

Assembly of States Parties Side Event

THROUGH THE LOOKING GLASS

Imagining the future of International
Criminal Justice

With a preview of Bradley McCallum's art exhibition:
"Weights and Measures: portraits of justice"

21 NOVEMBER 2016
THE HAGUE, NETHERLANDS

With the financial support of:

Assembly of States Parties Side Event

THROUGH THE LOOKING GLASS

Imagining the future of International
Criminal Justice

With a preview of Bradley McCallum's art exhibition:
"Weights and Measures: portraits of justice"

WELCOMING REMARKS

Bettina Ambach, Wayamo Foundation
Silvia Fernández de Gurmendi, ICC President

MODERATOR

Mark Kersten

PANEL MEMBERS

Athaliah Molokomme
Bradley McCallum
Dapo Akande
Fatiha Serour
Hassan Bubacar Jallow
Richard Goldstone

Report: Michael Benedict Photos: Kris Kotarski Design: Christoph Rathjen

WELCOMING REMARKS

BETTINA AMBACH (BA) welcomed the public to the evening's side event, explaining that it was co-hosted by the Africa Group for Justice and Accountability (AGJA) and the Wayamo Foundation, and featured a preview of artist Bradley McCallum's "Weights & Measures" exhibition. BA also extended a warm welcome to ICC President, Silvia Fernandez de Gurmendi. *The entire event had been made possible thanks to the generous support of the Ford Foundation and the Foreign Ministries of the United Kingdom, Switzerland, The Netherlands, Finland and Sweden.*

The event marked the AGJA's first anniversary, since it had been established just one year previously to tackle the strained relationship between some African states and the ICC, and to address justice and accountability on the African continent. The Group had since grown to 12 members, 5 of whom were present in person, namely, Dapo Akande, Hassan Jallow, Richard Goldstone, Athaliah Molokomme and Fatiha Serour.

The AGJA had begun to fulfil its promise and mandate on three fronts: firstly, by holding two bi-annual meetings, one in Cape Town and the other in Arusha; secondly, by engaging in stakeholder diplomacy with UN Security Council Member States in New York, the ICC in The Hague, and the justice sectors of Kenya, South Africa and Namibia, as well as publishing op-eds, press releases and statements; and thirdly, by holding capacity-building workshops for investigators, prosecutors and civil society

in Cape Town, Arusha and Bangui (with a view to the setting up of the Special Criminal Court in this latter country).

Prior to handing over to the ICC President, BA quickly went on to announce the "exciting" AGJA/Wayamo-sponsored project that was scheduled to take place in Abuja in a fortnight's time. This involved *training Nigerian prosecutors* so that they would have the requisite expertise to address complex crimes, including those that might potentially fall under the ICC's jurisdiction. The event would bring together Nigerian prosecutors, AGJA members, investigators and prosecutors from international institutions, plus a representative from the Office of the Prosecutor to provide an overview of admissibility under the Rome Statute.

SILVIA FERNÁNDEZ DE GURMENDI (SFG) Recalling that a year previously she had had the honour of speaking at the launch of the AGJA, SFG said it was a great pleasure to address the forum marking the first anniversary of the Group's establishment. *She had not been wrong in saying that she believed that the Group had an important role to play and could make significant contributions to advance efforts for accountability.* The AGJA had shown itself to be an important player, with a voice

of "expertise and commitment". She commended both the Group and the Wayamo Foundation for all that they had done in the preceding year to strengthen the international justice system in Africa.

It was clear that overcoming impunity for the worst crimes was a universal goal which was not confined to a particular region, and she

hoped that the Africa Group's example would be followed by the creation of similar groups on all continents. Even so, recent events had shown that the Court faced

particular challenges in Africa. *The work of the AGJA was thus all the more necessary and relevant at the current juncture.* Indeed, the group was not only striving to strengthen justice and accountability measures through domestic and regional capacity building, advice and outreach, but it was also helping to spread knowledge about the ICC and dispel common misperceptions about the Court's role.

The Group's importance and impact was visibly growing; it had shown that it could play a role as a *powerful advocate of international justice*, collectively and through its prominent members, independently from any state or organisation, regional or international. It could reach out to policy makers of key players and be a conduit and catalyst for discussions. Lastly, in engag-

The ICC was in good health. It was doing the work for which it was created and was demonstrating that it could deliver high-quality justice.

– Judge Silvia Fernandez de Gurmendi

ing with the Court while remaining independent, it helped build an important bridge between the Court and national and regional judicial systems.

The chosen topic of debate was very timely, in the light of the ongoing challenges facing the evolving global justice system. In particular, the recent announcements of withdrawal by three States Parties to the Rome Statute had been a source of concern about the future of the Court and international criminal justice in general. The current difficulties had to be taken seriously and addressed in an appropriate manner.

Nonetheless, as she had reported to the UN General Assembly and the Assembly of States Parties (ASP), *the ICC was in good health. It was doing the work for which it was created and was demonstrating that it could deliver high-quality justice. It had been "a very good and productive year".* The difficulties encountered had generated an extraordinary outpouring of support during recent weeks, a graphic indication that support for the Court -and more broadly for justice and accountability- remained very strong. International criminal justice was one of the greatest achievements of the previous 20 years. It was a long-term project, requiring unrelenting efforts to preserve accomplishments and move forward.

She was confident that the advances made would be maintained and that the ICC would continue to play a crucial part. To enhance its effectiveness, it was essential to continue efforts to encourage more states from all regions of the world to join the Rome Statute. Universali-

ty remained a top priority.

While expanding the Court's reach was crucial for the future of criminal justice, it was nevertheless clear that, as a last-resort institution, the ICC was only a part of a global system of justice in which national and regional courts and tribunals also played a crucial role. The role of the Rome Statute itself in this global system was broader than just the ICC, and was influencing national and regional justice solutions in different ways. Indeed, it had become some type of reference point in terms of material law, with the definitions of international crimes being adopted in many countries being either identical or very close to those contained in the Rome Statute.

The future of criminal justice lay in ensuring a mutually reinforcing global justice system, in which international, national and regional institutions coexisted and strengthened one another.

Recently, a regional approach in the landmark trial of Hissène Habré

before the Extraordinary African Chambers in Senegal had been warmly welcomed, and the developments in the establishment of the Special Criminal Court for the Central African Republic would thus be followed with great attention and interest. SFG noted with appreciation that one of the recent events organised by the Africa Group and the Wayamo Foundation had been a conference in Bangui intended to reflect on the challenges lying ahead of this new mechanism.

She again thanked the AGJA and Wayamo for the highly valuable work that they had already done and urged them to continue with their important mandate to support international criminal justice on the African continent and beyond. Moreover, she encouraged them to continue supporting the ICC as an important part of the international criminal justice system. She concluded by reaffirming her and the Court's disposition to assist them as much as possible "in this important endeavour".



PANEL DISCUSSION

The event, noted Moderator, **MARK KERSTEN (MK)**, was a unique opportunity to bring together justice and art. Perceptions mattered: it was not enough to do justice...justice had to be seen to be done. With that, he invited Bradley McCallum to say a few introductory words about his work.

BRADLEY McCALLUM explained that the portraits on show were a preview of an exhibition of his work that was to open in February 2017 at Constitution Hill, Johannesburg (South Africa), the site of the erstwhile notorious prison of the apartheid era. The complete show comprised 20 large-scale portraits and diptychs of major offenders from different tribunals and courts, as well as portraits of leading legal practitioners. These works would be exhibited along with audio portraits, i.e., sound testimonies from witnesses and victims, and in this regard, Mr. McCallum paid public tribute to the Kenyan subject of one of these, who had given him her testimony only the previous day and was actually present in person.

ROUND ONE

ATHALIAH MOLOKOMME (AM)

Q: You have been heavily involved during this ASP as the Head of Delegation for Botswana. What are your key take-aways from this conference? Are you more or less hopeful about the relationship between Africa and the ICC than when you arrived?

AM was happy to be back in The

Hague, the site of both the launch of AGJA and the ASP. She had come with an open mind as the delegate of a State Party to the Rome Statute, in the belief that it was her duty to be there every year to support both the Rome process, in the form of the ASP, and the ICC itself. She was very encouraged to hear the vast majority of States Parties speaking up and reiterating their support for the Rome Statute. Indeed, most of the States Parties saw *the ICC as*

It had emerged that a number of States Parties (as many as 35) would consider proposals for amendments to the Rome Statute as long as these did not undermine its core principles.

– Athaliah Molokomme

a good project, a worthwhile project, but not one that was perfect. Nevertheless it was the only hope for a future free from impunity for crimes against humanity.

However, it had been noted that some African countries had concerns, such as the view that the ICC was applying selective justice and unfairly targeting African leaders. Equally problematic were the issues of universal jurisdiction and the role of the UN Security Council in the referral process.

While countries' sovereign right to withdraw had been fully recognised, regret had nevertheless been voiced at the announced withdrawal of three, with some States Parties actually appealing to them to reconsider their decision. In the

final analysis, withdrawal would not serve to solve the problem. There had been an open bureau meeting at which the Africa-ICC relationship had been discussed: it had emerged that a number of States Parties (as many as 35) would consider proposals for amendments to the Rome Statute *as long as these did not undermine its core principles.*

The reference to the Africa-ICC relationship was at times misleading, misunderstood and, arguably, over-

emphasised. The withdrawals were not yet effective, were an exercise of national sovereignty, and, more importantly, would be addressed on an individual basis. *There was certainly 'no room for collective withdrawal'.* Rather than following the general tendency to concentrate on the problematic aspects of Africa's relationship with the ICC, it was essential to focus instead on the positive aspects, such as the establishment of mechanisms to facilitate complementarity.

AM was optimistic that the ICC-African relationship would continue to be an issue for debate and felt that, as long as the dialogue remained open, there would be opportunities to iron out differences and maintain the fight against impunity.



FATIHA SEROUR (FS)

Q: We have heard a lot about the need for „dialogue“ between various actors who disagree over the role of international justice in Africa. Some of these actors are diametrically opposed in the view on, for example, Head-of-State immunity. How can we bring these parties together to ensure that any dialogue is respectful despite different visions among the parties?

First and foremost, justice and accountability was a “non-negotiable principle”.

Secondly, she, like AM, was convinced that the future of justice and accountability was a positive future because the more concerns, resistance and hesitation there were from some, the more resolve there would be from others to pursue justice and accountability in Africa and elsewhere.

The issue of dialogue was very important. However it was necessary

to understand that there were many principles entailed, the first of which was that *for dialogue to take place, three ingredients had to be present, namely, respect, trust and mutual understanding.* Why mutual understanding?: this meant having an opportunity to sit, talk and *listen to concerns, address them and slowly work towards identifying the common core values.*

It was through dialogue that one found that there were no real differences between States and the ICC in attitudes and commitment to justice and accountability. It might, however, be necessary to look at ways in which one went about achieving these aims. Similarly, it also became essential to address the issues that might have separated the two sides.

There was a need to step away from looking at ICC as a mechanism against Africans and see it instead as a mechanism in support of justice and accountability in Africa.

RICHARD GOLDSTONE (RG)

Q: In your view, what should we expect with regards to South Africa's position towards the ICC? Is there any possibility that they may withdraw their withdrawal?

South Africa's sudden notice to withdraw from the ICC under Article 127 of the Rome Statute had initially saddened RG for two reasons: firstly, because of SA's leading role in the early years as a firm supporter of the ICC and the Rome Statute, and secondly, because SA had suffered for so many years from violations of fundamental human rights and had finally attained freedom after decades of victimisation, due to the efforts of the international community and the move to bring justice and accountability to Africa.

South Africa's case had raised “unusual, if not unique, legal problems” which would be tested by the High Court in Johannesburg on 5 December. The underlying question here was whether the notice of

withdrawal was constitutional. The court would be hearing an application to declare the notice unlawful and unconstitutional, and to order the South African government to retract its withdrawal. The latter claim was important because, from an international law stance, the cabinet's decision was effective, and the international community was not concerned about the domestic niceties of the case. This could change however if the court were to rule that the notice was unconstitutional and the government were to withdraw.

Moreover the court was going to



hear the submission expeditiously, though he would not be surprised if the Constitutional Court were to reject the application to hear the case at first instance. Such a rejection should not, however, be interpreted as prejudging the final outcome. Indeed, the case could well go from the High Court to the Constitutional Court directly, bypassing the Supreme Court of Appeal.

RG conceded that an order against the South African government would not result in the government "being thwarted in leaving the Rome Statute; at most it would delay it". This was in the light of a bill before Parliament for the repeal of domestic legislation incorporating the provisions of the Rome Statute. The Constitutional Court had ruled that any "controversial legislation" had to be fully debated in Parliament. He thus felt that the country was "in for a fairly extended period of debate in respect of the courts and in respect of Parliament" and that there was thus "a lot of water to flow under the bridge in the meantime". At worst,

the government would have to give a new notice of their intention, with withdrawal being possibly delayed until 2018.

Ending on a somewhat more hopeful note, RG said he felt less pessimistic after hearing the SA Minister of Justice speaking about his visit to the ICC President. It had been a "respectful and constructive meeting", and there had at least been "a civil and respectful debate". His understanding of what the Minister had said was that, with one year to go, "things could change".

HASSAN BUBACAR JALLOW (HBJ)

Q: There has been much talk of mechanisms other than the ICC being set up to achieve justice and accountability in African states (CAR, South Sudan, ACHPR). Can you give us a sense of which mechanisms are working and what challenges or obstacles exist for these and other justice mechanisms in Africa?

The background of the three threatened withdrawals meant that it was a sad day and not much of a "birthday present for the AGJA". However, the AGJA would be "deploying all the force it could" and he hoped that this would make a difference.

As the ICC was a court of last resort, this meant that there were many components, and each had its particular role to play. Hybrid and regional courts were just some examples. What was clear was that "the international system had to be retained". The different mechanisms had their respective advantages and limitations. In the case of hybrid courts, these enjoyed the

possibility of a broader remit, closer proximity and the potential for greater impact. On the other hand, they faced difficulties in the form of resource constraints, technical shortcomings and lack of political will. As an instance of this, HBJ cited the funding problems that had been experienced in setting up the Special Criminal Court in the Central African Republic. Even so, the necessary staff would be in place by the end of the year and so there was "light at the end of the tunnel". Unfortunately, the same could not be said of the proposed African Court under the Malabo Protocol.

Furthermore, a number of national jurisdictions had

established special divisions or courts: Uganda was one such case.

This amounted to general recognition of the fact that *the success of accountability depended on a very effective partnership between the ICC and national, local and regional courts*. In other words, *to ensure accountability, effect had to be given to the principle of complementarity*.

Accordingly, there was a need to empower regional and national courts and, where appropriate, develop hybrid courts. Owing to the complicated nature of such courts, the process of setting up them up was very slow (as he had already pointed out, there were issues of political will and financial constraints) but eventually they would be "coming through the pipeline".

BRADLEY MCCALLUM (BMC)

Q: What do you want to achieve with the work that you are doing? Can the artwork and images that you have created contribute positively to justice and accountability in Africa and elsewhere?

The last 4 years had seen him make the transition from a someone who was "completely green" in matters of international criminal justice and its attendant jargon to the person he was today, in the sense of being

This amounted to general recognition of the fact that the success of accountability depended on a very effective partnership between the ICC and national, local and regional courts.

– Hassan Bubacar Jallow

able to break down the language, take the core principles of international criminal justice, express them visually, and then use that visual language as a bridge to people outside of that world.

A painting was something that breathed and lived. Standing in front of a painting was very different to standing in front of a photograph. One could actually feel the time and consideration that went into each brushstroke. When spectators realised that what they were seeing was a painting and *not* a photograph a "gestalt" happened, a kind of awareness came over them.

It had taken time, inasmuch as it had not always been thought of as a diptych, a relationship between a negative and a positive. This had come out of the incredible com-

plexity of bringing individuals before a judicial process when the alleged crimes were so serious. How, he wondered, did one ensure a fair trial when one was looking at war crimes? *His saw his role and responsibility as that of using the visual metaphor and proposition, rather than framing guilt or innocence, or right or wrong in terms of one judicial process or another.*

BMC was seeking "to reframe some of the structural challenges that ICC was facing in terms of the post-colonial critique it was experiencing from the outside". He wanted to open that up more, in order to think through to the extraordinary work done by some of the

other courts. How, he asked, could one begin looking at the humanity and complexity of the way in which defendants were presenting themselves, and how was one to interpret their "internal conversation"?

The exhibition would almost coincide to the day with the 20th anniversary of the establishment of the South African Constitutional Court. Not only was it a momentous moment to reflect on "the most progressive constitution in the world", but it was also an opportunity to engage in a dialogue and discourse that would convey the experiences from the professionals in the room to an audience that normally would only receive the "sound bite". This made for a much more global framework in terms of how we understood our humanity.



ROUND TWO

Q: What do you expect will or could happen over the next year, before the next Assembly of States parties?

RICHARD GOLDSTONE

It was difficult to generalise. Governments tended to act in self-interest (sometimes mistaking where their true interest lay). As he saw it, there were two main reasons for withdrawal:

- (i) leaders wanting to protect themselves from war crimes trials, as in Burundi and The Gambia, and,
- (ii) internal political reasons, as in South Africa.

He felt that not too many countries would withdraw for the first reason (in many instances where post-colonial wars were being fought, the countries concerned were not signatories to the Rome Statute), and, similarly, there were not many that would “feel compelled to take the South African route”. Indeed, it was important to note that not all African states were opposed to the ICC: Botswana, Senegal, Nigeria, Sierra Leone, Zambia and others had been vocal in their support for the Court and the Rome Statute. This made a mass exodus of African states unlikely.

FATIHA SEROUR

She too took an optimistic view, not only for the reasons expressed by RG, but also because “the ICC was here to stay” because there was a need for an international

justice system. Secondly civil society was evolving and developing and was more outspoken on justice and accountability, and the more concerns, resistance and hesitation there were, the more resolve there would be. Admittedly there were more conflicts now than 5 to 10 years ago and, as a consequence, there was more abuse but resilience had stiffened. A multi-stakeholder, multifaceted fight for justice and accountability had to be encouraged. *Complementarity was not the best way...it was the ONLY way forward.*

The promise of a strong ICC was nurtured by individuals, and the trial and conviction of Hissène Habré would continue to bring hope to and strengthen the drive of victims of genocide in Africa.

– Athaliah Molokomme

ATHALIAH MOLOKOMME

Justice and accountability would continue to dominate discourse on and outside the continent in the coming year. While she looked forward to the legal issues surrounding Articles 27 and 98 being debated, she nevertheless hoped that discussion would not exclusively focus on this, since this would be constrictive. Citizens and civil society organisations were becoming increasingly aware of their rights and demanding justice and accountability, and would neither be cowed into submission nor intimidated. The promise of a strong ICC was nurtured by individuals, and the trial and conviction of Hissène Habré would continue to bring hope to and strengthen the drive of victims of genocide in Africa. She felt that AGJA would be part

of this movement for justice and accountability.

HASSAN BUBACAR JALLOW

He hoped and believed two things. Firstly, in terms of withdrawal, the worst situation was the one that was being currently experienced: it could not get any worse. He thought that, over the coming year, a better relationship between Africa and the ICC system could be expected. It was not even beyond belief that “some of the countries which had filed declarations of withdrawal would return to the fold”. In fact, he would not be surprised if that did take place.

Secondly, there was a need to invest seriously in making complementarity a reality, through empowering the national courts and helping then with capacity building, training and law reform, as well as enhancing or creating regional judicial systems. Similarly, there had to be support for other accountability efforts at a grass-roots level. If such efforts did not succeed, this would result in weak and damaged national systems which would be unable to cope and an overburdened ICC, a situation that would lead to serious difficulties.

DAPO AKANDE

Despite any impression to the contrary, he was not really pessimistic. One had to broaden the lens slightly beyond that of simply focusing on Africa, Russia’s statement of the previous week and the US elections. In terms of the impact of these developments on

the ICC and international criminal justice, it might mark a shift away from Africa alone to the relationship between the ICC and other states. Indeed, the very public criticisms from Russia and the Philippines might be a blessing in disguise and, paradoxically, might even prove positive for the ICC, in the sense that it would become far more difficult for African states to continue to make the claim that the ICC was exclusively about Africa. If other states were also upset at the ICC, it made it more difficult to make that claim. Secondly, states which supported the ICC would “have to step up to the plate”. It would test their resolve.

Q & A

Mark Kersten now opened the discussion to the floor but explained that time was short and he could therefore only take a few questions. Shown below is a brief sampling of the most salient points.

Q: What did the President of the ICC see as the implications for justice and victims of Gambia’s withdrawal from the ICC? What did HBJ feel about Gambia’s withdrawal?

On the subject of The Gambia, SFG repeated what she had said to the ASP, namely, that the ICC, was only one part of global justice. It was a last-resort court, “the last line of defence”. It was thus vital that existing parties remained in and others became part of the Rome Statute system.

Insofar as withdrawal was concerned, HBJ had reacted publicly to the media and communicated



his disappointment at the decision taken, since it could only serve to close an avenue for victims in search of justice.

Q: How was a balance to be struck between ICC due process and impunity?

DA said that due process was built into the Rome Statute and judges had an obligation to apply it and they did so. *He saw no tension between due process and impunity.*

Q: Who should “kick-start” dialogue? Who were the wronged parties?

FS: The ICC could not impose a dialogue unless there was some desire for it. Dialogue could not be forced. For a meaningful dialogue to take place, there had to be a safe environment. To kick-start the process, the two parties had to agree to and want dialogue. Secondly there had to be a facilitator without any type of vested interest. She repeated here that creating a safe space was fundamental. As in the case of South Africa, it was something for the ICC President to explore.

AM: While she fully agreed with FS about dialogue, she noted that the dialogue in question was on different levels between different actors. There were States Parties that were unhappy with the status quo, with layers of dialogue taking place about different issues, and though these were related, they were nonetheless different

HBJ: On the subject of dialogue, HBJ noted that the AGJA had offered itself as a facilitator and mediator.

BMC: Visual language could “open up awareness”. Sometimes the question was to determine who the stakeholders were and what the end goal was. However, one could at least raise the subject and allow the stakeholders to engage and address it in a space where different stakeholders can come together.

At this juncture, MK brought the session to a close, thanked the panel and invited all those present to join them for cocktails in the lobby.



AFRICA GROUP
FOR JUSTICE AND ACCOUNTABILITY



WAYAMO
FOUNDATION

ConjunctionArts inc.

CREATINGRIGHTS



CONTACT

► BETTINA AMBACH

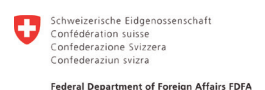
Director, Wayamo Foundation
Prinzregentenstr.82, 10717 Berlin, Germany
Tel. +49 30 81032821

info@wayamo.com www.wayamo.com
info@theafricagroup.org www.theafricagroup.org

With the financial support of:



FORD FOUNDATION



Federal Department of Foreign Affairs FDFA