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# ASP Side Event

## Weaving the Strands - Domestic, Regional, Hybrid and ICC Justice

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**AFRICA GROUP**

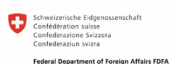
FOR JUSTICE AND ACCOUNTABILITY



**WAYAMO**  
FOUNDATION

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*During the 16th Annual International Criminal Court Assembly of States Parties, the Wayamo Foundation and the Africa Group for Justice and Accountability (AGJA) held a side event entitled “Weaving the Strands – Domestic, Regional, Hybrid and ICC Justice” on Thursday 7 December 2017. The event was made possible by the generous funding of Switzerland, the Netherlands, Finland, Norway, Germany, the Ford Foundation and the United Kingdom.*



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## Welcome remarks

Bettina Ambach opened the side-event by observing the 2nd anniversary of the Africa Group for Justice and Accountability. She thanked funders for their continued support for the Group and its activities as well as those of its partner organization, the Wayamo Foundation. Following her brief opening remarks, Ambach introduced both Hassan Jallow, Chief Justice of The Gambia and the current Chairman of the AGJA as well as ICC President Judge Silvia Fernández de Gurmendi, who has been an important advocate and source of support of the AGJA's work since its inception.

In her remarks, President Fernández gave a statement to mark the second anniversary of establishment of the AGJA. She declared: "I am very happy to have supported the Group from its inception. I was convinced then that the initiative to establish such a group was a great initiative that could make significant contributions in advancing efforts for accountability. I am delighted to confirm that I was not wrong now that I see how much the group has grown and developed in such a short period of time. The membership of the Group remains truly impressive, and I am very happy to see Ms Zainab Bangura as the latest addition. The Africa Group has now established itself as an important actor, with a voice of expertise and commitment. The past year has seen the Group expanding its activities, as it is now increasingly involved in concrete capacity building efforts in addition to advocacy work. This is very promising for the future in my view."



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President Fernandez observed that many challenges had confronted the project of international criminal justice over the past year, including the stated intention of some states to withdraw from the Rome Statute and the various concerns around this. According to Fernández, this context provided an opportunity to discuss and debate issues and have a constructive dialogue. She confirmed the Court's efforts to continuously reach out to states and to try to understand the concerns of all states. One example of this was a recent retreat with African states parties in Addis Ababa, just a few weeks prior.

The President reiterated that international criminal justice is one of the greatest achievements of past 30 years, but noted that it is also a long-term project. Moreover, the role of the Rome Statute system is broader than just the ICC — and we have already seen a positive effect on domestic and regional developments, something that the Court supports where possible. For example, the ICC recently had a very successful seminar on complementarity in Niger with 13 African states. President Fernandez declared that the future of international criminal justice lies in a mutually re-enforcing system where domestic, international, hybrid and regional levels work effectively together.

Of course, challenges persist and political opposition to accountability remains a worldwide problem. More than 20 African states have not joined the ICC. In this regard, capacity-building is critical and the President stated that she particularly appreciated the AGJA's work in this area.

President Fernandez concluded by thanking the AGJA and the Wayamo Foundation for their highly valuable work in supporting international criminal justice and the ICC as an important part of the international criminal justice system.

## Panel discussion

Hassan B. Jallow opened his remarks by thanking the guests present at the side event. On behalf of the AGJA, he declared that “we will continue to cooperate with the ICC to confront ongoing challenges, including the need for universality as well as capacity-building in many African states. Our objective is to promote justice and accountability on the continent and to improve the relationship between African states and the ICC, an institution we think is vital to the global struggle of justice and accountability.”





Jallow explained that the AGJA's mandate is carried out in various ways. It provides advice to states and conducts capacity-building and training exercises with domestic judiciaries and staff from regional and hybrid courts. It has ongoing projects in East Africa, Central African Republic, and has conducted an assessment of needs for The Gambia as it tries to write a new chapter on the rule of law and good governance. In this context, the AGJA looks forward to working with the ICC and, once again, thanks funders and donors for their continued support.

Jallow also issued a warm welcome to the AGJA's newest member, Zainab Bangura of Sierra Leone, who has been chosen to join the AGJA because of her distinguished track record in promoting human rights as well as accountability for sexual and gender-based violence.

In concluding his remarks, Jallow introduced the panelists and panel themes.

Navi Pillay began her intervention by thanking the attendees, panelists and the event's chair, Mr. Jallow.

Pillay drew attention to the topic of "weaving the strands", which she took to mean the need to examine all forms of ensuring justice and accountability, including transitional justice mechanisms and truth commissions, and so on.



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Pillay noted that she had served as an Appeal's Judge at the ICC and before that, at the International Criminal Tribunal for Rwanda (ICTR). "I was there at the start of these institutions and thought: we are all national judges serving here, except for some academics. But we all worked together as a team, committed to making a success of these institutions." Pillay also noted that she served a very short time as a national judge because Mandela had appointed her as an international judge at the ICTR.

Speaking on how one level of justice can affect another, Pillay explained that the Akayesu decision at the ICTR was followed by South African constitutional court decision which sought to make the commission of rape gender neutral in response to a case regarding the sodomization of a young male child. The matter was determined by the Constitutional Court by applying the Akayesu gender-neutral definition of sexual violence, thus making "real change at domestic level." This demonstrated, according to Pillay, "that there have been mutual benefits between national justice and international justice."

Given that the ICC is less than 20 years old, the Court is bound to experience ups and downs. For Pillay it was clear: "right now, in South Africa, it is very much down." Indeed, each President had supported the ICC since Apartheid, from Mandela to Mbeki. Mandela had nominated Pillay to the ICTR and Mbeki had nominated her to the ICC. But somewhere down the line, attitudes changed, particularly after the ICC's indictment of Sudanese President Omar al-Bashir.

Looking at the statement of Michael Masutha, the South African Minister of Justice at the Assembly of States Parties (ASP), Pillay observed that, firstly, he complained that the ASP has not spelled out a procedure or resolved the conflict between Articles 27 and 98 of the Rome Statute, where there are competing obligations of a state party to the Statute. She stated that "I feel that AGJA is there for this purpose. We are a pool of people who can hold a dialogue, listen, and understand differing points of view. I would encourage the South African Government and African Governments to work with AGJA to address these concerns."

Pillay declared that another concern, namely that the ICC cannot exist alone, is absolutely true. "That's why we are here today." There are many more bodies beyond the ICC, including truth commissions as well as commissions of inquiry that the UN Human

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Rights Council and General Assembly have established. Pillay pointed to the TRC as evidence of how the gap between peace and justice can be bridged.

Returning to the possibility of South Africa's withdrawal from the ICC, Pillay maintained that the main grounds for informing the ASP that the government will persist with its withdrawal is that it wants to continue to play a role in promoting dialogue and an interest in peace. But, she insisted, "it is possible for states to do both — address both the peace agenda and justice agenda and we in AGJA can help there as well." To do so, Pillay highlighted an AGJA initiative to engage and dialogue with South African parliamentarians in order to provide them with feedback and recommendations on engagement with the ICC.

Pillay also noted that the AGJA has followed developments at the African Union (AU) and that she is very disappointed in the AU's resolution endorsing immunity for heads of state and senior government officials. Many of those states involved in pressing for immunities at the AU had been leaders in the creation of the ICC, she observed. At the AU, there have been further developments on withdrawal, for instance on the ICC Withdrawal Strategy, but Pillay felt this is more an engagement strategy than a withdrawal strategy. Therefore, she saw it as offering new potential for dialogue.

While there is opposition to the ICC, there are also many African states that oppose withdrawal from the Court. Pillay noted that, the states that have self-referred themselves to the ICC have been very silent — and have not joined these calls. She argued that this is because these states don't have remedies for international justice despite crimes committed on their territory. Unlike before, today they have the benefit of an international institution — the ICC — that is able to achieve accountability. Moreover, many leaders have spoken in support of the ICC. As examples, Pillay highlighted the Nigerian Foreign Minister's vocal support of the Court, the formal reservations entered by states into AU's Withdrawal Strategy and its adoption, as well as the statement of President Kama of Botswana prior to the end of his tenure.

Pillay concluded by declaring that on all of these issues, "we as AGJA can play a role — and we intend to do so."

Stephen Rapp opened his remarks by saying that he was very happy to join the AGJA for the event and to participate in the panel. He observed that the panel was



meeting at a time of great challenges to the project of international criminal law. In South Sudan, four million have been displaced, the Equatoria region is experiencing rape and murder at a very high rate, and Bidi Bidi is the fastest growing camp for displaced persons in the world. The challenges, of course, are not just in Africa, he said. Myanmar now has hundreds of thousands displaced through a campaign of ethnic cleansing which may amount to genocide. Syria has some 13 million displaced and half a million dead since the war began. In total, 65 million people are fleeing violence — not just because of conflict but because they are subject to atrocities in situations where civilians have a larger chance of being targeted than combatants themselves.

The ICC is critical in addressing these atrocities as a court of last resort. But, in terms of practicalities in the world, Rapp noted that there is “no system of international justice, just some cases in The Hague and a few other places. We need to build a system of international justice.” He observed that there are currently four people on trial at the ICC but no one awaiting trial. No is one in pre-trial proceedings. “That’s not a system of international justice. We need more than that,” he stated.

According to Rapp, “complementarity is a slogan. Domestic systems often simply can’t do it. We see it sometimes happens, like in the UK under Andrew Cayley’s leadership, we see it in Colombia, we see it even in Guinea. When it’s effective, the ICC can get states to do it themselves. But we do have a fundamental deficit when it comes to states achieving justice themselves.” In this context, Rapp maintained that other institutions or courts trying to achieve justice are not in competition with the ICC. They



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exist to overcome real challenges. In particular, three challenges stand out: 1) creating the political will of states to prosecute these types of people and making such prosecutions realistic; 2) ensuring adequate capacity, especially after a large-scale conflict like in Rwanda or Sierra Leone where lawyers are often simply not there; and 3) providing the necessary legal tools.

Rapp observed that in some cases, like in Sierra Leone, ICC member-states still haven't domesticated the Rome Statute. Moreover, there are often constitutional provisions that prevent prosecutions of international crimes retroactively. That's why, in his view, hybrid courts can be particularly effective — they can achieve accountability for crimes committed on all sides of a conflict, as the Special Court for Sierra Leone did. Here, Rapp insisted that all sides would not have been convicted if it wasn't for the presence of international judges. He claimed that this will be the same for the hybrid court for South Sudan as well. Challenges exist there, but there is some progress. Due to the political realities in South Sudan, there has never been accountability for atrocities in the country.

Rapp said he was thrilled about the progress of establishing the Special Criminal Court (SCC) in the Central African Republic and the work that the AGJA and Wayamo have done in that regard, including with training programmes in Dakar and Bangui. He noted that the SCC has a minority of internationals. But, he insisted, this is still very important. "When you have international staff coming like that, the chances of having paper, toner, and all the necessary tools for a hybrid court to function are more likely."

On legal tools, Rapp noted that "the most thrilling thing I did this year was to hear the judges of the Extraordinary African Chambers deliver the appeals judgement against Hissène Habré. That was a mixed court too. Did it need to be mixed? From a practical standpoint, the Senegalese could do it. With regards to political will, it took a very long time to initiate Habré's prosecution, but they did it. But a legal issue was there — Senegal couldn't prosecute Habré retroactively unless they held proceedings with an international character. So they set up an international court that could apply international law that existed in the 1980s (when Habré perpetrated atrocities) without a constitutional or legal objection. It was necessary to do that."

In the end, Rapp said that we need these kind of mechanisms — and only as much internationalization as necessary. Instruments do exist, he stated. Another favourite of Rapp's is the "International Commission against Impunity in Guatemala (CICIG) in

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Guatemala". It provided for plea bargaining and witness protection, tools that such commissions don't tend to have but it even managed to prosecute the sitting president of Guatemala, Otto Pérez Molina. There is also the "International, Impartial and Independent Mechanism (IIIM)" in Syria, and more developments regarding accountability in Iraq. These means can help at least capacitate the reality of justice where ICC jurisdiction does not exist.

The point, according to Rapp, was not to expect that every trial in the world to be held in the same way. There must be minimum standards for such prosecutions. But, he stressed, what is required is a genuine process, and not necessarily the same process in each place.

Finally, Rapp declared that it is fundamental that we capacitate victims. They were absolutely crucial in the Habré case. For the Syrian investigators, it is very important that we have documentation efforts to work with the IIIM and other entities where we don't have judicial institutions to collect what is so critical — the linkage evidence.

In conclusion, Rapp stated that "as I try to weave together several strands, the whole idea is that if we are going to have a system of international justice we need all of these levels to be effective and we need major efforts to provide capacity and collect the evidence."

Zainab Bangura began her remarks by observing that if there is any crime that has benefited from international criminal justice more than any other, it is crimes related to sexual and gender based violence. These crimes are as old as war itself. Without the international criminal justice system, it would have been extremely difficult to prosecute sexual violence. For international crimes more broadly, domestic institutions are often insufficient. For example, Sierra Leone would not have managed to bring Charles Taylor to justice domestically. But due to the existence of the Special Court for Sierra Leone, justice was done and he was convicted. The same can be said about Jean-Pierre Bemba, who stood trial at the ICC and not in the Democratic Republic of Congo. According to Bangura, he would never have received a fair trial in the DRC. In Sudan, the lack of domestic prosecutions for egregious crimes also reflects the importance of international justice and the need for a hybrid court.



However, Bangura insisted that there “must always be a connection between the domestic and international systems and that they should complement each other.” She noted that today there are still places where sexual violence is not recognized as a crime. In her former role as the United Nations Special Representative on Sexual Violence in Conflict, she worked to ensure that domestic legislation was designed to prosecute sexual and gender based violence. This included working to ensure that important United Nations Security Council resolutions were implemented. The first step in this process was assessing existing domestic legislation and pushing for legal reform. This included working closely with judges, law enforcement agencies, ministries of justice, and legislative bodies.

Training to address sexual violence was noted as necessary by Bangura. She indicated that many law-makers and -enforcers were not aware of how to handle the crime. For example, in the DRC a decree had to be issued to set up a committee on sexual violence that was tasked to make laws to tackle this crime. It was necessary to take the lawmakers to the victims to show them the effects and injustices as they were resistant to pass the law.

According to Bangura, despite all of the work conducted at the domestic level, hybrid justice remains necessary to provide justice for the victims. For example, in Myanmar the number of victims of sexual violence are more than domestic courts can cope with. Bangura further noted that international justice can be used to encourage



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domestic justice systems to improve their legislation, investigations and prosecutions. She cited the example in Guinea, where her office offered assistance and, due to the pressure of the ICC preliminary examination at the time, the Guineans were receptive and accepted her office's assistance to improve the domestic prosecution of sexual violence. International and hybrid courts also play a role in building domestic capacity. For example the staff members of the Special Court for Sierra Leone are now working in their domestic justice systems and bring their skills and experience gained at the Special Court to their domestic work.

The topic of the side event, "Weaving the Strands — Domestic, Regional, Hybrid and ICC Justice" was particularly appropriate in Bangura's view as it has everything to do with her decision to join the AGJA. The Group's ongoing activities seek to build justice at the domestic, international and regional level. There is a great deal of work to be done, especially with regard to providing justice for victims of sexual violence, particularly women, who are often treated as second class citizens in many countries.

Finally, Bangura indicated that there could be no peace without justice. She pointed out that during conflict, the rule of law is attacked and courts, police stations, and any institutions that uphold the rule of law are targeted and destroyed. Thus it is difficult for post-conflict situations to immediately deliver justice when they are simultaneously tasked with re-establishing their justice systems. Whilst this is happening, international courts can step in and deliver justice in the interim.

Charles Jalloh began by describing the topic "Weaving the Strands" as a toolkit for justice. He noted that the world was entering a time where we are seeking to find solutions in terms of how best to use hybrid courts blending national and international processes to mete out justice for atrocity crimes. There is also a possibility in Africa that we might have a regional criminal court with the African Union's adoption of the Malabo Protocol which introduces a proposed expansion of the jurisdiction of the African Court of Justice and Human and Peoples' Rights to include international crimes in an International Criminal Law Section, alongside a general affairs jurisdiction as well as human rights jurisdiction. He pointed out the novelty that, for the first time, criminal law tools are being conceptualized within a regional human rights court with a victims' right to remedy at the centre of it all.

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According to Jalloh, the Malabo Protocol has been perceived in two ways: 1) African states are trying to undermine the ICC, a position that is simply untrue and unsupported by history or 2) that it is a viable opportunity and space to conceptualize a regional body to prosecute crimes. Jalloh reiterated that he was not seeking to promote the Protocol, as such, but merely looking at it constructively based on the premise that any mechanism that could advance accountability for atrocity and other crimes deserves serious discussion of its merits and or lack thereof.

The positive features of the Malabo Protocol include the invocation of the four traditional core international crimes and ten additional offences, commonly referred to as transnational crimes. Moreover, as Jalloh highlighted, the Malabo Protocol takes a major step forward by including rape in the context of genocide as well as broadening the definition of crimes against humanity. In addition, the crime of aggression can be committed by non-state actors as well under the Protocol. Corporate criminal liability is also contemplated. Finally, under the Protocol, the African Court would also have a full fledged defence office as an organ of the tribunal – thereby giving real meaning to the concept of equality of arms between the prosecution and defence.

According to Jalloh, while creative, it is important to recognize the fundamental challenges ahead for the Malabo Protocol. First, the Protocol, as of now, only has 9 signatures and no ratifications. It requires 15 ratifications before it can come into force. At this rate, absent a change in political will, it will take a while before the instrument will come into force.



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Second, Jalloh also raised questions around complementarity between the ICC and the future African Court. He observed that the Malabo Protocol is explicitly intended to be complementary with international courts, regional courts and sub-regional courts. However, the Rome Statute does not, strictly speaking, recognize regional courts under its complementarity regime. Article 17 of the Rome Statute, which speaks to the question of admissibility of cases and situations before the ICC, formally only contemplates national criminal jurisdictions as evidenced also by the preamble and Article 1 of the Rome Statute. Kenya had previously made a request, in the ICC working group on amendments, to recognize regional courts within the preamble and Rome Statute's terms on complementarity in Article 17, but this has – so far - not come to fruition. Perhaps in part because of the context in which the proposal was presented. It may be that, with the Kenyan cases no longer before the ICC, other states parties in the working group might now be more willing to revisit the question.

On the other hand, even if an amendment to the Rome Statute complementarity regime is not possible, there is nothing to prevent the ICC judges advancing a teleological approach to accommodate credible regional investigations and prosecutions for ICC crimes under Article 17. This point, while for the moment appropriately centered on Africa's experimentation with regional complementarity, would likely be relevant for other regions of the world in the future. For instance, there is presently an initiative under the leadership of Argentina to create a regional criminal court for Latin America. That court, as currently envisaged, will address drug trafficking and other transnational crimes. But it is easy to see how that type of jurisdiction could easily expand to include Rome Statute crimes for pragmatic and other reasons.

A third concern remains the inclusion of temporary immunity for heads of state and senior government officials. Jalloh noted that this was a last-minute inclusion during the drafting process of the Protocol. Initially, the clause on immunity in the Malabo Protocol basically mirrored Article 27 of the Rome Statute of the ICC. This position made great sense, especially given that 34 African states were parties to the ICC, and can be confirmed by looking at the 2012 draft of the Malabo Protocol. He noted that the temporary immunity issue is a good example of how politics can come into play to affect the legal texts of a treaty. The amendment, which was introduced by Kenya, basically inserted temporary immunity into Article 46 A which now has a bis creating some type of carveout for those senior leaders in power. Moreover, while it is clear that the provision does not



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create a permanent sort of immunity as they can be prosecuted after they are no longer in office, he noted that this provision defeats the expressed anti-ICC sentiment because it means that the African Court would have an exemption for immunity and not be able to try heads of state and other senior government officials. Consequently, since the ICC is not required as a matter of law to follow the Malabo Protocol but would instead apply its own Article 27, they would ironically end up in the sights of the Office of the Prosecutor in The Hague.

Finally, while in many ways interesting and even innovative, Jalloh added that funding constraints would be a major challenge for the future court especially considering its expansive subject matter and other jurisdictions. Besides his serious concerns about the track record of African states in funding human rights institutions including the current human rights court in Arusha and reliance on donor money for some initiatives, the future African Court of Justice and Human and Peoples' Rights will no doubt need more money than African states appear at present willing to give it.

Overall, he expressed the hope that all those in favor of accountability will continue to have a debate about how best we can weave the strands of justice by examining the promises, and perils, of regional court prosecutions for international crimes in Africa and elsewhere. Here, he noted that the experience from the area of international human rights law which has national, regional and international mechanisms might prove to be instructive to international criminal law as a sister discipline.

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