected on the regional context.

The case had arisen out of the AU's position towards Al-Bashir. In addition, the Malabo Protocol reflected a "turn to immunity for African leaders". Taken together, this had two insidious effects: a hardening of the position of continental leaders to immunity for African elites; and a campaign for an African Court as an "African push for African solutions to African problems".

Immunity, said **du Plessis**, was not a solution dreamt up by victims but by elites! The argument that such immunity was temporary, i.e., it only applied while Heads of State were in office, was "counterintuitive" and "perverse", since it merely encouraged leaders to cling to power. The very fact that the Protocol had been signed in Malabo where Obiang had been in power for 45 years said it all!

Beyond that, the whole issue of the African Court was problematic, especially the costing aspect: admittedly there were some progressive features but it was "a bit like putting lipstick on a pig.

It was "intended to scupper the ICC". Such a court would allow for "cynical complementarity". However, there was no realistic alternative, no possibility of forum shopping because, in short, the ICC was the only feasible court. In his opinion states should resist signing the Malabo Protocol.

The recent decision had been a momentary victory but in matters of justice one had to be patient: the law would eventually catch up with the Al-Bashirs of this world. Like Eichmann when he was caught. Al-Bashir would eventually say, "I've been waiting for you".

Christopher Gevers admitted that he was going to change tack slightly and talk about the accountability of civil society and what immunity presented as an opportunity for civil society to think critically about what international criminal law did in the world.

There had not been sufficient reflection about what the ICC did: it had been seen as an object of devotion, but there had not been a lot of reflection about what it in fact did. There was an ethical obligation on civil society to think about what international criminal justice did in the world.

After a decade, the ICC was moving out of "the shadow of power" into its own as a source of power: it was developing its own politics, institutions and an understanding of its role in the world. It was seen by some as moving to a more cosmopolitan model of international justice, i.e., from one based on state consent to one which evinced its own political framework and institutions.

„The law would eventually catch up with the Al-Bashirs of this world. Like Eichmann when he was caught. Al-Bashir would eventually say, "I've been waiting for you."

– Max du Plessis

In the context of immunity, "the stakes were incredibly high". Thinking of it as a cost/benefit exercise, the cost of arresting Al-Bashir for Sudan and South Africa would have been significant.

For all these reasons, a diagnostic exercise was called for. Rather than being critical, he would try to be objective. The ICC was an exercise in cosmopolitan politics. It was cosmopolitan in three ways:

- It was morally universalist.
- It was individualist (the individual seen as the unit of measure).
- It was general (it looked beyond the state).

It had been moving away from state consent to having a functional relationship with sovereignty. The ICC liked Security Council referral as an exercise of sovereignty but did not much like complementarity as an exercise of sovereignty.

This was a "creeping cosmopo-

Christopher Gevers, Lecturer, School of Law, University of KwaZulu-Natal.

litanism". The move away from a consent-based model was not altogether bad because, if states withdrew their consent, that left no foundation. As a practical-cum-tactical exercise, the ICC's shift could thus be regarded as "a useful thing".

The ICC found its legitimacy in universalism and the representation of victims (not in the democratic sense but as "a figure").

In other words the ICC held itself out as acting on behalf of the global international community and/or on behalf of victims. These were the two ways it tended to ground its legitimacy.

The Court was drawing on some type of late 19th-century liberalism. He was not saying that this was neo- or post-colonial: it was just a fact. It came from a particular view of history and society.

International criminal law appropriated the authority to define what was wrong with the world, and indeed to define "the worst thing that was wrong with the world", e.g., impunity, lack of reparations, etc.

This was not necessarily wrong but it displaced other diagnoses, such as the need for a redistribution of wealth or welfare. It amounted to defining problems in a particular way and defining solutions in a particular way.

Another feature of the international criminal law system was that it relied on a particular hierarchical framework, a global governance structure that was known to be unjust, i.e., the UN Security Council. The ICC rested in the "shadow of power" and did not challenge the institutions.

Lastly, International criminal law diagnosed problems as crimes and then empowered lawyers to solve them. Consequently, the ICC produced an elite class of lawyers.

One could not pretend that this was not the case or that it was not a political question. It was essential to adopt a critical approach.

„After a decade, the ICC was moving out of 'the shadow of power ' into its own as a source of power: it was developing its own politics, institutions and an understanding of its role in the world."

– Christopher Gevers

Fatiha Serour, AGJA member and Director of Serour Associates.

Nigerian television cameras.

Hannah Woolaver, University of Cape Town & AGJA's Athaliah Molokomme.

Q & A

Comments on some points of interest from the floor:

▸ Interpretation of the Rome Statute

Dire Tladi: The problem with the ICC was its hero-villain approach. What did that mean for the law and constraints?

There was a reason for legal rules and law and constraints, and therefore one had to respect these and interpret the law (which of need had to be moral). There was a good legal framework in place and it was thus not justifiable to stretch legal rules to accommodate different positions.

An element of justice had already been built into the framework. If one stretched the Rome Statute too far, one put the very system at risk. Terms should be given the meaning that they had and not construed in order to arrive at a specific outcome.

Christopher Gevers observed that until then Articles 27 and 98 had not been read together.

▸ The role of the Security Council – the "spoiler argument"

Max du Plessis: When African States had signed up to the Rome Statute, they had known full well what its terms were and that these were all part of a package. They had accepted this package so long as it had not affected them. Subsequently, however, they had adopted a "spoiler position", which could be expressed colloquially as "we're in it as long as it suits us". This ran counter to the Rule of law.

Neither **Gevers** nor **Tladi** agreed with the so-called "spoiler argument", and **Tladi** felt that a signatory state was fully entitled to say that it had not thought that the Statute would be interpreted in a particular way.

▸ Referral under the Rome Statute

Dire Tladi: The danger of referral lay in the Rome Statute being undermined, by a case being referred

without making it perfectly clear that it was the obligation of all states to co-operate. The reason for this lack of clarification was that countries like the USA were unwilling to be placed in such an uncomfortable position.

Dapo Akande replied that by definition a referred state was not a party, by definition a referred state had not given its consent, by definition the Security Council was giving the Court the right to exercise jurisdiction under the Statute.

The necessary implication of all this was that the entire Statute became binding, and therefore to clarify a specific issue, such as immunity, would actually be counterproductive.

Tladi rejected **Akande's** view, and said that examination of the Security Council resolution in the cases of Libya and Sudan showed that the Security Council itself did not think that referral placed a state in the position of a State Party.

▸ Head-of-State immunity – just?

Dapo Akande: Merely because he was of the opinion that Al-Bashir did not enjoy immunity, did not mean that **Akande** saw immunity as necessarily unjust. On the contrary, Head-of-State immunity had an important role to play.

He did not believe in regime change by force or by states setting up international tribunals. This was not conducive to good international relations. It was purely and simply that he did not feel that Al-Bashir had immunity in this specific case.

As to the ratio of the South African court, it seemed to him that its rejection of immunity was based on Section 4(2) of the country's implementing legislation, and that the decision went so far as to hold that it would apply to a situation where South Africa prosecuted a Head of State domestically, even in a non-ICC case.

▸ The African Court – a non-starter?

Christopher Gevers: The accusation that the African Court could not work due to financial constraints was a "poor and weak" argument.

Silvia Fernández de Gurmendi, President of the International Criminal Court.

AGJA member Femi Falana interviewed for Nigerian television.

Ambassador Stephen Rapp with Kenyan journalist Judie Kaberia.

CLOSING REMARKS:

AFRICA GROUP FOR JUSTICE AND ACCOUNTABILITY

CONCLUSIONS AND LESSONS LEARNT

MODERATOR
Bettina Ambach Director, Wayamo Foundation, Berlin

PANELLISTS

- **Dapo Akande** Professor of Public International Law, University of Oxford
- **Femi Falana** Human rights activist and lawyer, Lagos
- **Richard Goldstone** Former Chief Prosecutor of the United Nations International Criminal Tribunal for Rwanda and the former Yugoslavia
- **Tiyanjana Maluwa** H. Laddie Montague Chair in Law, Pennsylvania State University School of Law; Former Associate Dean for International Affairs, School of Law & Director, School of International Affairs
- **Athaliah Molokomme** Attorney General of Botswana
- **Navi Pillay** Former UN High Commissioner for Human Rights
- **Fatiha Serour** Director of Serour Associates for Inclusion and Equity, London
- **Abdul Tejan-Cole** Executive Director of the Open Society Initiative for West Africa, Dakar

Wayamo's Joseph Roberts-Mensah introduces members of the Africa Group for Justice of Accountability.

Judge Navi Pillay delivers a statement on behalf of the Africa Group for Justice and Accountability.

Introducing the final session, moderator **Bettina Ambach** explained that the AGJA wanted to hear what the audience thought it should be doing. The Group's main thrust was towards creating frank and open discussion, and engaging with other parties. It had in fact invited South African government and AU representatives to be present and sincerely hoped that they would be able to see their way to attending future events.

RICHARD GOLDSTONE

The AGJA was concerned, not only with the ICC, but also with justice and accountability in Africa and beyond. South Africa had played a leading role in setting up the ICC. The coming together of like-minded nations in the 199Os had led to the formation of the SADC group. There had been seminars for SADC leaders and the group had played an important role in garnering support for the ICC. Mandela himself had supported the initiative.

What had then changed in the interim? A number of AU states had referred cases to the ICC and two Heads of State had been brought before the Court. Now however, the AU had adopted an anti-ICC, elitist position. Furthermore, there was an unfortunate movement in South Africa threatening to withdraw from the ICC and repeal the implementing legislation. It was time for civil society to be active in resisting this (just as it had once been in ensuring that the country joined the ICC).

FATIHA SEROUR

There were three things to be underscored. Firstly, CSO involvement and engagement was probably not being given enough attention. This was the way forward and was both essential and non-negotiable. The value of CSO's had to be recognised. Secondly, double standards were at work, i.e., lawmakers attempting to evade the law. Finally, while one should rightly celebrate the progress made, one also had to recognise that the "space for human rights was shrinking". Momentum should not be lost.

The past three days had shown that justice and accountability was a multidisciplinary, multifaceted sphere of focus, in which the whole environment had to be looked at.

ATHALIAH MOLOKOMME

At its strategic meeting held on the preceding Monday, the AGJA had decided that sharing ideas was of the essence, and it therefore wanted to hear what the public had to say and suggest.

The Group's launch in The Hague in November 2015 had raised expectations and it did not want to be seen as a mere "talking shop". Accordingly, it had drafted and released the statement which had been read out by Navi Pillay on Tuesday. The AGJA's ambitions extended beyond the confines of Africa.

Its plans included:

- A follow-up, and courtesy visit to the AU in Addis Ababa, potentially coupled with a capacity-building event in Arusha.
- An activity in West Africa (still to be specified), possibly with former CAR President and AGJA member, **Catherine Samba-Panza**.
- A commitment by all 12 AGJA members in their respective places of abode and/or work to use their knowledge and influence to further the AGJA's mission, and enhance justice and accountability.

Reviewing the AGJA's Cape Town activities, **Ambach** described the two-day High-Level Meeting of prosecutors and investigators which had been held with participants from INTERPOL, the ICC and a wide range of countries, including Palestine and South Africa itself. This showed that the AGJA was not just a club but was actively engaged in practical issues, such as national mechanisms, co-operation with the international level, training needs and the like. The High-Level Meeting would ultimately yield a needs assessment for capacity building, perhaps in co-operation with other similar organisations, to avoid duplication of efforts.

Having said this, she invited comments from the floor. A brief sampling of some of the points made now follows:

Femi Falana and Athaliah Molokomme, members of the Africa Group for Justice and Accountability.

Members of the Africa Group for Justice and Accountability, March 2016.

COMMENTS

KERIAKO TOBIKO
Director for Public Prosecutions, Kenya

He had benefited from both the practical and erudite intellectual sides of the various discussions. The independence of the AGJA was "beyond reproach" and was, moreover, essential to ensure its credibility. The AGJA had to engage constructively and honestly but it also had to address legitimate concerns. The Group would have to face questions as to how it had been formed and its constitutive instruments. Lastly, it should look at ways in which it could be replicated.

PHILIPP AMBACH
Special Assistant of the President, International Criminal Court

It would be advantageous to have a forum, e.g., via a web page, vis-à-vis the outside world. Much of what was said was quickly forgotten and it was therefore important to have the information in a permanent, researchable form. Not only would this provide research support for regional initiatives, but it would also justify and explain what the Group did.

PATRYK LABUDA
Geneva Academy of International Humanitarian Law and Human Rights

There was a lack of empirical research on the ICC and Africa; most of the evidence was anecdotal. Research was needed into how the ICC was influencing jurisdiction in Africa.

NETSANET BELAY
Africa Director, Research and Advocacy, Amnesty International, Johannesburg

Assistance in giving voice to Africa would be incredibly useful. There was a need to demystify African countries' stance towards the ICC and show their support. The public needed to know the facts.

OTTILIA ANNA MAUNGANIDZE
Senior Researcher, Office of the Executive Director and Transnational Threats and International Crime Division, Institute for Security Studies, Pretoria

The AGJA was both well constituted and representative. Her own organisation would call for clear and critical engagement on important criminal justice issues. Duplication of capacity building was to be avoided by taking into account the expertise and knowledge of other organisations.

STEPHEN LAMONY
Head of Advocacy and Policy on UN, AU and Africa Situations, Coalition for the ICC (CICC), New York

Firstly, the Security Council was open to meeting the AU Open-ended Ministerial Committee; secondly, honesty was required from the AU in the way it engaged, e.g., in advocacy; and thirdly, the AU displayed double standards towards the ICC, inasmuch as it was afforded the opportunity of having an audience at the ASP but did not reciprocate in kind at its own summits. The ICC should be given a forum. He encouraged the Group to engage, not only with the AU as planned, but also with the UN Security Council.

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

The coming-together of the AGJA was a very good development. It could encourage the formation of an informal African Foreign Ministerial network. On the false and counterproductive separation between peace and justice, and funding, there were bridges to be built and the AGJA could help in this regard. Currently there was an emphasis on reaction rather than prevention: could the AGJA lend some impetus to genuine prevention efforts?

HANNAH WOOLAVER
Senior Lecturer in Public International Law, University of Cape Town

She offered the AGJA the support of the University of Cape Town at an academic level.

FEMI FALANA
Africa Group for Justice and Accountability

On the subject of the integrity of the ICC, the AGJA wanted to debunk the negative image of the ICC and make it clear that preliminary examinations had been started in countries outside Africa, e.g., the Ukraine and Palestine, and an investigation had been started in Georgia. Equally, it had to be said in fairness that there had been efforts within Africa to end the impunity of Heads of State, e.g., the Habré trial in Senegal and the proposed Special Criminal Court in the CAR.

FATIHA SEROUR
Africa Group for Justice and Accountability

She wanted to clarify that the AGJA was an informal group and wished to remain so in order to ensure its independence and credibility. It had come together in November 2015 and this was only its second meeting, which had turned precisely on the subject of its raison d'être and what it intended to do. It was engaged in creating an interface with a communications strategy. Furthermore the Group wanted to serve as a model and inspire other regions to follow suit. The AGJA sought to create a knowledge base for other groups.

ATHALIAH MOLOKOMME
Africa Group for Justice and Accountability

Because the AGJA members wore different hats, they had carefully discussed how to ensure that the Group's integrity was to be maintained and prevent it from being compromised in any way. She confirmed that an online forum would be created using the latest technology. Similarly, she said that the Group was well aware of the dangers of duplication: nonetheless she asked to be informed of this should anyone notice it happening!

NAVI PILLAY
Africa Group for Justice and Accountability

The purpose of holding these discussions had been fulfilled because the Group had now indeed heard the views of others. It was not going to adopt a monolithic position and simply proceed to "plug" that. She agreed that prevention was vital. The AGJA cared about Africa and about suffering in any case where justice was denied.

Following the comments, **Bettina Ambach** closed the proceedings by thanking all those present for their contributions and ideas, especially on the subject of outreach. The Group would work with other experts and, once the AGJA had the necessary funding and had achieved the status of trust and credibility, this would all hopefully result in advice and policy recommendations. It was important to fight misperceptions with the truth!

AFRICA GROUP
FOR JUSTICE AND ACCOUNTABILITY

University of Cape Town · Universiteit van Kaapstad · Yunivesithi yaseKapa

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