



## **Emerging Trends on Complementarity: Consultations with Stakeholders in Africa**

### Summary

As part of its on-going efforts to ensure that the most serious crimes of international concern are dealt with by the justice sectors in the countries where the crimes were committed, or as close as possible to the countries concerned, in 2018, Africa Legal Aid (AFLA) convened consultation meetings with stakeholders from Central, Eastern, and Western Africa, on 'Emerging Trends on Complementarity'.

The first stakeholders' consultations was convened in Banjul, The Gambia, in cooperation with the Attorney General's Chamber and Ministry of Justice of The Gambia, for West African stakeholders attending from Burkina Faso, Côte d'Ivoire, Ghana, Guinea, Liberia, Mali, Mauritania, Nigeria, Senegal, Sierra Leone, and The Gambia. Participants included government officials, judges, lawyers, representatives of various NGOs and international organisations, journalists, youth activists, academics and victims of international crimes. Various themes on complementarity were discussed and debated, including victims' participation, specific country situations, and the future of complementarity initiatives in Africa.

The second stakeholders' consultation took place in Kampala, Uganda, for Central and Eastern African stakeholders from Burundi, Cameroon, the Central African Republic, Chad, the Democratic Republic of Congo, Equatorial Guinea, Eritrea, Ethiopia, Gabon, Kenya, South Sudan, and Uganda. The meeting engaged stakeholders on a variety of topics such as creating political will in the pursuit of international justice, the Special Criminal Court in the Central African Republic and the proposed Hybrid Court for South Sudan, building legislative, investigative, prosecutorial, and judicial capacity in Uganda, specific country situations, and the victim in focus.

Hereinafter follows an overview of the program and a detailed report including feedback and comments from participants and observers. The consultations were a resounding success and AFLA looks forward to continuing its engagement with stakeholders and partners.

AFLA extends its gratitude to the Attorney General's Chamber and Ministry of Justice of The Gambia; the Swedish International Development Agency (Sida); the Federal Department of Foreign Affairs of Switzerland; Fondation pour l'Égalité des Chances en Afrique; the Netherlands Ministry of Foreign Affairs; and the International Crimes Division of the High Court of Uganda (ICD), for their cooperation and support.

The customary disclaimer applies: the views expressed in this report are personal to the presenters and commentators. They do not necessarily reflect AFLA's views or policy on human rights and/or international criminal justice, nor do they necessarily reflect the views of individual AFLA board members, partner organisations, including those who made generous financial contributions to this project.

## **EMERGING TRENDS ON COMPLEMENTARITY: CONSULTATIONS WITH STAKEHOLDERS FROM WEST AFRICA**

**Banjul, The Gambia**

**25-26 April 2018**

**Convened by Africa Legal Aid (AFLA)**

**in cooperation with**

**The Attorney General's Chamber and Ministry of Justice of The Gambia**



### **FEEDBACK AND COMMENTS**

*It was an honour to co-host the conference with AFLA and we look forward to our next engagement together.*

**Hon. Abubacarr Tambadou**, Attorney General and Minister of Justice of The Gambia.

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*It was a pleasure to take part in such a fruitful meeting, thank you for the invitation. Looking forward to participating in other AFLA meetings.*

*Thank you AFLA for the invitation to such an important gathering.*

**Fatoumatta Sandeng**, President, Solo Sandeng Foundation.

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*It was, as always, a pleasure!*

*Hope to see you soon.*

**Reed Brody**, Commissioner, International Commission of Jurists; Consultant, Human Rights Watch; Advocate for Hissène Habré's Victims.

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*I wanted to take a moment to thank you and your team at AFLA for the opportunity to share and learn at the recently ended conference on 'Emerging Trends on Complementarity', which AFLA organised in The Gambia.*

*The conference was very well organised and the insights from the speakers and participants provided teachable moments for me and, am sure, for all participants. I look forward to further engagements on this and other international justice issues in the future.*

**William Nyarko**, Executive Director, African Centre for International Law and Accountability.

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*Thank you team AFLA for allowing me this opportunity to participate in this Stakeholder's meeting.*

*In my view, it was very well organised, the discussion topics well selected and the participants were engaged right to the closing. I have participated in many such conferences and the litmus test of interest and how well participants are engaged is the attendance after lunch on the last day. That the room was completely full and that contributions had to be limited speaks volumes.*

*Well done and congratulations team AFLA. Your contribution continues to be both relevant and valuable. I was and continue to be happy to participate in the activities of AFLA. I wish you well.*

**H.E. Judge Geoffrey Henderson**, International Criminal Court.

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*Many thanks Evelyn, and everyone who contributed to organising the conference. I am grateful for the opportunity, and I look forward to participating in future AFLA-sponsored activities.*

**Ibrahim Tommy**, Executive Director, Centre for Accountability and the Rule of Law, Sierra Leone.

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*You and your crew put in a lot to make the meeting a success.*

*Without any shred of doubt, making human rights a reality in Africa is an invidious and perilous task requiring all hands on deck.*

**Segun Jegede**, Founder, Legal Watch and Human Rights Initiative; Special Prosecutor for the Government of Nigeria.

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*It was indeed a pleasure to be part of the conference. Just hope that my presentation helps.*

**Ayeshah Jammeh**, Secretary, Gambia Centre for Victims of Human Rights Abuse.

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*Merci infiniment à vous pour avoir donné l'occasion de parler dans ce panel et cette réception officielle pour donner notre vision sur la situation des victimes et des prestations du TFV mieux connu actuellement dans par les organisations défenseurs des droits humains*

**Mama Koité Doumbia**, Membre du Conseil d'administration, Fonds au profit des victimes de la CPI.

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*Me Ankumah,*

*Je suis Bien rentré et vs remercie de votre accueil chaleureux.*

*Votre réunion à été un coup de maître pour toutes les expertises et expériences de la complémentarité et de la recherche de meilleures performances pour nos justices internationale et sous régionale.*

*Merci pour cette vision efficace*

*Qui vous a valu ainsi qu'a vos collaborateurs la fierté de tous.*

*Je me tiens plus que jamais à votre disposition pour toute échéance similaire.*

*Cordialement.*

**Ahmedou TidJane Bal**, Conseil juridique et judiciaire, Équipe d'experts sur l'état de droit et la violence sexuelle dans les conflits, Bureau des Nations Unies du Secrétaire général des Nations Unies.

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**CONGRATULATIONS TO THE LEADERSHIP AND THE ENTIRE STAFF OF AFLA. SO PROUD OF YOU!**

**H.E. Adama Dieng**, UN Secretary-General's Special Adviser for the Prevention of Genocide.

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*Another landmark towards resourceful governance in Africa! Well done. Indeed, Jammeh must be prosecuted without undue delay, while evidence is still available, preferably, in The Gambia or within the sub region. I support African courts/ chambers to handle all trials on the continent so that public education on governance norms spreads within the region. That way, aspiring politicians will be well guided.*

*Congratulations for guiding us well.*

**Justice Florence Mumba**, Extraordinary Chambers in the Courts of Cambodia; Former Vice President of the International Criminal Tribunal for the Former Yugoslavia.

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*I pray that your new approach in deterring the global culture of impunity is estop, be realised and accepted as the best method within the comity of nations.*

*I enjoyed the various presentations and comments from most tested stakeholders, like you and ICC former authorities/jurists, as well as other out-door activities.*

*I also want to appreciate you for having invited me to participate and as well gain knowledge from experienced legal authorities.*

*I hope to be a part of your next program.*

*Meanwhile, should you be in need of my services for the planning and execution of such an important program in the immediate future, do not hesitate to contact me.*

**Augustine C. Fayiah**, Former Member of Parliament and Former Assistant Minister of Justice of Liberia.

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*It was my pleasure to attend and participate in the West Africa Stakeholders' Meeting on Emerging Trends on Complementarity. I look forward to follow up, and/or other meetings Inshallah.*

**Judge Aminatta Ngum**, Mechanism for International Tribunals (MICT).

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## **OVERVIEW**

### **DAY 1**

*April 25, 2018*

#### **Opening Session**

Chaired by **Justice Hassan Jallow**, Chief Justice of The Gambia; Former Chief Prosecutor of the International Criminal Tribunal for Rwanda (ICTR); First Prosecutor of the International Residual Mechanism for Criminal Tribunals (MICT)

Introduction of the Theme of the Consultation by **Evelyn A. Ankumah**, Executive Director, Africa Legal Aid (AFLA)

*Emerging Trends on Complementarity in Africa*

**Justice Fatoumata Dembele Diarra**, Judge at the Supreme Court of Mali; Former First Vice President of the International Criminal Court (ICC)

*The Road Thus Far: International Criminal Justice in Africa*

**Morten Kjaerum**

*Statement*

**Justice Hassan Jallow**, Chief Justice of The Gambia; Former Chief Prosecutor of the International Criminal Tribunal for Rwanda (ICTR); First Prosecutor of the International Residual Mechanism for Criminal Tribunals (MICT)

**Keynote Address**

*Complementarity in the Pursuit of International Criminal Justice in Africa*

**Panel 1, Victims as the Driving Force in the Prosecution of International Crimes**

Chaired by **H.E. Judge Geoffrey Henderson**, Trial Division, International Criminal Court

**Reed Brody and Henri Thulliez**

**Reed Brody**, Advocate for Habré's Victims; Commissioner, International Commission of Jurists

**Henri Thulliez**, Attorney at law, Paris Bar; Executive Director, Fondation pour l'Egalité des Chances en Afrique

*A victim centered approach to justice - lessons from the Hissène Habré case for The Gambia and beyond*

**William Nyarko**, Executive Director, African Centre for International Law and Accountability

*Massacre of 44 Ghanaians in The Gambia*

**Fatoumatta Sandeng**, President, Solo Sandeng Foundation

*Personal Account of the Solo Sandeng Case*

*Floor Discussion*

**Panel 2, Country Situations - Part 1**

Chaired by **Justice Mbacké Fall**, Supreme Court of Senegal, Former Chief Prosecutor of The Extraordinary African Chambers for the Prosecution of Hissène Habré

**Segun Jegede**, Founder, Legal Watch and Human Rights Initiative; Special Prosecutor for the Government of Nigeria

*The Boko Haram Situation*

**Eric Aimé Semien**, President, Observatoire Ivoirien des Droits de l'Homme

*The Situation in Côte d'Ivoire*

**Justice Florentine Kima**, Head of Division, Appeals Court of Ouagadougou, Burkina Faso  
*Views from Burkina Faso*

**Augustine C. Fayiah**, Former Member of Parliament of Liberia; Former Assistant Minister of Justice; Legal Practitioner  
*Perspectives from Liberia*

*Floor Discussion*

*Networking Reception*

**DAY 2**  
*April 26, 2018*

**Panel 3, Country Situations- Part 2**

Justice Fatoumata Dembélé Diarra  
Supreme Court of Mali; Former First Vice President of the International Criminal Court (ICC)  
*The Exercise of Complementarity in Mali*

**Ahmedou Tidjane Bal**, Legal and Judicial Affairs Counsel, Team of Experts on the Rule of Law and Sexual Violence in Conflict, Office of The Special Representative of the Secretary-General of the United Nations  
*The Guinean Experience*

**Asmaou Diallo**, President, Association of Victims, Relatives and Friends, Guinea  
*Justice for the Guinea Massacre: A Civil Society Perspective*

**Ibrahim Tommy**, Executive Director, Centre for Accountability and the Rule of Law, Sierra Leone  
*The Sierra Leone Experience*

*Floor Discussion*

**Panel 4, The Gambian Victim in Focus**

Chaired by **Mama Koité Doumbia**, Board Member, Trust Fund for Victims at the ICC

**Baba Hydera**, Gambia Centre for Victims of Human Rights Violations; Co-Publisher, The Point Newspaper  
*Using the Media as a Tool to Pursue Accountability for Grave Crimes*

**Imam Baba Leigh**, Imam Baba Leigh Foundation  
*Reflections of a torture survivor*

**Ayeshah Jammeh**, Secretary, Gambia Centre for Victims of Human Rights Abuse  
*Personal Reflections*

**Dr. Baba Galleh Jallow**, Executive Secretary, Truth, Reconciliation, and Reparation  
Commission of The Gambia  
*The Mandate of the TRRC*

*Floor Discussion*

**Panel 5, The Future of Complementarity Initiatives in Africa**

Chaired by **Evelyn A. Ankumah**, Executive Director, Africa Legal Aid

**Justice Mbacké Fall**, Supreme Court of Senegal, Former Chief Prosecutor of the  
Extraordinary African Chambers for the Prosecution of Hissène Habré  
*Lessons from the Extraordinary African Chambers in the Court of Senegal*

**Elise Keppler**, Associate Director of International Justice Programme, Human Rights Watch  
*Seizing Opportunities for Justice at Home: Lessons Learned from Sierra Leone to Guinea*

**M.B. Abubakar**, Director of Public Prosecutions, Attorney General's Chambers and Ministry  
of Justice of The Gambia  
*Prospects from The Gambia*

*Floor Discussion*

Closing by **Evelyn A. Ankumah**, Executive Director, Africa Legal Aid

**Commemorating the 20th Anniversary of the ICC Statute**

Guests of Honour:

**H.E. Fatoumata Tambajang**, Vice President of The Gambia (Represented by Ms. Mariam  
Khan Senghore, Permanent Secretary)

**H.E. Judge Geoffrey Henderson**, Trial Division, International Criminal Court

**Mama Koité Doumbia**, Board Member, Trust Fund for Victims at the ICC

**Report on Emerging Trends on Complementarity: Stakeholders' Consultation in West  
Africa**

## **Opening Ceremony**

The Opening Ceremony was chaired by **Justice Hassan Jallow**, Chief Justice of The Gambia and former Chief Prosecutor of the International Criminal Tribunal for Rwanda. He welcomed the participants and thanked AFLA for organising such an important meeting on emerging trends on complementarity on the African continent, and particularly in The Gambia. He then gave the floor to Evelyn A. Ankumah, Executive Director of AFLA, to make her opening statement.

**Evelyn A. Ankumah** warmly welcomed all participants and distinguished guests, thanking them for making the effort to participate in discussions on complementarity in international criminal justice. She reminded the audience of the definition of the complementarity principle, quoting its source from article 17 of the Rome Statute. She highlighted the fact that in essence, the ICC is a default Court, simply meant to act as a safety net whenever national courts are unwilling or unable to prosecute perpetrators of international crimes. 'Justice should be done at home, or as close as possible to home,' she said.

Ankumah said it was important during this meeting to think about ways, methods or plans to have trials either in the countries concerned, in the sub-region, or in Africa more generally. While she praised the tireless and successful efforts of victims in bringing Hissène Habré to justice, she nonetheless cautioned against their role to the extent that the outcome of the proceedings should be based on facts and not victims' emotions. She equally emphasised the need for political support, such as that of the African Union for the Habré trial.

She concluded by making a plea for Africa to unite in the goal to end impunity.

Next, **Justice Fatoumata Dembélé Diarra**, Former First Vice President of the International Criminal Court, and former judge of the Supreme Court of Mali presented on 'The Road Thus Far: International Criminal Justice in Africa'.

She started her presentation by pointing out how the recent experiences of trials of international crimes committed in African countries attest to the importance of international criminal justice for Africa, specifically mentioning the trials held before the International Criminal Tribunal for Rwanda (ICTR), the Special Court for Sierra Leone (SCSL) and more recently the trial of Hissène Habré before the Extraordinary African Chambers (EAC) which, in her view, marked the evolution of international criminal justice with an indelible stamp. While noting the initial great enthusiasm of African States for the ICC through their active participation in the drafting and ratification of the Rome Statute, as well as their numerous referrals to the Court, Judge Diarra, in her presentation, examined the reasons why African leaders are now turning their backs to the ICC, and what strategies should be adopted to curb the unwarranted negative campaign against the ICC. She divided her presentation into four main parts.

First, she talked about the importance of international criminal justice for Africa. She said it was important for Africa to develop a culture of accountability for international crimes in order for these crimes to be prevented. She noted that the international community's willingness to assist African states in this regard, was an opportunity to be seized in the best

interest of victims, especially given the limited resources and capacity African States have for the effective prosecution of such crimes.

Second, Judge Diarra restated the interest and enthusiasm of African States for international criminal justice. She observed Africa's great interest and enthusiasm as manifested by its participation in the drafting and ratification of the Rome Statute, in the setting up of ad hoc tribunals, and in the fact that most referrals to the ICC came from African States, right after the Statute entered into force.

Third, she addressed the revolt of African heads of state against the ICC. She opined that, the main point of disagreement between African heads of state and the ICC resides in article 27 of the Rome Statute, which states that the 'Statute shall apply equally to all persons without any distinction based on official capacity...' Several countries refused to join the ICC because of this article, such as Morocco, which treats its King as sacred. Judge Diarra further referred to another article which, in her opinion, was disliked by the heads of State: that is article 13 of the Statute, which allows the United Nations Security Council to refer a situation in which international crimes have been committed to the ICC Prosecutor, even if the State in question is not party to the Rome Statute; the situations of Sudan and Libya are prime examples of such referrals by the Security Council. She equally mentioned the involvement in the Kenyan situation of an investigative committee presided by former United Nations Secretary General Kofi Annan, which later referred the situation to the ICC. As well, she recalled the fact that former President Laurent Gbagbo was able to appear before the Court although Côte d'Ivoire was not yet a member state to the Rome Statute, because it had accepted the Court's jurisdiction by virtue of article 12 paragraph 3. These examples of heads of State brought before the ICC, Judge Diarra remarked, served to hinder the relationship between the ICC and African States. In the midst of these protests against the ICC, she criticised the absence of victims who seem to have been ignored and excluded from the debate.

Lastly, Judge Diarra concluded her presentation with a few recommendations for rehabilitating the relationship between the ICC and Africa. She declared the need to bring clear answers to the critics about Africans being the only suspects prosecuted by the ICC; the necessity to inform African States that almost all cases referred to the Court were referred by the countries themselves; that the Prosecutor can only investigate crimes committed on the territory of one of the 123 countries party to the Statute; the need to inform about the various acquittals, abandonment of proceedings, and non-confirmation of charges by the pre-trial chamber; the need to pursue lobbying efforts before diplomatic spheres in order to obtain more ratifications of the Statute; the need to carry out awareness campaigns against withdrawals from the Rome Statute under article 127; and finally, effectively communicate on the fact that a withdrawal for fear of investigations is useless, as a withdrawal has no retroactive effect but only comes into force one year after the written notification.

The floor was then handed over to **Morten Kjaerum**. He remarked how great of an honour it was for him to participate in the meeting. He commended AFLA's involvement in programme activities and common priorities in terms of promoting access to justice and the rule of law in Africa and, more specifically, to end impunity.

Kjaerum emphasised the necessity of the ICC in our world and that, though many would like for it to disappear, it has set foot marks which cannot be brushed aside. ‘Where do we deliver justice best for victims?’ he asked. He observed that the approach of international justice is subsidiarity, that issues are best solved at home.

He noted that in spite of the successes in terms of international justice on the African continent such as the Habré case, there also are numerous setbacks, which is why Consultations like this one are crucial to strengthen current efforts for the promotion of human rights and the global fight against impunity. Kjaerum opined that corruption is most likely the single most important impediment today for realising human rights and ending impunity, and was pleased to see that this issue was moving into the human rights agenda.

**Justice Hassan Jallow** delivered his keynote speech on ‘Complementarity in the pursuit of International Criminal Justice in Africa’. After once again thanking AFLA for choosing The Gambia to host such an important meeting in light of the recent developments in the country, he urged participants to explore ways in which complementarity should be strengthened, affirming that justice should be brought closer to home. He recalled the major challenges and threats posed by crimes on the African continent such as genocide, corruption and environmental crimes, which undermine the stability and very existence of entire communities.

He lauded the role that not only international criminal tribunals have contributed in the promotion of international justice and human rights, but also national courts, such as those of Spain and the UK. Hence, he highlighted the need for cooperation between both national and international courts, with the primary responsibility to prosecute crimes resting on the former. Justice Jallow cited inadequate national laws, weak legal structures and insufficient political will as some of the challenges faced by the effective implementation of complementarity. What’s more, Justice Jallow recognised the need for certain crimes, such as torture, to be captured in national jurisdictions, as well as the need for certain current crime definitions to be reviewed to reflect definitions given by international tribunals; a prime example of such a crime, he pointed out, would be rape which, at the national level, is often defined as involving an interaction between certain body parts whereas the ICTR in the Akayesu judgment gave a broader definition of the crime, namely, an assault of a sexual nature. He then went on to offer some solutions to such challenges as: engaging in law reform and revamping the judicial system to make it more efficient and effective.

For complementarity to be effective, he highlighted the need for States to cooperate, as complementarity is a welcome innovation and guide to international justice in Africa. He also called for the strengthening of bilateral treaties for legal assistance between States in matters such as extradition, accessing evidence and mutual legal assistance in criminal matters.

### ***Panel 1: Victims as the Driving Force in the Prosecution of International Crimes***

The first panel was chaired by H.E. Judge Geoffrey Henderson of the International Criminal Court. He reiterated Justice Jallow’s statement about complementarity being fundamental to international justice, equally remarking that victim participation is a welcome addition to the ICC in its efforts to achieving international justice. He welcomed and introduced each of the

speakers, after which he gave the floor to Reed Brody and Henri Thulliez for the first presentation on 'A Victim Centered Approach to Justice - Lessons from the Hissène Habré Case for The Gambia and Beyond'.

**Reed Brody** highlighted the role that victims had played in bringing Habré to justice, emphasising their key role as protagonists in this case. He then made a pictorial presentation on the background of the case:

Hissène Habré ruled Chad as a dictator between 1982 and 1990, enjoying the support of France and the United States. In 1990, he was overthrown by his Military Commander and fled to Senegal. Shortly afterwards, a Truth Commission set up in Chad to investigate the alleged violations, blamed the Habré regime for 40,000 killings and systematic torture. These tortures and mass killings were notably carried out in a prison called 'la piscine' - the swimming pool. Mass graves containing the remnants of his victims were found.

One key protagonist in this case was Souleymane Guengueng, who played a very important role next to the Victims' Association in Chad. The active involvement of a Senegalese survivor of Habré's jails, Abdourahman Gueye, also helped as an outreach to the Senegalese public to call for the prosecution of Habré in Senegal. Around the same time, the world had just witnessed one of the major turning points for universal jurisdiction. Augusto Pinochet, a former head of state, had recently been arrested in London for the crimes that he had committed in Chile and had been indicted for in Spain. Up until this point, the arrest of a former head of state was entirely unprecedented. This brought hope to the Chadian victims who sought out the assistance of Human Rights Watch, seeking the same for Hissène Habré.

In January 2000, Human Rights Watch assisted victims in Dakar to file a complaint under the Torture Convention leading to the indictment of Habré and his house arrest. However, following political pressure, the Court of Appeals ruled that Senegalese courts were not competent to deal with crimes allegedly committed abroad; this decision was confirmed by the Cour de Cassation. Simultaneously, victims in Chad were filing complaints against Habré's agents.

In order to have a wider impact, Human Rights Watch began to use a different strategy by focusing on the victims, training them in international advocacy to make them activists. 21 victims, including 3 Belgians, filed a case in Belgium against Hissène Habré under the Belgian universal jurisdiction law. However, the Belgian law was repealed but the Habré case got saved because of the victims' lobbying. A major breakthrough in the case emerged after several files were accidentally discovered, providing evidence of the torture and extrajudicial killings carried out by Habré's dreaded political police, the Documentation and Security Directorate (DDS). They revealed the killing of over 12,000 victims, including Senegalese nationals.

Eventually, in 2005, Belgium requested Habré's extradition from Senegal. However, the Senegalese Court ruled that Senegal had no competence to rule on the extradition of a former head of state and referred the issue to the African Union.

The AU established a committee of eminent African jurists which found that Senegal had the legal obligation to either prosecute or extradite Hissène Habré. The Committee on the Convention Against Torture had also held that Senegal had violated the Convention against Torture and had an obligation to either extradite or prosecute Habré. In spite of all this, still nothing happened. But fortunately, the case was kept alive as many organisations began to mobilise in favour of the victims.

Following this failure to act, Belgium took Senegal to the International Court of Justice (ICJ) in *Belgium v Senegal* where the ICJ ruled that Senegal had to either prosecute or extradite Habré without delay. This decision by the ICJ combined with the election of Macky Sall as Senegal's President in 2012, catalysed the eventual prosecution of Habré. Thanks to President Sall, Senegal agreed to amend its national laws to allow for the prosecution to take place, thus leading to the establishment of the Extraordinary African Chambers in Dakar.

As regarding The Gambia, Brody informed participants that several meetings were being held with Jammeh's victims with whom a campaign was launched to bring him to justice. He stressed the pivotal role of victims in bringing Habré to justice and the importance of victim participation. This is because victim participation:

- Helped create political will in the Habré case. The conditions of the trial were slow but victims such as Souleymane Guengueng became known and people followed in their struggle. He remarked that a victim centred approach is missing in today's quest for international justice.
- Determined the contours of the Habré trial. Brody pointed to Justice Mbacké Fall, former Chief Prosecutor of The Extraordinary African Chambers, and present during the meeting, as the backbone of the entire trial since he went to meet the victims, talked and listened to their stories. As prosecutor, he knew that justice was for all the victims.

Brody equally commended Jacqueline Moudeina in her role as the voice of the victims who came forward to tell their stories, and represented them in court. He concluded by stating that this victim centred approach to international justice is replicable. The energy and lessons of the Habré trial can be applied to other cases, such as the 'Jammeh to Justice' campaign.

**Henri Thulliez** then provided more details about the Habré trial. He started by exposing the mandate of the Extraordinary African Chambers, which was to prosecute "the person or persons most responsible" for international crimes committed in Chad during Habré's rule. It had competence over genocide, crimes against humanity, war crimes and torture as defined in the Statute. He discussed the composition of the Court, as well as the budget of the Court (7.4 million euros), noting that the biggest donor was Chad, where the crimes were committed.

In July 2013, the Chambers indicted Hissène Habré for crimes against humanity, war crimes and torture, and was taken into police custody. Thulliez pointed to the crucial role of investigating judges in the case as they went to Chad and sought evidence from the DDS archives that were used against Habré during the trial, conducted missions in Chad and

interviewed many witnesses and victims; Thulliez himself oversaw some investigative missions.

Meanwhile back in Chad, the criminal Court indicted ex-agents of the Habré regime.

The Habré trial started on 20 July 2015 and concluded in February 2016. Henri Thulliez paid tribute to Justice Mbacké Fall and Jacqueline Moudeina for their key role in the case. He also recalled the fact that defence lawyers were appointed by the Court to defend Hissène Habré, since his lawyers boycotted the trial and refused to show up on the first day. On the first day back after the adjournment, Habré had to be brought to the courtroom by force and systematically refused to speak.

Interviews were conducted with several victims, such as those who had undergone sexual slavery, torture and other cruel and inhumane acts. Thanks to the evidence found, victims were able to identify their torturers. Many experts and witnesses were also heard during the trial. The trial was recorded, broadcast on Chadian television and posted online. On May 30<sup>th</sup> 2016, Habré was convicted of crimes against humanity, war crimes, torture and of personally raping one victim. He was sentenced to life imprisonment. The Appeals court upheld the conviction and sentence but overturned the rape conviction on the basis of a technicality, and also ordered that reparations be paid to victims.

Thulliez announced that a campaign to bring Yahya Jammeh to justice had begun, and that they had met with Jammeh's victims. He concluded by stating that it is crucial to remember that in the Habré case, victims were the driving force behind obtaining justice and that today, the focus of international crimes should also include financial crimes.

Judge Henderson then thanked the presenters and handed the floor to **William Nyarko**, Executive Director of the African Centre for International Law and Accountability, to speak about the 'Massacre of 44 Ghanaians in The Gambia'.

Nyarko thanked AFLA and its partners for organising this meeting, as well as Reed Brody and Henri Thulliez for their inspiring account of the Habré case. He reminded the audience that to seek justice, we would need to tackle the issue of jurisdiction, political will and complementarity. He then gave a brief background overview of the massacre.

In July 2005 a group of some 56-57 Ghanaians, Nigerians, Senegalese and other West African nationals illegally migrated to The Gambia on their way to seek greener pastures in Europe. They were arrested and many were subsequently killed. The lone survivor of the massacre known to date is Martin Kyere from Ghana. In fact, had Kyere not managed to escape, the massacre of the West Africans may never had been told. After those unfortunate events, AFLA and other institutions were at the forefront of seeking justice in Ghana. A joint ECOWAS commission was set up to investigate the matter and concluded that non-state agents had committed the crimes. A deal was signed through a memorandum whereby the Gambian government agreed to pay USD 500,000 to the victims, but not as compensation, since it was denying responsibility for the killings and disappearances. Eight bodies of victims were sent to Ghana for burial. It later emerged that the 'junglers' who were suspected of committing those atrocities were working under the command of Yahya Jammeh. Victims

have always considered bringing the issue to justice and having Jammeh tried for his involvement in the atrocities committed. This therefore raises the question of how to bring to justice those responsible for committing these heinous crimes. Nyarko then went on to explore the various avenues available for bringing the perpetrators to justice.

He said The Gambia would be the first option as it has territorial jurisdiction; however, the Gambian judiciary would have to be more robust in following up the matter and prosecuting the perpetrators, he stated. Nyarko further opined that the new government needed some space to get things right and that institutions such as the Truth, Reconciliation, and Reparation Commission of The Gambia (TRRC) should be given powers to press for criminal proceedings. Alternatively, he said, Ghana would be able to have jurisdiction over the matter since most of the victims were Ghanaians. Ghana had begun investigating the matter but they were halted by lack of political will. However, he asked, if Ghana decided to prosecute these crimes, under what law would it be done? What does this case present in terms of crimes under the criminal code? He remarked that challenges still remained in terms of extraterritorial application of the law in Ghana. He raised other challenges, including the difficulty in securing the extradition of leaders such as Jammeh and the obstacles in Gambian law restricting proceedings against a former president. Nyarko evoked the option of establishing a special court at the ECOWAS level, following the example set by the Habré trial.

**Fatoumatta Sandeng**, President of the Solo Sandeng Foundation, and daughter of slain Gambian activist, Solo Sandeng, was then given the floor by the chair to give a personal account of what happened to her father and their family's experience.

She began her by recounting the words of her father: 'If I have to be the sacrificial lamb for Gambia to be free, then I would lay my life on the line'. Solo Sandeng suffered a number of arrests and threats from Yahya Jammeh's regime but never relented because of his love for his country, Sandeng recalled. He was eventually arrested and tortured to death. Sandeng observed how this incident initiated a turning point in the history of The Gambia as many people witnessed his arrest, and realised an end had to be put to such violations. She said her father was targeted because he demanded full participation of Gambians in the affairs of their country. Though he was arrested, tortured and killed on the same day, the government denied his killing. Hence, a campaign was started demanding his release, dead or alive.

The protests for Solo's release, she recalled, were intercepted by soldiers with tear gas and police brutality. Her family members were targeted and they were forced to flee the country, having to escape through bushes and remote villages in camouflaged clothing in order to hide from the security agents. They finally arrived in Senegal, where they sought exile. She said she was determined to continue her father's legacy and pursue the quest for justice that he had started; she received help from exiles in Senegal and other neighbouring countries.

At Solo's trial in June 2016, since the State authorities could not bring him before the court, the government finally declared that he had died in custody. Sandeng said she did not understand why the ICC did not consider that Jammeh's crimes have reached the gravity threshold. She said she and the other victims brought their plight before international media

to highlight the injustices perpetrated by Jammeh. She extended her gratitude to lawyers such as Reed Brody, Marion Volkmann and Henri Thulliez who are helping with bringing Jammeh to justice. However, she said the victims do not want it take 17 years as was the case for Habré. Evidence of Solo's torture and death finally emerged in the form of videos, which were shown during the trial.

Sandeng declared that the Victims Centre was pushing for the government and Ministry of Justice to bring all cases before court, and for all evidence to be gathered for the prosecution to commence.

The chair, Judge Henderson, thanked all the speakers and briefly summarised the speeches, stating that victims are now at the forefront of bringing justice through mobilisation and active advocacy. So what lessons are to be learned, he asked. He then opened the floor for discussion.

#### Floor discussion

**Ahmedou Tidjane Bal** made a comment by mentioning the case of Guinea in which the victims were key in campaigning for justice. He informed participants that in Guinea atrocities were committed in 2009, hundreds of people were killed and women were raped in broad daylight by police forces among other abuses. The victims played a major role and Diallo, present here today, and who is herself a victim, set up a victims centre which managed to propel the State into legal action in spite of fluctuating political will.

**Sanaa Camara, a Gambian participant**, remarked that Jammeh knew he would face justice some day and that his worst nightmare would probably be to be tried in The Gambia or Senegal, so he might prefer being tried by the ICC.

**Elise Keppler** asked what the difference was between civil and common law systems in terms of the role victims have to play because in civil law countries, victims certainly play a major role. She asked if it was possible to talk about the role of victims when that role is constrained.

Henri Thulliez and Reed Brody both answered the question from their respective legal backgrounds. **Thulliez** pointed out that in civil law systems, the investigating judge or *juge d'instruction* could investigate incriminating and exonerating circumstances equally, while the victims also have an active role to play e.g. the possibility of asking the judge to ask specific questions or consult specific experts. Indeed, he highlighted the key role of victims in seeking the «truth». This smooth collaboration between the victims and the prosecutor could be observed in the Habré case, where the victims became the prosecutor's lieutenant.

**Reed Brody** stated that in common law systems, the victim does enjoy much right to participate in trial and the prosecutor could work more closely with the victims, the people who know the facts best.

#### ***Panel 2: Country situations – Part 1***

This second panel was chaired by **Justice Mbacké Fall**, Supreme Court of Senegal and former Chief Prosecutor of The Extraordinary African Chambers for the Prosecution of

Hissène Habré. After introducing the panelists, he gave the floor to Eric Aimé Semien, President of the *Observatoire Ivoirien des Droits de l'Homme*, to speak about the situation in Côte d'Ivoire.

After thanking AFLA for this meeting and for its endeavour in the field of international justice, **Eric Aimé Semien** then gave a brief overview of the Ivorian situation. Semien recalled the fact that Côte d'Ivoire had been struck by nearly two decades of violence, including the armed rebellion of September 2002 and the post-election crisis which took place between November 2010 and May 2011. The ICC opened an investigation into the post-election violence in 2011. While Semien highlighted Côte d'Ivoire's long heritage of impunity and lack of accountability for crimes and violence over the past 20 years, he pointed out the new government's announcement to end impunity by engaging both domestic courts and the ICC. Hence, he noted the ratification of the ICC Statute in 2013, followed by domestication efforts made in 2015.

However, most perpetrators have not been brought to justice, some of them holding key positions in the military. According to Semien, the ICC has been a disappointment in terms of creating justice gaps because the Court appears to promote a 'victor's justice' and does not seem close to the people it is seeking to protect. He said the need for remedial action on behalf of victims was great in view of the succession of violent events in the country. Although various bodies were set up at the national level next to the courts to establish the truth and determine accountability such as the Dialogue, Truth and Reconciliation Commission, or the Special Inquiry and Investigation Unit, a huge mistrust and lack of confidence in government institutions made people look to the ICC as the only viable avenue for justice. Nevertheless, he pointed out, the current reality paints a different picture: to date, only three individuals have been brought to justice - former President Laurent Gbagbo, his wife Simone Gbagbo and Charles Blé Goudé, former youth leader of their political group - all of them from one side of the warring parties, namely the 'Gbagbo' side. Semien regretted that no one from the opposing side - the 'Ouattarra' side - was being prosecuted before the ICC, not to mention the total lack of political will to do so at the national level.

Semien remarked that the ICC had announced an investigation on the opposing side and asked why there was such a delay in investigating into the crimes committed by the opposing side, given that the crimes took place at the same time and that it only took three weeks to arrest and transfer Gbagbo to The Hague after the investigations started. He said justice was being done for one set of victims, but denied for another set. Such biased action on the part of the ICC, he opined, may lead to a desire for vengeance from the underprivileged side. He concluded by calling on the ICC to bear in mind that domestic prosecutions - if they take place - will not be fair and balanced, and hence to take quick action by sending strong signals and reviewing its policy on Côte d'Ivoire.

The next panelist was **Augustine C. Fayiah**, legal practitioner and former Member of Parliament of Liberia, who shared some perspectives from Liberia.

Fayiah began by noting that international crimes have the potential to undermine the rule of law, erode the economic base of a country, weaken institutions, destroy the social fabrics of a society and impact negatively on the integrity and soundness of decision-makers. Hence, in view of the deadly effects of these crimes, he pointed out that their combating had taken a global dimension requiring a concerted and integrated approach involving a wide array of stakeholders. He added that the establishment and strengthening of national institutions and upscaling of skills and capacity of competent local authorities responsible for implementing complementarity measures could be an effective remedy.

Fayiah then provided a list of suggestions and recommendations:

For complementarity and positive complementarity to be effective, countries should take immediate steps to build partnerships to create a legal framework and fully implement all such laws as necessary to effectively deal with violators of the provisions, protocols, conventions, and compacts that are geared towards protecting the rights and dignity of individuals. He said Liberia believed in complementarity and that two perspectives were to be considered: if Liberia is to be peaceful, perpetrators of human rights abuses ought to be dealt with, but if Liberia must consider the complex family inter-linkages which characterise its population, then it has to adopt the South African concept of restorative Justice; this however raises the issue of who takes the lead in such reconciliation.

With regard to political will to prosecute international crimes, Fayiah admitted that it was totally lacking in Liberia due to the fact that most perpetrators were people in power with the resources to commit such crimes. He then gave a few suggestions on how to create political will, including change of leadership through democratic processes; empowering and capacitating pressure groups such as the Civil Society, Press Unions, Bar Associations etc. with the skills and consciousness needed to advocate compliance with the laws; using the international community as leverage for diplomatic pressure; using concerted efforts by regional pressure groups to advance lobbying efforts for the recognition of international crimes, especially via ECOWAS.

Fayiah also gave additional suggestions in terms of jurisdictional matters, namely that the ICC develop various regional legal instruments that take into account the local customs and values of the various countries; the use of existing regional courts with international character, ensuring that the countries which fall within that region accede to such courts/instruments, and subsequently domesticate them; that perpetrators be tried in the country in which they commit the offence using the legal instruments of that country, but taking due note of existing regional legal instruments. Regarding the interface between national reconciliation processes and national prosecutions, Fayiah said this remained a major challenge in Liberia. Indeed, some of the perpetrators of violence and crimes during the crisis are the drivers of the national reconciliation process.

He concluded by mentioning that national prosecutions were the most challenging and that this is where complementarity and positive complementarity among stakeholders, as well as regional, continental and the international bodies would have to come into play.

After this presentation, Semien took the floor once again to present **Judge Florentine Kima's** paper on her behalf, about the Burkina Faso situation. She is Head of Division at the Appeals Court of Ouagadougou.

*Burkina Faso ratified the Rome Statute of the International Criminal Court on 16 April 2004. With this ratification, Burkina Faso recognized the jurisdiction of the Court from July 1<sup>st</sup> 2002.*

*Pursuant to its commitments made to the ICC (Article 128 of the Statute), Law No. 052-2009/AN was adopted on 8 December 2009, determining the powers and procedure for implementing the Rome Statute of the ICC by the Burkinabè courts. This law allows national courts to deal with the offences provided for in the Rome Statute, i.e. genocide, war crimes, and crimes against humanity, and also provides for more functional and effective judicial cooperation.*

*In Burkina Faso, universal jurisdiction means the capacity for domestic courts to prosecute a person suspected of committing international crimes outside the national territory and who is not in any way linked to Burkina Faso by nationality. The law affirms the primacy of Burkinabè courts and recognizes the ICC only as a subsidiary court, thus acknowledging the principle of complementarity.*

*Crimes against humanity, genocide and war crimes are imprescriptible and their perpetrators can neither be pardoned nor amnestied. While the implementation law has the merit of existing, it is not perfect. Indeed, the law did not establish the crime of aggression as an offence, nor did it give the courts and tribunals universal jurisdiction over it. Similarly, rape, which is one of the acts constituting a crime against humanity has caught the attention of civil society because the law does not provide a clear and precise definition, such that it can either be considered too wide enough to be covered by the Rome Statute, or too limited to escape the Statute. While Article 68 of the Statute deals with the protection and participation of victims and witnesses at trial, Burkinabè law has not devised any form of protection of victims or witnesses. Regarding victim reparations, Burkinabè law only deals with restitution and compensation, disregarding the rehabilitation provided for by Article 75 of the Statute.*

*On top of these technical shortcomings of the law, it is necessary to underline other difficulties relating to lack of political will and the general mistrust people have towards the ICC.*

*As for the first obstacle, it is interesting to note that on 22 October 2013, at the extraordinary summit of the African Union, some African countries including Burkina Faso decided to address a request to the United Nations Security Council to stay proceedings against the Sudanese and Kenyan Presidents, because they saw the ICC as a political and discriminatory instrument against Africa. Such a position of African politics poses the problem of respect of the separation of powers.*

*Similarly, during a seminar on the need to abolish the death penalty, MPs expressed their disapproval of the ICC even though it was the same body that ratified the Rome Statute and domesticated it, taking into account the principle of complementarity.*

*Fortunately, this position did not prevent the military prosecutor, after the failed coup of September 2015, to prosecute soldiers involved in crimes against humanity, the same incrimination being taken over by the investigating judge. However, the Military Court Review Chamber has reclassified the facts as murder and wilful assault, and the military prosecutor intends to ask the trial court to maintain the qualification of crime against humanity.*

*Regarding the second obstacle, the ICC appears, in the eyes of a certain segment of the population, as an instrument of humiliation and degradation against them. Thus, during a workshop organized by the Ministry of Human Rights Promotion coinciding with the anniversary of the Universal Declaration of Human Rights, civil society organizations highlighted the fact that the ICC, according to them, only judges Africans.*

*These two positions raise the issue of the place of victims during and after the commission of the offences. For a state, recourse to the ICC sounds like a failure because, in a way, it is testimony to the state's inability or unwillingness to offer justice to the victims. However, the quest for peace requires the manifestation of truth and the expression of justice; it also precedes forgiveness which, to be accepted, must be disconnected from all political considerations. Pope John Paul II emphasized that there is no peace without justice and no justice without forgiveness. In order to emphasize the need for justice as a prerequisite for forgiveness, it is important to underline that Burkina Faso, upon the recommendation of a council of wise men, instituted a National Day of Forgiveness held on March 30<sup>th</sup> 2001, the day after the murder of journalist Norbert ZONGO and subsequent unrest which followed. While the official ceremony, chaired by the President of Burkina Faso, was being held, the relatives of victims gathered on their graves denouncing the lack of justice. Since then, the country has experienced multiple crises which led to the fall of the regime, proof that the search for peace is delusive without justice.*

*It is therefore necessary, to always bear in mind the significance of complementarity.*

*It is also important to raise public awareness on the need to search for truth through justice by emphasizing that justice has "neither colour nor nationality", and that it is better that it come from The Hague rather than never.*

*The training of judicial actors can be useful in terms of understanding and implementing these crimes.*

*Finally, it is useful for legislative gaps to be filled and for victims and witnesses protection units to be created.*

William Nyarko proceeded with the presentation of **Segun Jegede's** paper in the Boko Haram situation in Nigeria. Jegede is the founder of Legal Watch and Human Rights Initiative, as well as Special Prosecutor for the Government of Nigeria.

*Perhaps, more than any other period in world history, the last two decades have seen a significant impetus in the effort to create an enduring global mechanism to bring to justice those who bear the greatest responsibility for the world's most dreadful crimes.*

*Despite several delays and setbacks, the international community's vision of establishing a widely accepted global criminal justice system was finally realised with the adoption of the Rome Statute of the International Criminal Court on 17 July 1998. Before then, international obligations had always been outdone by the doctrine of state sovereignty which affirms the full right and power of a nation state to govern itself without any interference from outside sources or bodies.*

*However, two world wars and the unimaginable human rights tragedies that took place in the former Yugoslavia and Rwanda changed all of that and propelled the international community to find a way to address the growing impunity in several parts of the world.*

*The ICC Statute came into force on July 1, 2002, upon 60 ratifications and was ratified by Nigeria on 27th September 2001 along with many other countries, thus creating a new system to deal with the world's most egregious crimes: genocide, war crimes, and crimes against humanity. The goal of the Rome Statute is to end impunity for the most serious crimes of concern to the international community as a whole and contribute to their prevention.*

*With the foregoing as an introduction, it is the modest endeavour of this presentation to briefly review the Boko Haram Situation in Nigeria and the ICC's valiant attempt to ensure that the perpetrators of the heinous crimes committed by the group are brought to book. Also, the contribution examines pertinent issues that may undermine State parties' determination to end impunity for the most serious crimes of concern to the international community.*

### *The Boko Haram Situation*

*The radical Islamist group, Boko Haram is believed to have been formed in the town of Maiduguri in northeast Nigeria, where the local residents nicknamed its members "Boko Haram" a combination of the Hausa word "boko," which literally means "Western education" and the Arabic word "haram" which figuratively means "sin" and literally means "forbidden".*

*Founded around 2001 or 2002, the group claims to be opposed not only to Western civilization and education, but also to the secularization of the Nigerian state. There is a fair consensus that, until 2009, the group conducted its operations more or less peacefully and that its radicalization followed a government clampdown in 2009, in which some 800 of its members were killed. The group's leader, Mohammed Yusuf, was also killed after that attack while in police custody.*

*Under a radical Islamic agenda, these militants have perpetrated violence across northern Nigeria since about 2009, aiming to rid the country of any "Western influence", particularly western education. The group's modus operandi varied according to the intended objective of the respective attacks. Some attacks were carried out by just two or three gunmen on a motorcycle, others by hundreds of fighters supported by tanks and anti-aircraft weapons mounted on trucks. Other Boko Haram attacks included bombings of civilian areas, such as places of worship, markets or bus stations, often by suicide bombers.*

*From January 2013 to March 2015, 356 reported incidents of killings can be attributed to Boko Haram in 9 states of Nigeria as well as occasionally in Cameroon and Niger which led*

*to the killing of over 8,000 civilians. The group also abducted defenceless civilians. In 2014 alone at least 1,123 persons were abducted, of which 536 were female victims. From May 2013 to April 2015 alone, the abduction of more than 2,000 women and girls was documented.*

*The most notorious case is arguably the abduction of 276 girls from the Government Girls Secondary School in Chibok, Borno State on 14 April 2014. Most of the persons abducted by Boko Haram were unmarried women and girls, many of whom were reportedly forced into marriage with Boko Haram fighters. Forced marriages reportedly entail repeated rapes or violence and death threats in cases of refusal. The case of the “Chibok girls” has attracted global attention and condemnation.*

*It is the brutal campaign mounted by Boko Haram and the equally virulent response from the Nigerian Security Forces which has occasioned the proprio motu intervention of the ICC Prosecutor in a determined effort to rein in the unbridled impunity which has characterized the conflict.*

#### *The Preliminary Examination*

*Following a spate of ferocious attacks and bombings by Boko Haram in North Eastern Nigeria from 2002 onwards, a preliminary examination was initiated by the OTP on the basis of information communicated by individuals, groups and non-governmental organisations. During the course of its preliminary examination, the OTP analysed information relating to a wide and disparate series of allegations against Boko Haram and has recently determined that there is a reasonable basis to believe that crimes against humanity, namely, acts of murder and persecution have been committed by members of the Boko Haram sect in Nigeria and has identified eight potential cases involving the commission of crimes against humanity and war crimes under articles 7 and 8 of the Statute. Six of the potential cases were for conduct by Boko Haram, and two for conduct by the Nigerian Security Forces.*

*The cases against Boko Haram consist of:*

- The policy of Boko Haram to intentionally launch attacks against civilians perceived as “disbelievers”;*
- Abductions and imprisonment of civilians, leading to alleged murders, cruel treatments and outrages upon personal dignity;*
- Attacks on buildings dedicated to education, teachers and students;*
- Boko Haram’s policy of recruitment and use of children under the age of 15 years to participate in hostilities;*
- Attacks against women and girls: consisting of abductions, rapes, sexual slavery and other forms of sexual violence, forced marriages, the use of women for operational tasks and murders;*
- The intentional targeting of buildings dedicated to religion, including churches and mosques;*

*Concerning the Nigerian Security Forces, the first potential case relates to:*

- *The alleged mass arrests of boys and young men suspected of being Boko Haram members or supporters, followed by large-scale abuses, including summary executions and torture;*
- *Attacks against civilians. In the town of Baga, Borno State, up to 228 persons were alleged to have been killed following a security operation on 17 April 2013.*

*In time, the preliminary examination has progressed to phase 3 'admissibility', and the OTP is currently assessing whether the Nigerian authorities are conducting genuine proceedings in relation to the situation in order to resolve jurisdictional and admissibility issues.*

*Though Nigeria is yet to domesticate the Rome Statute, in a most dramatic fashion, positive complementarity has achieved unexpected results by spurring the Government of Nigeria to commence the prosecution of members of the Boko Haram group held in detention for their roles in the spate of attacks, bombings and kidnappings carried out in North Eastern Nigeria. Some members of the Nigerian security forces involved in the abuses identified have similarly been put on trial.*

*Recently, to demonstrate Nigeria's ability and willingness to address the violations identified by the ICC, the Minister of Justice in a press briefing on the status of cases currently being prosecuted by government revealed that the first phase of 301 cases of Boko Haram suspects has now been concluded with 205 convictions and 96 acquittals.*

*In the absence of any implementing legislation of the Rome Statute, the crimes allegedly committed by Boko Haram that could fall under the ICC's jurisdiction are being prosecuted under the 2011 and 2013 Terrorism Acts by the Attorney-General of the Federation.*

### *Criticism of the Trials*

*Though, the trials have been hailed in certain quarters as demonstrative of the Nigerian government's determination to work with the ICC towards achieving the goal of the Rome Statute to end impunity for the most serious crimes of concern to the international community, strident disapproval has, nonetheless, trailed the conditions under which the trials were held. Some have decried what they describe as the secret nature of trials and others, such as Amnesty International, have asserted that the mass trials provide insufficient guarantees for fair trial and consequently risk failing to realize justice.*

*These criticisms may prove to be only a tip of the iceberg as the ICC and state parties to the Rome Statute continue to find a mutually beneficial means of realizing the court's mandate.*

*While the positive complementarity principle as a strategy for encouraging national governments to undertake their own prosecutions of international crimes looks good on paper, a review of most African countries' institutions and judicial systems indicates that they are not prepared to conduct complementarity-based prosecution of international crimes. Some of the challenges faced by African countries in this regard, include the following:*

### *Inadequate and Problematic Legal Framework*

*Under Article 17 of the Rome Statute, the test of a state's willingness and ability to investigate and prosecute international crimes is hinged upon the genuineness of the process, and is further determined by the independence and impartiality of the domestic proceedings. Consequently, one of the assumptions associated with complementarity is that there will be credible institutions at the domestic criminal justice systems to carry out genuine investigation and prosecution of international crimes.*

*To all intents and purposes, however, a survey of most African States parties judiciaries indicates that they are unprepared to implement the complementarity regime at the domestic level. This is because the complementarity regime of the Rome Statute is over-inclusive - as it assumes to do much more than it can in practical terms.*

*As a way forward, the ability of African state parties to carry out genuine proceedings must at a minimum begin with the adoption of implementing legislation. Though, even after the Rome Statute's crimes have been incorporated into domestic law, adjudicating on the basis of it may still prove to be a challenge, depending on its status vis-à-vis other laws. For example, in dualist states such as Nigeria and several African countries, international instruments or treaties do not have the force of law except after they have been given such force by the legislature.*

*Up till now, international crimes have not been incorporated into Nigerian law. In order to meet ICC's admissibility threshold, Nigeria and many African State parties will need to specifically proscribe international crimes, defined as such, in order to carry out genuine domestic prosecutions of international crimes.*

#### *Differences between International and Domestic Crimes*

*At the moment, no crime in Nigeria approximates the crimes against humanity, murder and persecution, which have been allegedly committed by members of Boko Haram. Both the high threshold set for the act and the mental element required for proof of international crimes such as genocide and crimes against humanity remove them from the realm of ordinary crimes. A review of the crimes of genocide and crimes against humanity illustrates that prosecuting them as the ordinary domestic crimes of murder, rape and theft does not meet the objectives of the Rome Statute.*

*Two components of the crime of genocide are readily apparent from the definition provided in the Rome statute and Genocide Convention. The first is the specific intent (the mens rea or mental element) to destroy in whole or in part a national, ethnical, racial or religious group; the mental element of the crime is important in determining whether or not an act constitutes genocide.*

*Likewise, for an act to constitute a crime against humanity, the specific element requiring that such acts be committed in the context of a widespread or systematic attack must be present. It is important to note that criminal legislation in Nigeria does not include any of the international crimes categorised as such. The crime against humanity of murder is not the same as the ordinary domestic crime of murder under Nigerian criminal legislation, either in*

*their definition or elements. Also, the crime of persecution is not recognised in Nigeria. Consequently, there are no such crimes as 'crimes against humanity' in Nigeria.*

#### *Non-retroactivity of criminal law*

*The recent trial of Hissène Habré in Senegal by a hybrid court illustrates the jurisdictional and procedural nightmare that domestic prosecution of international crimes might entail. In a judgment which preceded his trial, the Court of Justice of the Economic Community of West African States held that Senegal cannot use its domestic courts to try Hissène Habré for allegedly committing, from 1982 to 1990, torture and crimes against humanity in Chad. According to the Court, the legislative changes adopted in 2007 by Senegal, incorporating international crimes into its Penal Code and providing for extraterritorial jurisdiction of Senegalese courts over international crimes, would violate the principle of non-retroactivity of criminal law if applied to prosecute crimes allegedly committed by Habré almost 20 years before. Therefore, an ad hoc tribunal should be tasked to try Habré on the basis of general principles of law common to the community of nations. Whatever may be the outcome of the debate as regards whether the trial was conducted in the right forum there is no gainsaying the fact that this single accused trial must have cost Senegal a fortune in its endeavour to address the oddity of non-retroactivity before putting Habré on trial.*

#### *Immunity and Death Penalty*

*Conflicting domestic laws can potentially inhibit national implementation of the Rome Statute. Contrary to the Rome Statute, Nigerian laws allow the death penalty and immunity of the President and certain other persons in official government positions. Legal incompatibilities such as this affect states' institutional readiness to implement complementarity. It is therefore expedient for Nigeria and other state parties with conflicting provisions to undertake extensive review of its laws including the constitution and provisions relating to immunity and the death penalty to bring them in line with the provisions of the Rome Statute. This amendment could be minor, and may simply consist of the addition of a provision making an exception to the principle of immunity for the Head of State or other officials, should they commit one of the crimes listed under the Statute.*

#### *The Procedure for Appointing Judges and Professional Legal Skills*

*The unavailability of judges and prosecutors trained in the field of international criminal law or related field may constitute a major drawback to the implementation of complementarity. It is desirable that in addition to the professional legal skills required of a judge, national judges who will adjudicate international crimes should possess additional essential quality of prior training and experience in international criminal law. This is important because judges who have the requisite experience will be more effective when hearing hundreds of cases resulting from mass oriented crimes.*

#### *Tackling Corruption*

*Corruption is a complex phenomenon in Nigeria and many African countries. Part of the institutional preparedness to implement complementarity involves minimising or completely eradicating corruption from the judicial system. This is critical because due process is*

*achieved through a criminal justice system, with offenders processed from the time of arrest until they are finally acquitted or released from prison after serving a prescribed sentence.*

#### *Intimidation and Manipulation of Judges*

*The complementarity threshold of unwillingness, set out in Article 17(2)(c), concerns the independence and impartiality of national proceedings. This presentation envisages a situation in which a state is ostensibly endeavouring to prosecute an alleged perpetrator but the proceedings are being manipulated to ensure that the accused is not found guilty. This implies that even where a state is able and willing to prosecute and has actually commenced trial, machinations in the process could lead to a finding of unwillingness for which the ICC will intervene.*

*However, the guarantees offered by the Constitution of most states seem inadequate as the political arm of the government still occasionally manages to exercise influence, and at times openly harass it, thereby making it doubtful if indeed most African countries really possess a constitutional system that ensures the insulation and independence of the judiciary from negative manipulations by politicians.*

#### *Complementarity as a Double-Edged Sword*

*National courts face some challenges because legislation, institutional capacity and due process may be lacking and trials may be fraught with irregularities and biases. For example, the Specialised Courts in which Sudan purports to prosecute those responsible for the atrocities in Darfur routinely sentenced unrepresented suspects to death after secret trials involving confessions obtained through torture. Complementarity may thus become a 'double-edged' sword. On the one hand, it may reflect the willingness of states to take the lead in bringing the perpetrators of international crimes to justice, while on the other hand, it may expose perpetrators to national judicial systems that are far less likely than the ICC to provide them with due process, increasing the probability of malicious prosecutions and wrongful convictions.*

#### *Role of the Prison Service in the Criminal Justice System*

*Complementarity and cooperation are two pillars upon which the Rome Statute is founded. Thus, the ICC depends on states, not only to arrest and surrender suspects that it seeks to prosecute, but also for states to take up convicted persons to serve prison sentences in their domestic prisons. This is important because there are no international prisons to which individuals convicted of international crimes by the ICC could be sent to serve their prison terms. Nearly all African countries including Nigeria, require extensive reform of their prisons to bring them in conformity with international standards.*

#### *Witness Protection Program*

*An effective witness program is required to support the trials of persons indicted for the international crimes to be tried domestically by State parties. A witness protection program seeks to encourage a person who has witnessed or has knowledge of the commission of a crime to testify before a court, or before an investigating authority, by protecting him from*

*reprisals and from economic dislocation. Protecting witnesses from the dangerous criminals they implicate does not come cheap. For example, the ICTY and ICTR expended millions of dollars to keep their witness programs going, and were in large measure, responsible for the successful trials conducted by the two tribunals. It is doubtful whether African state parties have the financial capacity to run an effective program required for successful trials of international crimes.*

### Conclusion

*Most African judiciaries seem unprepared to implement the complementarity regime at the domestic level. This is because the complementarity regime of the Rome Statute is over-inclusive. One of the assumptions associated with complementarity is that there will be credible judicial systems and institutions at the domestic level to carry out genuine investigation and prosecution of international crimes. However, for all practical purposes, it is evident that the institutions that should partner with the ICC are either non-existent or grossly inadequate.*

*Admittedly, for positive complementarity to work, it is not enough to rely on the OTP to inspire national jurisdictions to undertake investigations and prosecutions. Although such encouragement is significant, positive complementarity may not yield desired results if there is no strong national framework in place enabling states to exercise criminal jurisdiction. Consequently, a more systematic approach towards empowering national legal orders is imperative. It is strongly suggested that proactive complementarity by which both the ICC and states are actively engaged in on-going processes at the domestic level is necessary for the implementation of complementarity.*

After thanking the panelists for their interventions, Justice Mbacké Fall opened the floor discussion.

### Floor discussion

**Justice Diarra** asked Semien whether any actions had been taken against those who committed atrocities in Côte d'Ivoire. **Semien** responded that prosecutions were only being carried on Gbagbo's side, while Ouattarra's victims were still waiting for justice. He also mentioned the need for Côte d'Ivoire's judicial system to be improved regarding the independence of judges, witness protection, evidence, investigations and victim policy. He especially highlighted the need for the ICC to act and reassure Ivorians of justice instead of perpetuating a perception of victor's justice. **Brahima Kouadio** of the Ivorian section of the Coalition for the International Criminal Court (CICC) made some further remarks on the question. He said the CICC strived to make sure that the victims received justice, but that complementarity in Côte d'Ivoire was yet to be seen at work because there was a lack of political will. No new arrests had been made since President Ouattarra's election. In line with Fatoumatta Sandeng's comment, he said we could not wait for victims to plead for justice for much too long and justice had to be done right now.

**Ibrahim Tommy** asked Fayiah what should be done for victims in terms of accountability and justice in Liberia, since he had the feeling there has been no initiative taken by victims to obtain justice.

**Morten Kjaerum** asked whether there was a model country in Africa we could look at to follow up the Boko Haram situation and bring perpetrators to justice. Nyarko responded by pointing to South Africa and Botswana which have a very robust judicial system, but added that we needed to find more examples than these two. He said we had to continuously ensure respect for the rule of law regardless of the judicial system and that we need to look at what it meant to have positive complementarity in practice.

**Ashu Hailshamey** made some remarks about the effectiveness of the complementarity principle. He recalled the fact that sitting presidents enjoy immunity from crimes they commit while they are in power. He said complementarity is a great principle but difficult to apply if the sitting president does not leave. Why do we wait to try perpetrators after they have left power? How effective will the struggle to stop impunity be if we wait for them to leave power, he asked? **Nyarko** responded to these remarks by stating that it is the duty of States to ensure that crimes committed in their countries are prosecuted and to prevent these atrocities from happening in the first place. He equally affirmed that there was a lot of room for improvement, and that heads of State, even in their own national jurisdictions, only have immunity for official acts.

### *Panel 3: Country Situations – Part 2*

**Morten Kjaerum** presided over the third session, briefly introducing each of the panelists and handing over the floor to **Justice Fatoumata Dembélé Diarra**, former judge at the Supreme Court of Mali and First Vice President of the International Criminal Court, to deliver her presentation on the Malian situation.

**Justice Diarra** started by recalling the meaning of the complementarity principle as it appears in Article 1 of the Rome Statute: the ICC is complementary to national courts, which have the prime responsibility to investigate and prosecute crimes against humanity, war crimes, genocide and the crime of aggression. She said this article had to be applied conjointly with Article 17 which covers admissibility issues and states that a case is inadmissible before the court if ‘the case is being investigated or prosecuted by a State which has jurisdiction over it, unless the State is unwilling or unable genuinely to carry out the investigation or prosecution; The case has been investigated by a State which has jurisdiction over it and the State has decided not to prosecute the person concerned, unless the decision resulted from the unwillingness or inability of the State genuinely to prosecute; The person concerned has already been tried for conduct which is the subject of the complaint, and a trial by the Court is not permitted under Article 20, paragraph 3; The case is not of sufficient gravity to justify further action by the Court’. She then recalled that the inability of a state to prosecute a crime can be determined through several elements including: total or partial collapse of the judiciary, the State’s inability to seize the accused, and its inability to gather the necessary evidence and testimony or to otherwise carry out the procedure.

Justice Diarra then gave a brief analysis of Mali's implementation of the complementarity principle. Being a party to the ICC Statute since 16 August 2000, Justice Diarra pointed out that Mali had undertaken actions which went beyond the mere implementation of complementarity, to equate to full cooperation. Indeed, following the heinous crimes committed in the northern part of the country in 2012, Mali deferred the situation to the ICC on 16 January 2013 regarding Ahmad Al Faqi Al Mahdi and Al Hassan Ag Abdoul Aziz; the former has already been convicted of 9 years imprisonment. The decision to defer the situation to the ICC was mainly due to the complexity of the situation and the difficulties encountered by the local investigators in gathering the necessary evidence and testimonies. She voiced her hope for other suspects to be caught and transferred to the ICC.

However, on top of that, Justice Diarra further submitted the various cooperation efforts made by Mali, such as the signature of several agreements in application of article 86, and more specifically the agreement on privileges and immunities for ICC personnel operating on Malian territory; the signature of a convention on the imprisonment of Malian convicts before the ICC in Malian prisons; the refusal to sign bilateral agreements on the basis of article 97c; participation in the election of judges in January 2003; refusal to partake in the campaigns to withdraw from the Statute on the basis of article 127. Regarding the cases which are not being investigated by the ICC, she said this was because either the national courts were capable of prosecuting those cases, or the elements constituting an international crime had not been met.

Justice Diarra concluded by stating that Mali should serve as an example to other countries in the fight against impunity.

After thanking Justice Diarra and lauding Mali for its stance on supporting the ICC, Kjaerum introduced **Ahmedou Tidjane Bal**, legal and judicial affairs counsel in the Team of Experts on the Rule of Law and Sexual Violence in Conflict, Office of The Special Representative of the Secretary-General of the United Nations, to talk about the Guinean experience.

Bal remarked that the judgment of international crimes quickly raised the issue of the jurisdiction of national and international courts, given the need to take into account both the sovereignty of States and the difficulty of bringing the powerful to justice. It is this principle, he said, that has led ICC and national courts exercising universal jurisdiction to consider their jurisdiction as subsidiary to that of the State concerned, to reassure them among other reasons. It however soon became clear that the will and the capacity to judge, can be weakened by political or technical factors; to circumvent these obstacles, Bal stated, the ICC engages positive complementarity measures with the countries that have decided to try the perpetrators of international crimes, thus becoming a corollary of subsidiarity.

Bal recalled that Guinea Conakry ratified the Rome Statute in 2003 and decided to investigate and shed light on the events which took place on 28 September 2009. He then gave a brief account of those events:

On September 28, 2009 at the Conakry stadium, a protest against the candidacy of Moussa Dadis Camara in the presidential elections was repressed, resulting in more than 100 deaths, 109 rape cases and nearly 100 missing persons. A national inquiry minimised the damage,

which led the international community, under the leadership of the United Nations, to conduct an international investigation. This investigation designated the guilty parties and alleged perpetrators, and established serious evidence of the commission of crimes against humanity.

Despite the failures of its judicial system, Guinea signed a joint statement with the UN by which it undertook to deal with the events of 28 September by setting up a panel of judges to investigate the case, bring the perpetrators to account and make reparations to the victims.

The UN, through its Department on sexual violence in conflict and its team of experts, pledged to support the panel of judges by deploying an expert (i.e. Bal himself) to assist in terms of effective investigation methods, mutual legal assistance between Guinea and its partners, an adequate communication system between the panel of judges, civil society, victims, government authorities and the international community, and lastly, in terms of finding a satisfactory system for the protection of victims and witnesses.

The specificity of Guinea was therefore that in spite the shortcomings of its judicial system, it committed itself to making the necessary reforms to be able to prosecute the international crimes committed on its territory, instead of opting out and referring the situation to the ICC. Hence on the one hand, there was a joint partnership with the UN and on the one hand, positive complementarity efforts with the ICC.

Bal went on to talk about the various partnership activities within the context of complementarity, which involved a series of visits to Conakry by the Team of Experts, some under the direction of the Special Representative of the United Nations Secretary-General for the Rule of Law and Sexual Violence in Conflict, as well as visits from the ICC Office of the Prosecutor.

These mission teams met systematically with the President of the Republic, the Minister of Justice, the panel of judges and the victims' associations to ensure political will was kept intact, to measure the progress of the case and of the accompanying reforms.

Bal pointed to the major institutional and judicial reforms which intervened in 2014 to improve the justice sector, giving credit to the sustained efforts of the Minister of Justice.

Victims' associations, as Bal recalled, were key partners in overseeing the victims along with other human rights organisations. They have taken a particularly dynamic role in temporarily relieving the victims of their suffering and stigmatisation, while awaiting the expected judicial reparations and the establishment of a compensation fund.

International organisations such as Human Rights Watch, through their reports, recommendations and suggestions, also significantly helped in processing of the case.

The international expert worked in close collaboration with the Ministry of Justice while supervising the panel. He notably ensured the establishment of a system of protection of judges and recommended the anchoring of a victims and witnesses protection unit, from the public prosecutor's office to the court of appeal. His joint action with the judicial authorities and with the support of the team of experts, led to the arrest of one of the principal

defendants, the hearing of the former President of the junta and support for the execution of various rogatory commission procedures.

Finally, a good communication strategy was set up to put all parties and stakeholders at the same level of information while respecting the secrecy of the investigation. All in all, nearly 500 victims' hearings have been made and 14 suspects indicted.

Bal concluded his presentation by stating that complementarity is a form of cooperation and judicial collaboration of utmost importance for our States, and that they should therefore take advantage of this partnership to promote the rule of law and end impunity.

Kjaerum thanked Bal and proceeded to hand the floor over to **Asmaou Diallo**, President of the Association of Victims, Relatives and Friends in Guinea. She made a presentation on the Guinea Massacre of September 28, 2009, bringing a civil society perspective to the table.

Diallo recalled that it had been more than 8 years since the massacre of September 28, 2009 had taken place, a massacre during which more than 150 people, including her own son, were killed and 100 women raped. After briefly recounting the events of that day, she explained how the Association of Victims, Relatives and Friends of September 28, 2009, AVIPA, of which she is the current President, was born in the aftermath of this massacre. The goal, as she stated, was to provide a shelter and support centre for the victims since not only were they neglected by the State, but the latter was especially keen on silencing them to minimise the scope of the crimes. However, due to pressure from national and international NGOs, an International Inquiry Commission was set up to shed light on the massacre and identify those responsible. Also, the ICC Office of the Prosecutor opened a preliminary examination into the Guinean situation in on 14 October 2009. On December 17, the International Inquiry Commission published a report establishing the individual criminal responsibility of several high-ranking military officials, including the head of the junta, Moussa Dadis Camara, and Aboubacar Sidiki Diakité. The Commission recommended speedy national prosecutions or, alternatively, a referral to the International Criminal Court.

In February 2010, legal proceedings began in Guinea and a panel of investigating judges was set up to investigate the crimes committed on 28 September 2009 and the days that followed. Diallo's Association, along with its partners the FIDH and OGDH, engaged in documenting evidence, systematically collecting the testimonies of victims and bringing all the information collected before the Court. In May 2010, these three organisations became a plaintiff in the case and they have since assisted nearly 450 victims. For more than 8 years, the organisations and their lawyers have worked tirelessly to feed the case and support the largest number of victims. Thanks to the active participation of victims and FIDH lawyers, a major accomplishment was achieved in December 2017 with the closing of the investigation phase.

The international community, and particularly the ICC, has also played a key role in the progress made thus far. Following its preliminary examination, the ICC concluded that the crimes committed could be characterised as crimes against humanity. The Prosecutor's Office immediately began to engage in efforts of positive complementarity to encourage a trial as soon as possible, through numerous visits to Guinea and interviews with the victims, the

representatives of AVIPA, AVIPA's lawyers, and Guinean magistrates and the local authorities.

In addition, as part of AVIPA's joint action with OGDH and FIDH, they also worked closely with the ICC Prosecutor's Office, hence allowing their organisations to provide regular information and assistance to the ICC in its assessment of the capacity and willingness of the Guinean State to deliver justice. Moreover, the closure of the investigation in December 2017 and the very recent creation of a steering committee for the organisation of the trial must allow, Diallo said, for the first trials to take place in 2018, in line with the Guinean government's commitment.

She equally stated that for these trials to take place, the support of the international community and the ICC to the political and judicial authorities has never been more necessary. Major challenges remain, such as the fact that certain functions are still occupied by the accused, the large number of victims and the very high expectations surrounding this trial.

Diallo recalled the fact that Guineans would be called to the polls in 2020 to elect their new president and that for those elections to be held in the most favourable and secure context, the trials would have to be opened as soon as possible during the course of 2018. She ended by stressing the importance of victims' reparations. While a compensation fund for victims, to which several international partners have already pledged to contribute, must be set up by the authorities concomitantly with the organisation of the trial, she said the Guinean government would have to contribute even symbolically to demonstrate its commitment to the long-term fight against impunity in Guinea.

Next, **Ibrahim Tommy**, Executive Director of the Centre for Accountability and the Rule of Law in Sierra Leone, shared some experiences from Sierra Leone.

Tommy began his presentation by recounting the unfortunate events of the civil war which ravaged Sierra Leone for 11 years between 1991 and 2002. By the time the war was declared over, an estimate of at least 50,000 lives had been lost and thousands more, including women and children, had been maimed and raped. Under the 1999 Peace Accord that would bring an end to the conflict, the government granted absolute and free pardon to all combatants and collaborators in respect of anything done in pursuit of their objectives. Essentially, the rebels received complete amnesty for crimes committed between 1991 and 1999.

Fortunately, as Tommy further noted, the United Nations, serving as a guarantor of the agreement, signed the agreement with a disclaimer that the amnesty shall not apply to international crimes of genocide, crimes against humanity, war crimes and other serious violations of international humanitarian law. A massive campaign was therefore launched in the country between 2000 and 2001, led mostly by civil society organisations and international partners, for justice and accountability for those egregious violations.

Ultimately, the Sierra Leonean government agreed to do something about the violations. It had neither the resources nor the enabling legislation to try those responsible but since there was massive political will to ensure justice and accountability, a request was made by the

government to the UN Secretary General to create a special court. Hence, by an agreement signed on 16 January 2002 between both parties, a hybrid international court, the Special Court for Sierra Leone (SCSL), was set up with a mandate ‘to try those bearing the greatest responsibility for the violations of international humanitarian law and Sierra Leonean law since 30th Nov 1996’. The Office of the Prosecutor indicted a total of 13 persons, including leaders from all the factions in the conflict and 9 of the accused persons were convicted, including the Liberian President Charles Taylor (for the crimes committed only in Sierra Leone). While the SCSL helped to narrow the impunity gap to ensure accountability and justice for victims, its mandate was limited, hence the necessity for the International Criminal Court.

Well before the Special Court was set up, Tommy recalled, there had been efforts to become party to the ICC. The Government of Sierra Leone signed the Rome Statute on 17 October 1998, being the 20th State to have ratified it (15th September 2000). However, nearly 18 years later, Sierra Leone is yet to pass implementing legislation despite strong advocacy efforts by civil society. A draft “domestication” bill is currently at the Ministry of Justice and as Tommy pointed out, there are renewed hopes for implementing legislation to be passed due to a new administration and parliament, and the fact that the Justice Minister practised before the SCSL. Nonetheless, some international pressure could also help boost national efforts according to Tommy.

He concluded his presentation by emphasising the fact that for complementarity to work, there was a need for political will, the ability to investigate, prosecute and adjudicate, investment in national institutions home, as well as active judicial activism among others. In the specific case of Sierra Leone, Tommy pointed out that political will was critical to the success of the Special Court both in terms of setting up the court and protecting the independence of the prosecutor. He then gave some lessons which could be learned from Sierra Leone’s experience:

- Political will can be influenced through local and international actors. The role of victims and the media is critical to such efforts.
- Ensuring that trials are conducted in the country where the crimes occurred is critical to ensuring victims’ access to justice through outreach, low budget, and promoting a lasting legacy of accountability and respect for the rule of law (2007 and 2018 elections).
- It is better to ensure that the Court is set up within the domestic system, but with massive support to ensure that it meets international standards.
- In any accountability or complementarity framework, it is important that all sides to the conflict are held accountable, including mid-level commanders.
- Victims’ social and economic needs need to be attended to.
- Truth seeking and reparations for victims should receive equal attention and support; ensure that it is justice for the perspective of the victims.

- Civil society, media and victims should lead the campaign for and accompany the process of accountability. Victims are sometimes weak and invisible, but the evidence is that if the atmosphere exists and are given the platform, their voices are certainly more powerful and persuasive in terms of demanding accountability.
- Establishing and/or strengthening local institutions of justice and accountability are critical to achieving complementarity.

#### Floor discussion

**Semien** asked Justice Diarra whether she thought that the national courts could bring the perpetrators to justice. He asked Diallo whether the Guinean government had made any efforts to bring the perpetrators to justice since the September 2009 events. Diallo said they had done a lot of advocacy and that the Minister of Justice had promised to do his best to bring all perpetrators to justice, and that he would resign if prevented from doing so. She said they had no choice but to bear with the time it was taking. She said the main thing that was lacking, was a clear stance of the State. Bal added that it was only in 2014 that concrete action began to be taken, and that the President had recently confirmed that there would be no interference with the judicial system.

Semien further asked Tommy what role the local courts had played in pushing for justice before and after the SCSL. Tommy responded by saying that at the national level not much had been done to prosecute mid-level commanders. He further remarked that from the various presentations, a common concern which emerged was that national courts in Africa were ill-equipped and thus, not ready to prosecute international crimes. He once again voiced his concern for the situation in Côte d'Ivoire, urging the ICC to carry out in depth investigations.

**Nyarko** remarked that there is a backlash of the ICC portrayed by the media and no implementation of the Rome Statute in many African jurisdictions. He stated that capacity building was essential as well as implementing legislation with a clear definition of crimes, questioning the role civil society could play in this.

**Ankumah** stated that while she believed the SCSL had greatly contributed to international jurisprudence, she felt the Court had been overshadowed by the focus on Charles Taylor. She also asked whether there could be justice without reparations. Tommy commented by saying that Charles Taylor's trial did lay a profile for the Court, and that it sent a strong message to potential war lords. He however remarked that a holistic approach to justice was necessary because unless economic and social challenges were dealt with, victims would be neglected in spite of perpetrators being punished.

**Dombia**, in response to Semien's question, said that many perpetrators in Mali still had not been held accountable and that the victims were excluded from the procedures. She equally remarked that the ECOWAS Community Court of Justice did not serve the victims' interests and that there was a need for real reform in that sense.

**Kouadio** remarked that while several African countries were protesting against the ICC, a few were pro-ICC and were willing to cooperate with the Court. Hence, he suggested that the latter do some lobbying for the other countries to change their attitude towards the ICC.

**Justice Fall** asked Justice Diarra what the implications of complementarity were once a situation was referred to the ICC by a State party: who had primacy over the investigations, the ICC or the State party in question? He wondered why Mali, having the capacity to prosecute the case it deferred, did so anyway. Justice Diarra replied that once the ICC intervened in a situation it had full powers and could conduct any investigations it wished to. However, she mentioned, Mali did judge a commissioner and several other investigations are being conducted in regional courts within the country but these prosecutions are being hampered by active terrorist groups in the north of Mali.

**Sandeng** stated that she realised, through the various presentations made, that African heads of State appear not to be learning any lessons. Her question then was why allow them to keep acting in all impunity while granting them amnesty and immunity for crimes committed? She said we had to organise ourselves and fight against such privileges.

#### ***Panel 4: The Gambian victim in focus***

**Mama Koité Doumbia**, Board Member of the Trust Fund for Victims at the ICC, presided the fourth panel. After introducing each of the four panelists, she gave the floor to the first speaker, **Baba Hy dara** who, in his capacity of Co-Publisher of The Point Newspaper, gave a presentation on ‘Using the Media as a Tool to Pursue Accountability for Grave Crimes’.

Hydara began by mentioning the crucial role media plays in ensuing accountability for grave crimes. For instance, reporting crimes helps to document them for posterity he said, and such documentation can also be used to highlight grave crimes, to name and shame politicians and officers who use their power to commit these crimes. According to him, the relevance of this would soon come to light during the long awaited TRRC in The Gambia.

Hydara further mentioned how Gambians had gotten accustomed to 22 years of impunity to the extent that it seemed normal to perpetrate human rights violations. Perpetrators, confident that they would never be held accountable, continued to commit them and encouraged others in that sense. The way in which certain news outlets portrayed perpetrators of these grave crimes contributed to their unaccountability, further marginalising or even blaming victims for the abuses they suffered. Those media outlets which became the voice of the voiceless, never giving in to intimidation, were perceived as Enemies of the State. They suffered false arrests on bogus charges, the burning their of media houses, forced disappearances, draconian laws, torture and even murder became routine. Hydara recalled his own father’s assassination, Deyda Hydara, during this period.

In what Hydara now referred to as the #NewGambia following Yahya Jammeh’s downfall and the newly democratically elected President, he said the new state of affairs in the country served as a testimony of how far they had come as a nation as well as a reminder that they should never again backslide into a culture of impunity. With the commencement of the TRRC’s work to demonstrate the plans of the new government to tackle crimes perpetrated

against victims, he said he was expecting the media to play a central role in the process. In his opinion, the way media reports this process will determine the TRRC's success, which is why he said funds had been raised to build the capacity of journalists in reporting techniques.

Hydara concluded by saying that the TRRC will pose a huge challenge for a small nation like The Gambia, but that this would be an opportunity to rise to the occasion and show the world that Gambian media is as efficient and professional as any other. As a boy growing up, he recalled having admiration for a great doyen of journalists who contributed immensely in developing a society and influencing people's perception of things around them, being tenacious in their efforts to attain this new Gambia. He observed that in the case of the new Gambia, those perceptions would be 'Accountability for grave crimes to restore rule of law, end impunity, indemnity and immunity from prosecution'.

Next, **Ayeshah Jammeh**, Secretary of The Gambia Centre for Victims of Human Rights Abuse, took to floor to share some personal reflections as a victim.

Jammeh thanked AFLA for organising such an important conference and introduced herself as a direct victim of Yahya Jammeh's regime. Indeed, her father and aunt were both killed by Yahya Jammeh's hit squad called the Junglers.

She recalled that her father worked as a manager in a well-known hotel in Banjul. One day his brother, Yahya Jammeh, asked him to become farm manager in their native village, Kanilai. He accepted despite her mom's fears because it was his brother after all. Once he took up his new position, her dad refused to be part of the exploitation machinery Yahya Jammeh had put in place; he did not shy away from telling his brother that he could not treat his people the way he did. Her dad became increasingly popular with the villagers, who started listening more to him than to the 'Big Man' aka Yahya Jammeh – because he told them that they should not accept any abuse, even from a President. Instead of listening to his brother, Yahya Jammeh felt threatened and killed his brother. Soon after that, her aunt wanted to confront Jammeh, and she was killed as well.

Around 2006, Jammeh recalled, when Yahya Jammeh was asked on National TV if he would pardon a business man who had allegedly betrayed him, his answer was: "if I did not spare my own brother, don't think that I will spare anyone else". Despite this confession, she said her family had hoped that someday her father would return, but it was only years later that her father's death was confirmed by a former 'jungler' on an online radio called the Fatu network.

She stated that her family had been living in fear for 12 years, up until 2017. Having lost two family members, the only way to survive was to hide their identity as Jolas, her father's tribe. Her dad's only crime, she said, was to tell his own brother that he could not commit atrocities against the people of their native region. Her case is one amongst thousand others: stories of torture, enforced disappearances, sexual violence, arbitrary detention, ill-treatment and oppression among others. She, along with other victims, created a Victims' Center and it has already registered more than 1000 victims. All the crimes committed over the 22 years of Jammeh's dictatorship have a severe and long-lasting impact on The Gambia.

She ended her presentation by emphasising that today the victims want justice. They want Yahya Jammeh and all the people who committed crimes to face justice. She said they could not accept any political deals nor wait for the Truth Reconciliation and Reparation Commission to finish its work in four to five years from now. They want to see justice being done and thus send a strong message to all African Presidents, so they can know that crimes against humanity will and can no longer be tolerated in Africa.

**Dr. Baba Galleh Jallow**, Executive Secretary of the Truth, Reconciliation, and Reparation Commission of The Gambia (TRRC) proceeded with his presentation on the Mandate of the TRRC.

Dr Jallow started by recalling the fact that Gambians had been living under one of Africa's most oppressive regimes for the past 22 years, with scores of people killed or forced into disappearance, arbitrarily arrested and detained, sometimes tortured, sacked without explanation, having had their properties seized or otherwise destroyed on the orders of the president. He then stated the TRRC's mandate, which is to help ensure that 'Never Again shall Gambians allow themselves to be oppressed by a dictatorship or allow their rights to be violated with impunity', contained in Section 14 (b) of the TRRC Act. Thus, the overriding rationale for the creation of the TRRC is to prevent a recurrence of dictatorship and gross human rights violations in The Gambia.

In pursuit of its mandate, Dr Jallow stated, the TRRC shall work through a sitting commission headed by a Chair and a secretariat headed by an executive secretary. The TRRC Act further provides that 'The Commission shall consist of eleven members, all of whom shall be citizens of The Gambia from amongst persons of high moral character and integrity who have distinguished themselves in their respective fields of vocation or communities'. The geographical, religious and gender diversity of The Gambia will have to be taken into account when appointing these members, and the President shall appoint the members in consultation with the Minister of Justice and other institutions. The Act even provides that 'The Commission shall adopt a child and gender sensitive approach in conducting its investigations in cases of children and women' and 'may seek assistance from traditional and religious leaders to facilitate reconciliation and healing'.

Dr Jallow further mentioned that in the fulfilment of its mandate the TRRC will 'create an impartial historical record of violations and abuses of human rights from July 1994 to January 2017, in order to "promote healing and reconciliation . . . respond to the needs of victims . . . provide victims an opportunity to relate their own accounts of the violations and abuses suffered . . . establish and make known the fate or whereabouts of disappeared victims . . . grant reparations to victims in appropriate cases . . . address impunity, and . . . prevent a repetition of the violations and abuses suffered by making recommendations for the establishment of appropriate preventive mechanisms including institutional and legal reforms"'.

The mandate period of the TRRC is two years, with the possibility of extension. Dr Jallow said that in view of the TRRC's 'Never Again' mandate, the real challenge would be how to ensure that this mandate becomes reality in The Gambia. He highlighted this as a concern in

view of the fact that the majority of the 40 truth commissions that have existed around the world since 1974 had not always succeeded in accomplishing such a mandate. Indeed, as he mentioned, most societies that have witnessed truth commission processes have not experienced the kind of socio-political and cultural transformation that can prevent a recurrence of dictatorship or widespread human rights violations. Some transitional justice experts attribute this relative lack of truth commission success to a lack of inclusivity in truth commission processes, and he said they wanted to do things differently by actively seeking the participation of all Gambians in the TRRC process.

In 2017, the Ministry of Justice in collaboration with key players and stakeholders in the country carried out a nationwide tour and held community meetings at which Gambians were invited and encouraged to express their opinions on the TRRC process. Opinions and ideas shared at these national consultations informed the establishment by the Ministry of Justice of a technical committee of governmental and non-governmental institutions to actively work together on shaping the TRRC and other mechanisms of the larger transitional justice program namely, the Human Rights Commission and the Constitutional Review Commission. This technical committee, including an internal task force of young state attorneys continue to hold regular consultative and brainstorming sessions at the Ministry of Justice. They contributed to the conceptualisation and formulation of the TRRC Act and the guidelines for the selection of commissioners and are actively involved in the production of a Strategic Plan for the National Transitional Justice Program. The guidelines for the selection of commissioners have been published in the media and in the urban areas, calls have been issued to the general public and civil society organisations for the nomination of persons of integrity to serve on the commission. The nomination and selection process for the five regional commissioners will involve widespread consultations at the village, district and regional levels. Once the nomination and selection process is complete, the President shall appoint commissioners after consultations with key state institutions and civil society organisations.

Furthermore, Dr Jallow noted, the TRRC, in association with the UNDP and the International Center for Transitional Justice, are developing a communication and outreach strategy fully informed by the ethic of inclusiveness and partnership with civil society organisations, religious communities, local communities, youth groups, schools and women's organisations and Press Unions in pursuit of their collective 'Never Again' mandate. The idea is to both share knowledge and information on transitional justice and the TRRC process and to see how best civil society can take ownership of the TRRC mandate. The TRRC recognises that in this national conversation, it will have to navigate the tricky space of cultural orthodoxy. But in the process, it will also acknowledge the human capacity for rational thought and action that can create the kinds of right relations they want in Gambian society between state and society, between society and society, between community and community, between individual and individual, and between citizens and their long held political beliefs and assumptions.

Dr Jallow finally ended his presentation by pointing out that this national conversation on the 'Never Again' mandate will be coordinated and overseen by the TRRC Secretariat in

fulfilment of its functions under the TRRC Act and will not in any way hinder the formal sittings, hearings and other transitional justice work of the commissioners. The fruits of this national conversation, he stated, will complement the recommendations contained in the final report of the TRRC to ensure that ‘Never Again shall Gambians tolerate dictatorship and gross human rights violations in this country’.

Given Imam Baba Leigh’s delayed arrival, Reed Brody briefly shared a testimony on his behalf. He introduced **Imam Baba Leigh** as one of the most active victims fighting for justice in The Gambia. He is a religious leader who criticised the use of the death penalty during his religious teachings. He was arrested, tortured and beaten with ropes, dragged down the road attached to a car, buried alive. He was released after several campaigns by Amnesty International to have him released.

### Floor Discussion

**Bal** commented on Dr Jallow’s presentation by stating that he liked the name of their Commission which differentiated itself from others, namely in the fact that ‘reparations’ was included in the name. He gave the example of South Africa’s Commission and other similar ones in which ‘truth’ and ‘reconciliation’ were privileged, to the detriment of ‘reparations’. He therefore asked Dr Jallow what the Commission was doing in this regard.

**Aminata** expressed her concern over the fact that the TRRC’s mandate was being limited to Jammeh’s reign, excluding all the atrocities committed during the colonial times. She also remarked that capacity was a major problem in the country, a problem she had experienced first-hand having served as a magistrate for several years. While she acknowledged and lauded the fact that the new law school was training many lawyers and other legal experts, she was concerned about the means they had at their disposal to fully exercise their profession. These, she said, would inevitably become key legal issues during the proceedings.

**Justice Diarra** intervened to remind the TRRC to keep in mind the reparations aspect of its mandate. She equally commented on Aminata’s remark by saying it was best not to extend the TRRC’s mandate to include colonial crimes as those were crimes committed by their ancestors. She also encouraged Hydrara to keep up his good work, with which she was well acquainted.

**Sandeng** remarked that the Office of the Prosecutor of the ICC had carried out preliminary investigations in The Gambia and concluded that the gravity threshold of atrocities committed had not been met. She said that unless Gambians realise the gravity of these crimes and take matters into their own hands, they would not progress.

**Keppler** asked what steps the TRRC could take to promote rather than undermine the pursuit of justice. **Dr Jallow** said the government needed to take action to ensure that the victims’ concerns were dealt with, including treatment and rehabilitation. The independence and impartiality of the TRRC, he said, would not be compromised. He said a Victims Assistance Program would be set up, with a psychological unit. He reminded the participants that the TRRC was empowered to make reparations to the victims. Dr Jallow also did acknowledge judicial and forensic shortcomings but said they would receive assistance from the

International Committee of the Red Cross, especially in terms of forensic services. He urged the government to take immediate solid steps to deal with the victims' plight.

**Ankumah** reiterated Sandeng's comment about the Office of the Prosecutor concluding that the gravity threshold had not been met regarding the crimes committed in The Gambia. She said that maybe this needed to be discussed before the ICC judges for them to decide whether the magnitude threshold has been met.

**Justice Diarra** said the Prosecutor could not determine that war crimes were committed in The Gambia because the atrocities were not committed during a context of an armed conflict, and neither could they be defined as genocide because no specific group was being targeted.

**Hydara** noted that the case of the 44 murdered Ghanaians did produce a great public outcry. Though it could not be qualified as genocide, the ethnic element was well present he said, and hence supported the exploration of the avenues suggested by Ankumah. He also remarked that many accomplices of Jammeh's regime were still in government and thus wondered the extent to which the TRRC could be independent. He also mentioned that it was still unclear how the TRRC intended to follow the victims.

**Ayeshah Jammeh** said that the victims have been given some support, but that the government needs to provide more assistance because the TRRC was not fully functional. She regretted that the government did not have a clear communication strategy with the victims.

**Doumbia** seconded Ms Jammeh's comment and said a special mechanism had to be put in place for the victims.

**Baba Leigh** made his appearance towards the end of the discussions and apologised for being late. He made very brief remarks, saying that he was not comfortable recalling his past sufferings and sharing, once again, his testimony in front of an audience. He said he was tired of being a laughing stock and that it was time to walk the talk. He said the world know what Gambians had suffered but still nothing was being done. He urged the participants into action in the best interest of the victims.

### *Panel 5: The future of complementarity initiatives in Africa*

**Evelyn A. Ankumah**, Executive Director of Africa Legal Aid, chaired the fifth and last session. After welcoming the participants, she introduced each of the last three speakers: **Justice Mbacké Fall**, Counsel at the Supreme Court of Senegal and Former Chief Prosecutor of the Extraordinary African Chambers for the Prosecution of Hissène Habré; **Elise Keppler**, Associate Director of International Justice Programme at Human Rights Watch; and **Aminichi Adeyemi**, the Principal State Counsel representing the Director of Public Prosecutions of The Gambia, MB Abubakar.

**Justice Mbacké Fall** gave a presentation on the lessons from the Extraordinary African Chambers in the Courts of Senegal. He started off by saying that the determination of Hissène Habré's victims to bring him to justice was a key factor in the long process which led

to the creation of the Extraordinary African Chambers and, as such, was the first lesson to be drawn from the trial. Indeed, it was by their tenacity to obtain justice that they seized the Chadian, Senegalese and Belgian courts, as well as the appeal lodged against Senegal before the United Nations Committee against Torture.

He briefly recalled the events leading up to the creation of the Extraordinary African Chambers. He mentioned how the Senegalese courts dismissed the victims' complaints for lack of extraterritorial jurisdiction, causing them to seek justice before the Belgian judicial authorities. They opened proceedings, carried out investigations and asked Senegal to execute the arrest warrant against Habré and extradite him to Belgium. He did equally recall that Senegal and Belgium are States Parties to the New York Convention against Torture which obliges them to prosecute, judge or extradite to the requesting State Party any person suspected of torture. Faced with Senegal's reluctance to respect its international obligations, Belgium appealed to the International Court of Justice, which, by a decision of 20 July 2012, asked Senegal to either try or extradite Hissène Habré to Belgium. Africa subsequently took a great interest in the case and the ECOWAS Community Court of Justice rendered a judgment on November 18, 2010 in which it found the existence of potential violations against Hissène Habré through the violation of the *res judicata* effect of a court decision and of the non-retroactivity of criminal laws. After interpreting the nature of the mandate given to Senegal by the AU, the Court asked Senegal to work towards the creation of an ad hoc international tribunal.

The Extraordinary African Chambers operated between 2013 and 2017, and required the mobilisation of financial and human resources at both regional and international level, as well as the establishment of a judicial cooperation framework with Chad and mutual legal assistance with Belgium and France. These chambers integrated in the Senegalese courts were composed of Senegalese magistrates but, at the trial phase, were presided by magistrates from other AU member states. The Chambers had the mandate to prosecute the main person(s) responsible for committing crimes and serious violations of international law in Chad from 8 June 1982 to 1 December 1990. It was also through the victims' concerted efforts that their right to compensation was recognised by the African Chambers and then implemented through a compensation fund created by the African Union.

Justice Fall pointed out the fact that the exercise of universal jurisdiction was a challenge as a result of the extraterritorial commission of the crimes in question. Hence, a judicial cooperation agreement was signed between Chad and Senegal on May 3, 2013 to facilitate the work of judges assisting their Chadian colleagues in the execution of requests made in rogatory letters. It was on this basis that all the evidence was gathered for trial. Chad nevertheless refused to transfer five persons targeted by the victims at the same time as Habré and, consequently, only Hissène Habré was sentenced. Another breach of the cooperation agreement was Chad's refusal to transfer detained persons to N'Djamena whose appearance at the public hearing as witnesses was required.

Notwithstanding these procedural incidents, the African Chambers succeeded in trying Habré while respecting his defence rights and rights of the victims. The trial was also held within a reasonable time and in accordance with the principles of a fair criminal trial. Justice Fall

noted that the Extraordinary African Chambers, through the application of universal jurisdiction and political will, have demonstrated that Africa can successfully fight impunity.

He recommended that African Union's involvement, which could contribute to the generalisation of mutual legal assistance through the adoption by Member States of the Model National Law on Universal Jurisdiction (AU 2011). The improved model, he said, could also be extended on a case-by-case basis in the exercise of complementarity when international crimes cannot be prosecuted and tried because of the State's incapacity or unwillingness. However, he pointed out that budgets would have to be allocated to the Justice sector for them to successfully prosecute these serious crimes and violations of international law.

**Elise Keppler** proceeded to make her presentation on 'Seizing Opportunities for Justice at Home: Lessons Learned from Sierra Leone to Guinea'. Keppler started by commending AFLA's initiative in convening such an invaluable exchange on promoting complementarity across the West African region which has been on the forefront of advancing justice for grave crimes, citing the important efforts made thus far including the Special Court for Sierra Leone, the trial of Hissène Habré, and the anticipated trial of those implicated in the stadium massacre in Guinea before national courts. As well, she pointed out West Africa's firm support for the ICC to ensure greater justice for victims in the face of recent withdrawals from the Rome Statute encouraged by some African leaders. According to her, the real issue is to build on these contributions to increase access to justice. Having been involved with work on complementarity related initiatives in a range of African countries such as Sierra Leone, Uganda, Guinea, Gambia, CAR and Liberia, Keppler stated that the major challenges for justice at national level were lack of political will and capacity, with the real challenge being the former; indeed, as she stated, all the resources in the world will not be enough to ensure advances on justice if the government is against the initiative or unwilling to ensure the justice system has the necessary independence to function. However, political will can be mobilised by helping governments realise the need for justice for past crimes.

Keppler mentioned the release of a Human Rights Watch report to be released on May 3<sup>rd</sup> which looks at the role that a range of actors can play in mobilising that support. The report examines whether the Office of the Prosecutor of the ICC can stimulate trials for atrocity crimes at the national level through four country case studies, all of which have been or are the subject of Office preliminary examinations: Guinea, the UK, Georgia and Colombia. Across the four case studies, Keppler said there were signs that the Office could play an important role in boosting national prosecutions, which could be particularly successful where effective partnerships with other important actors – including victims groups and rule-of-law assistance providers, like UN agencies – could be established. In her opinion, and according to Human Rights Watch more generally, the approach of the Office in Guinea—which has been the most positive example in these four case studies—should be replicated to a greater degree in other preliminary examinations. In Guinea, the ICC has been heavily engaged in encouraging progress in domestic investigations. Most notably, its visits to the country where ICC officials can regularly engage government officials and judges on specific steps toward progress have made important contributions. The Court has also regularly

interacted with other key actors such as victims' groups and the UN Special Representative of the Secretary General (UN SRSG) on progress made and on how to mobilise further progress, both of which have themselves made independent, essential contributions to moving justice forward. Also, as Keppler stated, the importance of the media should not be underestimated in terms of mobilising political will.

Keppler spoke about the various lessons victims' groups in Gambia and Liberia could learn from those in Chad. Though these groups cannot be part of a 'partie civile' in Gambia and Liberia, they regularly call out inaction and blockages to progress. Victims groups and other activists can also seek to leverage the role of international donors, governments and intergovernmental entities like the EU, pressing them to make justice for past crimes a vital issue.

Fundamentally, these national efforts are taking place in the shadow of the ICC in hopes that the ICC will not be needed. However, for that leverage to have meaning, a strong and effective ICC is needed as it serves as a visible embodiment of the international community's political will to support justice and an alternative avenue to justice for victims where national courts do not act. Such a strong ICC is all the more necessary, she said, in view of the fact that it operates in a far more difficult climate with increasing atrocity crimes and a far more fragile commitment to accountability than when it was created. To succeed, Keppler said, the Court needs the strong support of the international community though challenges to its mandate will never fully recede or abate. However, she mentioned the need for the ICC to learn lessons from its earliest years to heighten its own performance: strong backing politically, operationally, and financially of its states parties is essential to the ICC improving its ability to function effectively – both in terms of improving its practice and staving off threats to its existence.

Elise Keppler ended her presentation with a few recommendations towards both governments and civil society across West Africa working to galvanise their respective governments:

- Make the case publicly for supporting the ICC and the broader Rome Statute system through statements at appropriate high-level meetings, including regional summits and the September opening of the UN General Assembly.
- Convene or attend, with ministerial participation, throughout 2018, conferences on the ICC to mark the Rome Statute's twentieth anniversary, with appropriate communication strategies to give a high level of visibility to your government's backing for the ICC; this would also provide a forum for discussion and planning among ministers to strengthen support to the ICC.
- Carry out public awareness and information campaigns at the national level to promote awareness of the ICC and the Rome Statute system.

- Formulate (or reformulate) and publish the government's strategy of support to the ICC; this can be an opportunity to make the case for the Court's relevance and importance in furthering your government's key strategic priorities;
- Publicly state that your government will work to renew attention to arrest strategies and other necessary cooperation in the Court's investigations, prosecutions, trials, and reparation proceedings;
- Take steps to increase cooperation with the Court, including by implementing the Rome Statute into national legislation and concluding cooperation agreements with the ICC on the relocation of witnesses, interim release, acquittal, and enforcement of sentences.
- Urge other governments to join the Rome Statute, using the 2018 anniversary as a target date for accession.

Kepler ended by saying she hoped these efforts would see a strengthened ICC, one that can serve to stimulate national authorities to provide justice consistent with the principle of complementarity and function more effectively, one able to act when needed as the Court of last resort its founders envisioned.

The final speaker was **Aminichi Adeyemi**, speaking on behalf of M.B. Abubakar on 'Prospects from The Gambia'. She began by sending her sincere heartfelt sympathies to the victims present in the room, then proceeded to speak about the newly elected government which, she said, was focusing on dealing with past instabilities. She indeed recalled that the new government had ended 22 years of the old regime. She equally mentioned that the new government intended to reverse the previous statement about its ICC withdrawal and that The Gambia had deposited its instruments for the adoption and ratification of the Rome Statute. The new government, she said, was fully committed to seeing that justice be done and was concerned about how to best give justice to the victims.

Civil society has played a crucial role in changing the government and they remain vocal in ensuring that justice is done which, in her opinion, is commendable. Pressure groups have vowed to make sure that no more atrocities are committed. She said The Gambia should take stock to see that impunity is not cultivated. The TRRC Act and Commission of inquiry have been established and are gathering evidence to bring perpetrators to justice. She pointed out that The Gambia had learned from the case of Hissène Habré as meetings were being held regularly at the Ministry of Justice to see that justice is served. There also is a need to reinforce the weak legal system and enact new laws or amend them for the purposes of deterring the commission of serious international crimes e.g. laws against torture and the disappearance of persons need to be domesticated in The Gambia.

Adeyemi mentioned that many victims were not manifesting themselves for fear of stigmatisation, but that sensitisation for their rights was being made to ensure that everyone

receives justice. However, the legal system faces major challenges including lack of forensic experts and adequate investigative facilities e.g. the exhumed bodies need to be examined by experts for DNA. She said The Gambia was calling on other West African countries for assistance. Though the ICC is important, she said justice had to start at home. She regretted the fact that the ICC Office of the Prosecutor's (OTP) threshold for analysing the gravity of crimes committed is very high and said the OTP should examine the situation in full after atrocities have been committed. In the cases of Afghanistan and Burundi, exceptions were made and the same should be done for The Gambia she said.

Adeyemi recognised the need to develop capacities to match the international standard for dealing with crimes. She emphasised the need for States to encourage one another not to become a haven for perpetrators, with special assistance geared towards nations that are transitioning after atrocities are made. She further mentioned the need for regional cooperation in terms of fighting impunity, and the fact that The Gambia needed financial resources to develop its legal system.

According to Adeyemi, other urgent matters to be dealt with were the need to seize the assets of perpetrators; the protection of witnesses; a counselling centre for victims of crimes to help deal with psychological issues; the need to revamp the functioning of the courts so they uphold the rule of law. She said The Gambia was learning from other countries for how best to handle the cases.

Evelyn Ankumah thanked Adeyemi for sharing her broad expertise and added that she, too, did not believe that the Gambian situation does not meet the gravity threshold and advocated for the case to be re-considered by the OTP. She said pressure could be mounted on Equatorial Guinea for Yahya Jammeh to be brought to justice.

#### Floor discussion

**Justice Diarra** remarked that we did not need to be focused on the ICC in terms of bringing Jammeh to justice, mentioning the Hissène Habré and Charles Taylor trials as successful examples which did not necessitate the ICC's intervention. She also noted that seeking justice for Jammeh apart from the ICC was a better option because he committed crimes before the ICC's mandate began in 2002; as such, he would not be fully prosecuted for his crimes were he to be prosecuted by the ICC. She reckoned a special tribunal for The Gambia to try Jammeh or, alternatively, the exercise of universal jurisdiction by another African country.

**Evelyn Ankumah** said it was indeed necessary to adopt a holistic approach to bringing Jammeh to justice without simply being fixated on the ICC, but that the ICC had to be included in the various options to be explored.

**Reed Brody** added that Equatorial Guinea had ratified the Convention Against Torture and hence, was bound by its terms.

**Ibrahim Tommy** asked Justice Mbacké Fall whether there was any enforcement mechanism in place to ensure that Habré's victims receive reparations. He asked Elise Keppler what could be done about developing a culture of accountability and creating political given that

the leaders are usually the main perpetrators. He asked Aminichi Adeyemi how the Gambian government envisaged dealing with the issues and recommendations of the TRRC.

**Justice Fall** said it was very difficult to locate and seize all Habré's assets. There is, nevertheless, a special Trust Fund for victims which is set to receive funds from various countries and donators, Chad being the first State to contribute.

**Elise Keppler** said it is difficult to initiate prosecutions in national courts but that some innovations were underway e.g. the Hybrid Court of South Sudan. However, she said the court had made no progress since leaders are implicated. The principle that no one is above the law should be upheld and lack of capacity can be overcome with international assistance, but it should be up to the governments to reach out to them.

**Ms Adeyemi** said the Ministry of Justice was making strides in spite of limited funds to ensure victims get justice, doing their best to address the needs of all victims. She added that the Attorney General's Chambers were open to everyone and that anyone could bring forth any evidence they had.

**Eric Aimé Semien** asked Justice Mbacké Fall about the arrest warrants issued by the Extraordinary African Chambers which were not executed. He also asked why Habré had defied the Court by refusing to talk and whether he had a message to convey in so doing. He further remarked that Africa should be adopting texts against impunity and he did not understand the famous immunity clause in Article 46-1 of the Malabo Protocol which basically puts an end to international criminal justice. Justice Fall answered regarding the non-execution of arrest warrants, saying that although the EAC had been dissolved, it was possible to refer the outstanding cases to the AU. He recalled that Habré was able to fully blend in in Senegal up to the point where the authorities were informed that he had committed atrocities, and President Macky Sall committed himself to adhering to international law. Justice Fall added that the EAC should serve as a model to be replicated and even improved in other countries. He suggested extending the mandate of the ECOWAS Community Court of Justice to include international crimes, but highlighted the financial challenges which would inevitably come along with it.

**Mama Koité Doumbia** remarked that we had talked about lack of capacity and legal problems. However, there was a pressing need to address the issue of how to bring seating presidents to justice. She said lack of political will was no longer a valid excuse and that we had to look into how to bypass this lack of political will by ensuring that justice be done at the regional level.

**Bal** said there was not enough capacity to try these cases. He suggested the international community provide capacity building trainings to national legal players so they did not have to rely on the former in the long run.

**Morten Kjaerum** noted that there was an interesting and strong momentum in Africa. He said there was a lot to build on from different country experiences over the past 10 years. The main challenge now was to materialise it by building a strong rule of law system. He said he

was more hopeful than he had been since he left the continent and looked forward to continued collaboration with AFLA.

**Evelyn Ankumah** closed by recommending that we explore and intensify best practices, for there are lessons to be learned from various experiences in order to improve international criminal justice. She said we engage the AU and many other partners with whom there might be disagreements at times but, in that case, we stand on the side of the victims. She warmly thanked all the participants, the various partners and donors without whose support this Meeting would not have been possible, and the victims. The 2-day Stakeholders' Consultation was thus concluded.

**EMERGING TRENDS ON COMPLEMENTARITY: CONSULTATIONS WITH  
STAKEHOLDERS FROM CENTRAL AND EASTERN AFRICA**

**Kampala, Uganda**

**4-5 July 2018**

**Convened by Africa Legal Aid (AFLA)**



**FEEDBACK AND COMMENTS**

*It was nice participating in the workshop and I learnt a lot from experiences shared. This helps us to think of how to better the South Sudanese search for justice. If you are looking for partners in South Sudan, count on us we are ready to collaborate and learn from your expertise.*

**Jackline Nasiwa**, Executive Director, Centre for Inclusive Governance, Peace and Justice;  
Member of Transitional Working Group for South Sudan.

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*Congratulations to all participants! Africa needs this conversation. We need to get political will on the side of the Rule of Law in our governance systems so that political power is exercised with restraint. When justice is available at home, there will be no impunity.*

*Well done!*

**Justice Florence Mumba**, Extraordinary Chambers in the Courts of Cambodia, Former Vice President of the International Criminal Tribunal for the Former Yugoslavia.

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*It was my honour to be associated in this very important event.*

**Dr. Robert Eno**, Registrar, African Court on Human and Peoples' Rights.

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*Congratulations on a well-organised and successful conference. The discussions were quite rich and illuminating. Thank you for inviting me. It was an honour to be part of it.*

*I look forward to reading the report of the meeting.*

**Sarah Kasande Kihika**, Director, International Centre for Transitional Justice, Uganda.

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*I am very happy to have this great opportunity to express my appreciation that you have selected and invited us to participate in the AFLA meeting. It was a pleasure too to meet you all.*

*I hope you will be able to tackle the question regarding Burundi as my wish is to see Burundi return to the ICC. This may happen with more involvements and support from the international community.*

*Warm regards*

**Mathieu Sake**, Founder and CEO, Community Association for the Protection of Human Rights (ACPDH), Burundi.

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*Merci à toi et à AFLA de m'avoir associé à cette rencontre au mom de notre réseau des Avocats et des Barreaux de la CEEAC*

*Je vous en suis gré.*

**Paul Ngeleka Musangu**, Coordinateur, Réseau pour les Avocats de la CEEAC.

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*I was truly honoured to be part of the conference. Pursuant to our 'side-bar' discussions and assuming the request still stands, when I get back to Uganda after my summer programme, I'll begin to put my presentation into article format for publishing in your journal.*

**Pheobe Murungi**, Head, International Justice, BarefootLaw.

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*I am honoured that you considered me worthy to grace the participants with our experience representing victims in the Ongwen case. I look forward to more of your engagements.*

**Joseph Akwenyu**, Victims' Legal Representative in the Ongwen Case before the ICC.

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*It was a pleasure to have had an opportunity to be part of this landmark conference held in Uganda. Indeed, it was a resounding success with many lasting lessons and impressions. Thank you for pulling it off and for providing the space to me. I look forward to the reports. I hope to interact with you and AFLA again in future.*

*Much regards,*

**Sylvia Namubiru**, Executive Director, Legal Aid Service Providers Network (LASPNET).

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*Greetings and thanks for inviting me. I enjoyed being part of this successful event.*

*Congratulations again.*

*Best regards.*

**Jose Dougan-Beaca**, Former Senior Human Rights Officer at the UN Office of the High Commissioner for Human Rights.

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*It was a great conference and I really enjoyed participating.*

*Best regards,*

**H.E. Judge Kimberly Prost**, International Criminal Court.

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*It was great working with you and AFLA and we look forward to further collaboration as we continue to set a strong foundation for Africa to effectively manage its International Crimes business by itself.*

*Our war crimes case comes to a climax at the end of this month with a pre-trial ruling. For us as prosecutors, the meeting was a unique forum to learn more in the sphere of International Crimes, particularly by picking a leaf from what other countries are doing.*

*It was a wonderful learning session that helped us to appreciate International Crimes better and meet more partners with similar interests. I will continue to be available for future networks and look forward to more activities.*

*Warm regards,*

**Charles Richard Kaamuli**, Principle State Attorney, Lead Prosecutor, Kwoyelo War Crimes Case.

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*It was a fulfilling experience, and I am ever grateful to you for making it possible for me to attend the event.*

*Kind regards,*

**Daniel Mekonnen**, Director, Eritrean Law Society, Geneva.

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## **OVERVIEW**

### **DAY 1**

*July 4, 2018*

#### **Opening Session**

Chaired by **Hon. William Byaruhanga**, Attorney General of Uganda

Introduction of the Theme of the Consultation by **Evelyn A. Ankumah**, Executive Director, Africa Legal Aid (AFLA)

*Justice Done at Home or Close to Home*

**H.E. Judge Kimberly Prost**, International Criminal Court (ICC) – Keynote Address

*Strengthening Complementarity as a Cornerstone of the Rome Statute System*

Meeting opened by **Hon. William Byaruhanga**, Attorney General of Uganda

**Panel 1, Creating Political Will in the Pursuit of International Justice**

Chaired by **H.E. Mirjam Blaak-Sow**, Uganda Ambassador to the Benelux and the European Union; Member of AFLA Governing Council

**Jacqueline Moudeïna**, Executive Director, Chadian Association for the Promotion and Defence of Human Rights; Counsel for Hissène Habré's Victims  
*The Chadian Experience*

**Jose Dougan-Beaca**, Former Senior Human Rights Officer at the UN Office of the High Commissioner for Human Rights  
*Perspectives from Equatorial Guinea*

**Paul Ngeleka Musangu**, Coordinator, Network for ECCAS Lawyers  
*Views from the Democratic Republic of Congo*

**Phoebe Murungi**, Head, International Justice, BarefootLaw  
*Complementarity and Concurrent Jurisdiction*

**Dr. Robert Eno**, Registrar, African Court on Human and Peoples' Rights  
*The Malabo Protocol and Complementarity of International Criminal Justice: Challenges and Prospects*

*Floor Discussion*

**Panel 2, The Victim in Focus**

Chaired by **Joyce Nalunga Birimumaaso**, Chief Executive Officer, Uganda Law Society

**Dr. Carla Ferstman**, Senior Lecturer, School of Law, University of Essex; Former Legal Director of Redress  
*Victims' Rights: Translating ICC Provisions into Domestic Contexts*

**Joseph Akwenyu**, Victims' Legal Representative in the Ongwen Case before the ICC  
*Victims' Participation*

**Patricia Bako**, International and Transitional Justice Officer, Avocats Sans Frontiers, Uganda  
*Challenges to Victims' Participation at the International Crimes Division (ICD), of the High Court of Uganda*

**Scott Bartell**, Programme Manager, ICC Trust Fund for Victims  
*Victims Assistance Experience in the CAR, DRC, and Uganda*

*Floor Discussion*

**Commemoration of 20th Anniversary of the Rome Statute**  
*Courtesy of the Netherlands Embassy in Kampala*

**DAY 2**  
*July 5, 2018*

**Panel 3, The Special Criminal Court in the Central African Republic and the Proposed Hybrid Court for South Sudan**

Chaired by **Jane Adong**, Field Counsel for Victims in the Ongwen Case; Former Prosecutor at the International Criminal Tribunal for Rwanda (ICTR)

**Roland Amoussouga**, Former Senior Legal Adviser & Spokesperson of the UNICTR, Former Coordinator/Head of the Secretariat of the International Commission of Inquiry on the Central African Republic (ICOI-CAR) & currently Head of Integrated Office, United Nations Multidimensional Integrated Stabilization Mission (MINUSCA) in the Central African Republic (CAR)

*The United Nations' Contributions to the Ongoing Fight Against Impunity in the Central African Republic (CAR).*

**Alain Tolmo**, Special Prosecutor, Special Criminal Court in the Central African Republic  
*The Work of the Special Criminal Court in the CAR*

**Jehanne Henry**, Team Leader, Africa Division, Human Rights Watch  
*Unilateral Establishment of the Hybrid Court: A New Path for Justice in South Sudan?*

**Jackline Nasiwa**, Executive Director, Centre for Inclusive Governance, Peace and Justice; Member of Transitional Working Group for South Sudan  
*The Proposed Hybrid Court for South Sudan: Prospects and Challenges*

*Floor Discussion*

**Panel 4, Building Legislative, Investigative, Prosecutorial, and Judicial Capacity in Uganda**

Chaired by **Dr. Carla Ferstman**, Senior Lecturer, School of Law, University of Essex; Former Legal Director of Redress

**Sylvia Namubiru Mukasa**, Executive Director, Legal Aid Service Providers Network (LASPNET)  
*Identifying Gaps in Uganda Legislation Pertaining to Accountability for the Most Serious Crimes of International Concern*

**Venis Baguma Tumuhimbise**, Head of Investigation on International Crimes and Counter Terrorism, International Crimes Division (ICD) of the High Court of Uganda  
*Challenges in Investigating International Crimes in Uganda*

**Charles Richard Kaamuli**, Principle State Attorney, Lead Prosecutor, Kwoyelo War Crimes Case  
*Obstacles to Prosecution of International Crimes in Uganda*

**Justice Elizabeth Nahamya**, Mechanism for International Criminal Tribunals (MICT); Former Deputy President of the International Crimes Division (ICD) of the High Court of Uganda  
*Complementarity: Padlocks, Keys, and Bottlenecks in the Criminal Justice System in Uganda*

*Floor Discussion*

**Panel 5, Situations in Burundi, Ethiopia, Eritrea, Gabon, and Kenya**

Chaired by **Sarah Kihika**, Director, International Centre for Transitional Justice

**Mathieu Sake**, Founder and CEO, Community Association for the Protection of Human Rights (ACPD), Burundi  
*The Burundi Experience*

**Gatehun Kassa**, Assistant Professor of Law and Human Rights, College of Law and Governance Studies, Addis Ababa, Ethiopia  
*Perspectives from Ethiopia*

**Daniel Mekonnen**, Director, Eritrean Law Society, Geneva  
*The Situation in Eritrea*

**Paulette Oyane**, President, Centre for the Promotion of Democracy and Defence of Human Rights, Gabon  
*Views from Gabon*

**George Kegoro**, Executive Director, Kenya Human Rights Commission (KHRC)  
*Kenya, after the Handshake: A Civil Society Perspective*

*Floor Discussion*

**Panel 6, The Bemba Acquittal, and What it Means for International Criminal Justice**

Chaired by **Evelyn A. Ankumah**, Executive Director, Africa Legal Aid (AFLA)

**Njonjo Mue**, Chairperson, Kenya Section of the International Commission of Jurists (ICJ-Kenya)

**Paul Ngeleka Musangu**, Coordinator, Network for ECCAS Lawyers

**Alain Tolmo**, Special Prosecutor, Special Criminal Court in the Central African Republic

*Floor Discussion and General Conclusions*

## **Report on Emerging Trends on Complementarity: Stakeholders' Consultation in Central and East Africa**

### **Opening Ceremony**

The Executive Director of Africa Legal Aid (AFLA), **Evelyn A. Ankumah** introduced the Chair of the Opening Ceremony, the **Hon. William Byaruhanga** Attorney General of Uganda, and thanked him for having accepted AFLA's invitation to Chair the opening, and open the Meeting.

Honourable William Byaruhanga began by welcoming H.E. Judge Kimberly Prost to Uganda. He informed participants that he had participated in the recent Assembly of States Parties' Meeting in December 2017 that elected Judge Prost to the ICC. He informed participants that at that meeting, Ugandan national, Judge Salomy Bosa was also elected to the ICC.

In his welcome address, the AG acknowledged the presence of the various dignitaries and indeed, the presence of all participants. He thanked Africa Legal Aid and its Executive Director, Evelyn A. Ankumah for choosing Uganda as the venue for this important stakeholders meeting. He noted that the stakeholders' meeting on emerging trends on complementarity was in tandem with Uganda's objective of making the principle of complementarity a reality.

He said Uganda believes in upholding principles of justice, human rights, rule of law and accountability. In June 2002, Uganda ratified the Rome Statute establishing the International Criminal Court. In January 2004, Uganda referred the situation in Northern Uganda concerning the Lord's Resistance Army (LRA) to the ICC, becoming the first State to refer a situation in its own territory to the Court. Two of the LRA commanders, Dominic Ongwen and Thomas Kwoyelo are currently facing trial before the ICC and the International Crimes Division of the High Court of Uganda respectively.

To fulfil its commitments under the Rome Statute and promote the principle of complementarity in international justice, rule of law and accountability, Uganda enacted ICC Act 2010. This Act domesticated the Rome Statute and gave jurisdiction to the International Crimes Division (ICD) of the High Court of Uganda to try crimes against humanity, war

crimes and genocide. The ICD's mission is to fight impunity and promote human rights, peace and justice, and its vision is to have a strong and independent judiciary that delivers justice and is also seen to deliver justice.

From 31 May to 11 June 2010 Uganda hosted the first Review Conference of the Rome Statute of the International Criminal Court.

He said the future of the rule of law lies in dialogue and collaboration, not in isolation. Attorney General Byaruhanga expressed the hope that the discussions to be held during the consultations on Emerging Trends on complementarity and cooperation of courts will inspire and pave the way for realising the goal of bringing justice closer to victims of grave crimes.

He then gave the floor to **Evelyn A. Ankumah**, Executive Director of AFLA, to address the audience. Ankumah spoke on 'Justice done at home or close to home'.

Ankumah acknowledged the dignitaries, colleagues and friends present at the opening, and thanked them all for coming to participate in discussions on emerging trends on complementarity in international criminal justice. She informed participants that Complementarity is a term usually used in relation to the International Criminal Court. She said the Rome Statute expresses it in technical terms and stipulates that 'the Court shall declare a case inadmissible if a state, that has jurisdiction over the crime in question, is genuinely unwilling or unable to carry out investigation or prosecution'. In other words the ICC should not deal with a case if a national or a local criminal system can and will do the job. Simply put, if national systems are available, the ICC should not intervene. As significant as the ICC is, it is a default court. Its task is to serve as a safety net. Ankumah said in an ideal world, we would not need the ICC, but in today's world we do need the ICC - 'I am convinced of it' she said. However, she observed that The Hague is not the ideal place where international criminal justice should be first pursued. She said international justice should be pursued in the village, the province, the state or the region where the crimes concerned were committed. 'Justice should be done at home, or at least as closely as possible to home'.

The closer prosecutors and judges are to the place where the crimes were committed, the easier it may be to collect evidence, and the lower the costs are likely to be. The closer trials take place to the territory of the crimes, the easier it is for victims to see that justice is being pursued, that justice is being done.

Ankumah said she welcomed the trial of Hissène Habré, but ideally, the trial should not have taken place in Dakar, Senegal but in N'Djamena, Chad. Ideally, Charles Taylor should have been tried in Liberia, or perhaps Sierra Leone, but, not in far-away The Hague. Ideally, Yahya Jammeh should be tried in The Gambia, even though an initial trial would be welcome in Ghana, for Jammeh's culpability in the massacre of 44 Ghanaians in transit in The Gambia, on their way to seek greener pastures in Europe.

She informed participants that during the two-day meeting, participants would discuss recent events in the Central and Eastern African region. Participants will hear about atrocities that took place in various countries, and explore options for holding the perpetrators accountable.

She called on the stakeholders present to think about ways, methods or plans to have trials in the countries concerned, in this region, in Africa. She did concede however that in some cases the ICC must intervene as a default court.

She emphasised that the trial of Hissène Habré is a major source of inspiration and informed the audience that Jacqueline Moudeina, counsel for Habré's victims, who was among the stakeholders present, will tell participants much more about the Habré trial. Ankumah said a key lesson that she learned from the Habré trial is the role of victims, who played a crucial role in the gathering of evidence and never gave up on the ideal of bringing Habré to justice. She said the compelling testimonies of the victims gave the judges no alternative than to decide the way they ultimately did.

However, Ankumah cautioned about the role of victims in criminal trials. She said while criminal proceedings should leave room for expressions of emotions, hurt or trauma, the cases should be decided on the basis of facts, and if that can be guaranteed, victim involvement is welcome, and perhaps even key to legitimacy.

She said political will, and the need for political support is another lesson she learned from the Habré trial. 'Without the backing of the African Union, would the Habré trial have taken place at all?' she asked. 'Would the trial have been so effective?', 'And would it have been perceived to be legitimate?' Ankumah expressed the view that in the Habré case, the AU's role was a positive one, and a crucial one at that. She said if the AU would follow its own example, it would serve Africa well. Referring to the recently established Special Criminal Court in the Central African Republic, Ankumah said for that Court to be successful, it is crucial to have it operate with the political support of the relevant powers. Likewise, for the proposed Hybrid Court for South-Sudan to come into being political will is necessary.

She contended that that political will must start at home, and as close to home as possible. One can only be inspired by the words of Osagyefo Dr. Kwame Nkrumah, one of the founders of the African Union. Nkrumah was right when he said 'AFRICA MUST UNITE'. This was during the decolonisation struggle, and Nkrumah did not have international criminal justice in mind at the time. Yet, Ankumah believes there is solidarity amongst Africans; there is something like an African citizenship. Indeed, Senegal showed solidarity to Habré's victims by hosting the Habré trial. She said it was not politically expedient for Senegal to prosecute Habré, yet it did.

Ankumah concluded that the notions of community, solidarity, and kinship that are embedded in that idea of African citizenship should also drive us in the pursuit of justice, including criminal justice. She said she is a full and passionate supporter of the ICC, and reiterated that the ICC is a court that is only here to help us out if local, national or regional justice is not achievable. She called on participants to commemorate the 20th Anniversary of the ICC, and to promote and exercise complementarity, the cornerstone of the ICC Statute, for the sake of justice.

The Attorney General then called on **Judge Kimberly Prost** to address the audience.

Judge Prost thanked AFLA for organising the meeting, and informed participants that she has many personal connections to the theme of the conference and its relation to the Rome

Statute. She said that African states played an important role in the drafting of the Rome Statute. She enlightened participants to the fact that she worked on various capacity building initiatives to implement the Rome Statute during her tenure at the Commonwealth Secretariat. She acknowledged the significance to be in Kampala where the Rome Statute was reviewed in 2010 to include the crime of aggression. She said it is important to take time to recognise the Statute as an important accomplishment and its important role. Though a great accomplishment, it was not easy to draft such a statute and it faces many challenges. Prost said our task is to preserve the Rome Statute system for justice, and that what was born in Rome 20 years ago was a system to challenge states to investigate grave crimes at national level.

Though there are many criticisms against the Court, it is nonetheless a busy court, and even with more resources it can only do so much. There is a perception that this court alone can bring justice, but we have to be sure we understand the Rome Statute system: it has jurisdiction only when the state is unwilling or unable to prosecute. The best place to prosecute in, is in the country where the crimes were committed, but this is not always possible. We need to be looking at other options such as extra-territorial prosecutions. Regional courts are a welcome opportunity as well. The aim is to develop capacity, efforts begin with national capacity building and we must be clear of what this capacity is. We must have the laws in place but unfortunately they are still lacking though Uganda is a leading positive example. The Habré case is a prime example of not just international criminal law, but also of international cooperation: indeed, all African states should follow the example of Senegal. There must be prosecutors, investigators and judges who know how to handle these crimes.

So who is responsible for this capacity building? Many put this responsibility on the Court but this is not its role, it is the role of the international community. Capacity alone is not enough, political will is needed as well, and states must be willing to support regional efforts. The ICC is a treaty-based court and states get to choose to join or not, and many still have not signed or implemented it. Not only does ICC lack jurisdiction on territory of non-state parties, but also the power that complementarity brings does not have any effect. We need to change our conversation about the ICC, no state can be an opponent of justice and each has the responsibility to make sure that grave crimes are not committed on its territory and to bring justice to victims. There is a universal capacity and willingness to prosecute crimes, but the question is what are they doing to achieve that goal? The Habré case is a prime example. Other examples include the proposed hybrid court for South Sudan, specialised crimes units, in Syria, in the Netherlands, among other countries.

One of successes of the ICC is that it has led to seeing accountability not as an option but as an expectation. It is an idea that comes from Nuremberg and Tokyo. It is our duty to establish a world wide web of international justice.

The **Attorney General** remarked that Judge Prost and Ankumah spoke very powerfully and that both had a strong passion for human rights. He then made some remarks on Ankumah's speech especially when she said the ICC is a default court and a safety net. He agreed with this statement and made reference to the ongoing cases Uganda has in the Hague, such as the

Ongwen case before the ICC and the one against the Democratic Republic of Congo before the ICJ. He said there seems to be confusion about the ICC as it is often seen as an extension of colonialism, which is why he agrees with Ankumah that crimes should be tried in country of commission. He said there is a lot of discussion about whether the ICC is fair or not towards African leaders, but remarked that the important thing to note is that the ICC is a default court. Indeed, in his opinion, the attainment of justice must be an international obligation.

Regarding Judge Prost's speech, he said it is appropriate to ask the UN where it is in terms of building capacity and ask the ICC what its proposal for international justice is. As for critics, he said they should instead provide a proposal for what international justice should be, otherwise they make the ICC redundant. Indeed, he agreed that accountability had become an international expectation. He said he was convinced that on the tone set by these Judge Prost and Ankumah, this conference would be a great success.

He then declared the meeting open.

### ***Panel 1: Creating political will in the pursuit of international justice***

**H.E. Mirjam Blaak-Sow** welcomed all distinguished guests and participants to Kampala for this meeting, and thanked AFLA for convening it. She provided a definition of 'political will', which she said refers to that collective amount of political benefits and costs that would result from the passage of any given law. In other words, it is about achieving a balance between incentives and disincentives among potential interveners with the necessary resources, including offsetting their values and their interests.

After introducing Jaqueline Moudeina, H.E. Blaak-Sow handed over the floor to her.

**Jacqueline Moudeina** introduced herself as a practising lawyer registered at the Chadian Bar, as well as President of the Chadian Association for the Promotion and Defence of Human Rights. She expressed her frustration regarding the time constraint but promised to do her best to keep it brief.

This association over which she presides took the initiative to engage legal proceedings against Habré and his accomplices. She pointed out that the main challenge they faced was that Habré was in exile in Senegal while his accomplices were in Chad and still in power. Greatly inspired by the Pinochet case, they approached Human Rights Watch and American lawyer Reed Brody was recommended to assist them, and has been doing so for the past 17 years. She said they started by listing all the victims by doing a census of Habré's survivors because although they already existed as an association, they were afraid of working openly. She talked about how they brought structure to this association and mounted a case against Habré for 2 years, collecting information from victims' testimonies.

Moudeina then recalled going to Dakar with seven victims to file their complaint against Habré. He was sentenced for crimes against humanity and torture under the Convention against Torture. They subsequently filed complaints against Habré's accomplices and the first

to be targeted was the chief of police. Unfortunately, Moudeina was targeted in an attack which incapacitated her for over 5 months following several surgeries. This, however, did not prevent them from continuing their fight, she recalled. When Habré was charged, his lawyers appealed, and they eventually reached the Supreme Court which unfortunately declared the Senegalese courts to be incompetent; indeed, Moudeina said, this was not a surprise given the highly political nature of the case.

They then turned to Belgium for legal remedies, where they met some naturalised Chadian victims of Habré who were able to become civil parties. Habré was charged with international crimes by Belgian courts and they requested his extradition, but to no avail. The case ended up before the African Union (AU), and Moudeina recalled that the AU president at the time was against African presidents being tried by the West. A special commission was set up and it decided that only Senegal could judge Habré in the name of Africa. Even then, Moudeina said, the case still dragged on for years before Habré could be brought to justice.

The association, after a while, decided to return to Belgium to remind the courts that the arrest warrant issued against Habré was still standing, as well as the request for his extradition. Belgium then brought Senegal before the ICJ, which ordered Senegal to try Habré without further delay if it did not extradite him to Belgium. It took a long time, but things began to move when Macky Sall came to power. Habré's lawyers took the victims' association before the ECOWAS Court; it was decided that an ad hoc tribunal was needed to try Habré. President Macky Sall decided to support them and an agreement was concluded which led to the creation of the Extraordinary African Chambers. Habré was tried, convicted, and ordered to compensate the victims but, as Moudeina recalled, nothing has been done yet on this matter. The same applies to Chad, where his accomplices have been sentenced and ordered to compensate the victims; Chad itself was sentenced jointly and severally to compensate victims and still nothing has been done.

Moudeina reminded the participants that Chadians suffered great terror for 8 years. She said Habré had created a special police force called the Documentation and Security Directorate (DDS) that turned into man eater; indeed, she recalled, the level of human cruelty was incredible. She noted that the association used emblematic examples for building up their case, such as women who were detained and taken to the north to serve as sex slaves for the military. In order for these survivors to speak, it took 10 years of convincing, Moudeina said; they were finally able to gather their courage to testify once in the courtroom. Also, torture was systematic in Habré's prisons. One key witness was a survivor responsible for burying the bodies of victims; he had survived a massacre of 150 war prisoners ordered by Habré. According to Moudeina, what also helped them was the archives of the DDS among which they even found letters signed by Habré himself; one such letter, for instance, clearly stated that no one was to come out of those prisons alive.

As Moudeina recalled, everyone said they would not succeed in bringing Habré to justice but they were convinced otherwise, and they did manage to bring him to justice eventually. She ended by stating that the victims were at the heart of this procedure and that if they had managed to bring Habré to justice then everyone can do it, it just requires enough willpower.

**H.E. Blaak-Sow** thanked Moudeina for her courage and resilience with the victims, recalling the landmark moment they had witnessed together in Dakar as the Extraordinary African Chambers handed down its judgment in the Habré case. She then proceeded to introduce Jose Dougan-Beaca and gave him the floor to make his presentation on the situation in Equatorial Guinea.

**Dougan-Beaca** expressed his thanks to Evelyn and AFLA for convening this event. He said he would talk about the legal framework of Equatorial Guinea and structure of the judiciary.

Regarding the country's legal framework, he started by pointing out that people are usually familiar with the country because of the oil boom. He said Equatorial Guinea has been independent since 1968 and that in 1959, it was upgraded from the status of colony to a Spanish province so Spanish law became applicable in the country. He quoted the Constitution of November 2012 art 8 states that: 'the State of Equatorial Guinea abides itself by the principles of International Law and reaffirms its adherence to the rights and obligations deriving from the Charters of international organisations and agencies that it has become party to'. This, he said, was important because in 1968 there was no declaration of which laws should be applied first. He added that the government has been under continued criticism from opposition and human rights advocates.

As for the structure of the judiciary, he said it is based on an organic law whose 14<sup>th</sup> Article establishes that the source and hierarchy of laws in the national legal system shall be the law, the costumes and the general principles of law. Criminal cases regarding people covered by immunity are dealt with by the Second Chamber of the Supreme Court; provincial courts have jurisdiction over criminal cases investigated by the instruction judges; Courts of instruction will investigate cases that have to be tried by the Provincial Courts; and Commercial Courts deal with all cases the prosecutor can not deal with.

Both laws and courts are in place, so we may ask where the problem is Dougan-Beaca observed. He said the country's foreign policy is based on contributing to the maintenance of peace in Africa and the world, being an active actor in achieving inter-African solidarity, non-interference in internal affairs and South cooperation in economic relations. Dougan-Beaca remarked that Equatorial Guinea sees itself as a champion in the pan-African way to progress and the current head of State sees himself as a committed pan-Africanist. Because of the commitment to inter-African solidarity, Equatorial Guinea has assisted other African countries with humanitarian assistance when these were under stress.

Dougan-Beaca ended by mentioning that the challenges the country faces are political ones. He said the country has a humanitarian approach when it comes to universal jurisdiction and is a stern advocate of immunity from prosecution for both acting and former heads of states. The issue then, he opined, is how you reconcile this position with the fight against impunity and the principle that no one should be above the law.

H.E. Blaak-Sow thanked Dougan-Beaca for his insightful presentation and introduced Paul Ngeleka, who contributed with views from the Democratic Republic of Congo (DCR).

**Paul Ngeleka** thanked the organisers of the meeting, as well as all the participants. He said he will describe the conditions under which the ICC was seized by the DRC. In 1996 and 1997 Laurent-Désiré Kabila was a rebel leader supported by Rwanda and Uganda; though he came to power, rebellions continued and were still supported by Uganda and Rwanda. Kabila was then murdered and his son, Joseph Kabila, came to power. Ngeleka observed that the wars have caused great damage to the economy and justice sector among others.

He further stated that Joseph Kabila referred the cases of Thomas Lubanga, Germain Katanga, Mathieu Ngudjolo, Calixte Mbarushimana, Bosco Ntaganda and that of Sylvestre Mudacumura. The first two cases were prosecuted for crimes committed in Ituri and while investigations had begun at the national level, the government believed that it was better to refer them to the ICC. They were sentenced and returned to the DRC to serve their terms. Ngeleka further mentioned that Ngudjolo was also prosecuted for crimes in the east but was acquitted, similarly to Mbarushimana who also was acquitted because the charges were not confirmed by the Trial Chamber. The Bosco Ntaganda trial is ongoing for 13 counts of war crimes and 5 counts of crimes against humanity, while Sylvestre Mudacumura is on the run so there have been no charges against him as of yet.

Ngeleka observed that many DRC nationals have been brought before the ICC. With regard to the crimes committed in the DRC and prosecuted at the national level, he provided an example of a genocide case: in 2011 after the publication of the presidential elections results, a religious group, the Kibanguists, supported Kabila for religious reasons. As a result, opposition supporters carried out attacks against the Kibanguists, the pastor was killed and many human rights violations are committed. The case was judged nationally on the basis of the Rome Statute but the judges did not know how to qualify the facts, because though a religious group was being targeted, it was being attacked for political reasons; also, this was just a one-time attack. Hence, it was not possible to qualify it as genocide under the Rome Statute.

Ngeleka also referred to one perpetrator who was sentenced and escaped a year after his appeal was rejected. After eventually returning to the DRC, he was welcomed with open arms by the government in the name of peace. Ngeleka remarked that he is neither serving his term nor has he compensated the victims and has allegedly participated in recent attacks in the DRC. In light of the ongoing crimes which continue to be committed in Ituri and North Kivu, with Uganda being a witness to these atrocities through the refugees it is receiving from the DRC, Ngeleka suggested creating a special court to judge all the perpetrators.

H.E. Blaak-Sow thanked Ngeleka for his presentation. She then presented Phoebe Murungi from Barefoot law and particularly thanked the organisation for their great innovative work which led to them receiving several awards, among which was one received in Belgium last year during which she was present herself.

**Phoebe Murungi** made a presentation on complementarity and concurrent jurisdiction. She defined concurrent jurisdiction as a case where different courts share, or have jurisdiction over the same matter. She then gave the first obvious case of concurrent jurisdiction as the sharing of jurisdiction between international and domestic tribunals, whereby international

courts and tribunals often end up dealing with the cases that would ordinarily lie under the territorial jurisdiction of one or more states. As a result, she observed, there is a lack of clarity over who exercises jurisdiction in any given situation.

Murungi observed that previously when two courts with jurisdiction over international crimes shared jurisdiction, the domestic courts would defer; this was the case with the establishment of the ICTY, ICTR, SCSL etc. However, she pointed out, there is no more priority in jurisdiction since the ICC, via complementarity, gives primacy to national courts. She said that the African Court on Human and Peoples' Rights (ACHPR) has opted for a double complementarity principle whereby it adopts the complementarity system of the ICC and in addition, stipulates that its jurisdiction would also be complementary to that of courts of the regional economic communities where specifically provided for by the communities. The ACHPR treaty, she remarked, caters for both domestic and other regional courts but is silent on the relationship with other international courts, specifically the ICC with which it evidently shares overlapping and concurrent jurisdiction. Ms Murungi observed that this led to the main concern regarding how these two courts, with concurrent jurisdiction in regard to the 'core international crimes' of war crimes, crimes against humanity, genocide and aggression, will operate side by side.

Murungi then proceeded to some dangers which come with concurrent jurisdiction:

- The 'bystander effect', whereby several courts have jurisdiction and none feels the obligation to act, because there are many with the responsibility to do so;
- Actual conflict in jurisdiction, whereby two courts have actual conflict in terms of who is going to try the matter; the case can equally be handled by either court: the contrasting danger to the 'bystander effect' is the simultaneous handling of the same dispute between the same parties by different courts;
- Possibility of re-trial by either court upon declaration of admissibility of the case.

In terms of political will, the question, according to Murungi, is where this will stand in light of concurrent shared jurisdiction. It is up to the state parties themselves to decide, she opined. If they determine this shared jurisdiction, there has to be political will to make sure that the cohesion is not detrimental. However, when that collision happens how will it be resolved?, she asked. She looked at one mechanism which could be adopted, i.e. the ICC and UN. Article 3 of that agreement calls for cooperation and consultation between the two bodies on matters of mutual interest pursuant to the provisions of the agreement which goes on to provide for reciprocal representation, exchange of information, administrative cooperation etc. Murungi suggested State parties come up with a mechanism which ensures there is no collision.

H.E. Blaak-Sow thanked Murungi and introduced the next speaker, Dr. Robert Eno, who talked about the challenges and prospects of the Malabo Protocol and complementarity of international criminal justice.

**Dr Robert Eno** started by asking why the Malabo Protocol and an African Criminal Court are necessary, and why the AU decide to establish a regional criminal court.

He said this decision stemmed from what the AU considered to be an abuse of the universal jurisdiction principle, especially regarding the immunity of heads of state. He observed that the AU's concern regarding the ICC sped the process as well. In the elaboration of the Malabo Protocol, 10 more regional and international crimes were added on top of the ICC crimes, which he pointed out as follows: unconstitutional change of government, terrorism, mercenarism, corruption, money laundering, trafficking in persons, trafficking in drugs, trafficking in hazardous wastes, and illicit exploitation of natural resources.

Dr Eno said the Malabo Protocol seeks to provide a regional response to the fight against impunity and enhance international criminal justice from an afro-centric perspective. A need was thus expressed for a court that can prosecute crimes that are particularly prevalent in Africa, but are of apparently little prosecutorial interest to much of the rest of the world. He mentioned the fact that some critics say this court was created just to frustrate the ICC but in his view, this expansion of crimes dispels such concerns. Also, he argued, Africa's quest for international criminal justice did not start with the AU's disillusionment with the ICC, but can be traced as far back as the 1970s during the drafting of the African Charter on Human and Peoples' Rights. The constitutive act of AU also provided the possibility to establish such a court. He then quoted article 25.5 of African Charter on Democracy, Elections and Governance as the most concrete manifested of such an intention: 'perpetrators of unconstitutional change of government may be tried before a competent court of the Union'. Hence, he considered unfounded the argument that it's only after Bashir's arrest warrant that such a court was considered.

He also pointed out some of the challenges, including the immunity clause as well as lack of financial resources, or political will. He mentioned public confidence as one of the main challenges and said the Court will need 5 to 10 years to prove itself. But other than these challenges, he asked whether there was anything wrong with having an African Criminal Court alongside the ICC.

According to him, there is nothing wrong with establishing a regional criminal court. Indeed, as he mentioned, Article 1 of the Rome Statute states that the ICC is complementary to national courts and does not envisage complementarity with regional courts. While the Malabo Protocol provides for complementarity with national and regional courts, it is silent about its complementarity with the ICC. Criminal justice is a primary responsibility of states, and complementarity, he stated, is found even in the UN Charter for example, and is not just in the Rome Statute. He argued that the international human rights regime is also founded on the principle of complementarity, exemplified by the doctrine of exhaustion of local remedies, which places primary responsibility for protecting human rights on the State and international tribunals as a last resort.

Dr Eno pointed to the many advantages that may stem from having a complementary regional criminal justice system. He said experience shows that despite the will to fight against impunity, it rests primarily on the political will of each national state and so agreement on such matters is easier to achieve between governments within the same geographical region, sharing a common history and cultural tradition. It is thus natural, in his opinion, that regional systems are more readily accepted than international systems, as states would be more likely

to surrender to jurisdiction in system set up by like-minded countries. Also, he referred to the fact that regional arrangements and proximity have better opportunities for investigations, and the courts can work together. He said the states can choose which court to cooperate with, while others also propose a hierarchy in which the ICC would be an appellate court.

In conclusion, Dr Eno said the Malabo Protocol, just like many other international instruments, including the Rome Statute, is not perfect and has a lot of room for improvement. But just like the ICC, the African Criminal Court is here with us, or will be in a few years' time, so rather than fight it, he said we should seek to support it and see how to make it work.

#### Floor discussion

Daniel Mekonnen asked Dr Eno to what extent the AU provided support wherever there is accountability, stating that there are challenges regarding sitting heads of states who are themselves prime suspects, such as the President of Eritrea. Dr. Eno responded that regarding accountability, the current mechanisms of the AU are specific; the only ones available are those on the welfare of the child, the African Commission etc. But there is a possibility of establishing ad hoc mechanisms, he said.

Harriet Ssali Abrahams asked Moudeina what tactics they used to convince victims to testify after two years, and what the victims' expectations were. Moudeina said this work was not easy at all but luckily, they already had a victims' organisation. She said she had to go to the victims. A report noted 40,000 deaths and thousands more displaced but as an investigating lawyer, she decided to make her own census. She did everything to establish trust with the victims. In terms of security, there was not any at all so many victims were afraid to testify because they feared for their lives, many still live in fear today. She mentioned that she was even attacked by Habré's wife.

Abrahams also asked Murungi whether there were any advantages regarding complementarity between the courts, as she had only mentioned disadvantages. While Murungi said she preferred highlighting the dangers, she did say there were several benefits including decrease of caseload and increase in contextualised jurisprudence among others.

Finally, to Dr Eno, Abrahams asked why the controversial provision regarding the immunity of sitting presidents could not be excluded for now and then find a way of dealing with it later? he said this provision has been heavily criticised even by supporters. He however said that all the positive aspects of the protocol have been overshadowed by this clause, and recalled that there is no perfect mechanism. Therefore, he suggested, why not implement it now then work on improving it?

The Honourable Justice asked Dr Eno whether the AU has identified characteristics which makes them think that the African Court will be better able to appreciate the crimes for which it shares jurisdiction with the ICC. Dr Eno replied that the advantages he enumerated regarding the regionalisation of courts has nothing to do with the commission or nature of the

crimes, but rather within the current relation of states. as it is easier to deal with at the regional rather than global level.

Patricia Bako asked Moudeina how she managed to keep the momentum throughout 17 years. Moudeina acknowledged that it was a major challenge indeed. They were supported by some international and German organisations and needed to raise funds each time they needed to move with the victims. When the trial started, they obtained a grant from the EU which sustained them throughout that entire period.

Alain Tolmo asked Moudeina whether there is a special status in Chad for human rights defenders and if the accomplices were judged at the national level. Moudeina replied that in Chad their organisation is officially recognised but because they are fighting against those in power, they are classified as enemies. She said that not all of Habré's accomplices were judged, and that some of those who were sentenced are not even doing their time.

Tolmo asked Ngeleka whether it is forbidden for religious groups to do politics, and if so, why were you worried that the crimes committed against the Kibanguists did not constitute an act of genocide? Ngeleka said the Kinshasa District Court which tried the opposition leaders applied Art. 6 of the Rome Statute, but that this religious group was not attacked for religious reasons but because they had made a political choice; besides, there was no intention to destroy this religious group.

Getahun Kassa told Dr Eno that he agreed with him, but asked why African states have not massively ratified the Malabo Protocol, as there are only 11 so far. Dr. Eno said this mainly comes from the immunity clause which is the most contested and criticised provision, even by those who support the Malabo Protocol. Since June 2014, there have been 11 signatures but no ratifications. He said that if we follow debates from heads of states, we get the impression that the next day they will all ratify because they speak about it with a lot of passion. However, according to Dr. Eno, this pressure not to ratify not only comes from civil society but also from donors and bilateral relationships. In one of the ACHPR's partnerships, it has been specified that they do not use their money to finance anything linked to Malabo Protocol. There was a decision by the Assembly that said there should be a collective withdrawal from the ICC statute. Also, even if the Protocol enters into force, there is a lack of resources; in 2015 there was meeting in Arusha looking at the Court's financial implications and the sum was so colossal that AU could not bear it: it would be no less than 400 million dollars, while the AU's annual budget is 600 million dollars.

### ***Panel 2: The Victim In Focus***

Joyce Nalunga Birimumaaso, Executive Director of the East African Law society, represented Simon Peter Kinobe as chair of the panel. She introduced all the speakers and proceeded to hand the floor over to Carla Ferstman who did a presentation entitled 'Victim's Rights: Translating ICC Provisions into Domestic Contexts'.

**Carla Ferstman** expressed what great a pleasure it was for her to be in Kampala and to work with Evelyn Ankumah and AFLA. She gave a brief outline of her presentation, and said she would look at some of the formal requirements of the ICC Rome Statute in respect of

domestic application of victims' rights, in particular the complementarity regime in so far as it engages victims' rights, and the regime for state cooperation with the Court set out in part 9 of the Statute. She then said she would look at the informal requirements of the Statute in the spirit of recognising that the ICC is part of a wider system of international justice in which States parties take centre stage.

#### *Formal requirements of statute*

Dr Ferstman started by giving an account of the complementarity regime of the ICC, recalling that a case is only admissible before for the ICC if a state is unwilling or unable to carry out investigations or prosecution (Article 17). Therefore, if local authorities are unable to proceed with domestic investigations and prosecutions because there are no local procedures to protect victims and witnesses, this might militate in favour of the ICC exercising jurisdiction. She stated that this was the view taken by the ICC in the case concerning Libya in which the Court decided it was unable to judge Saif Khaddafi. Dr Ferstman consequently advised for states to guarantee victim and witness protection in accordance with the high standard provided in Article 68. She took the example of the East and Central African sub-regions where Kenya adopted the Kenya Protection Act, the DRC has a special legislation concerning victims of sexual violence, and there is a proposed victim protection legislation in Uganda. She however pointed out that it is important to identify the operational framework of this legislation: how are protection cases identified, who has the power and obligation to protect, what to do if there is a conflict of interest, is there a budget in place etc.? She also advised that states should incorporate crimes against the administration of justice that are punishable such as witness tampering, offences involving perjury or false testimony and solicitation of bribes.

Regarding issue of cooperation, Dr Ferstman said much attention has been on role of state parties to enforce the Court's arrest warrants, but there are other areas of cooperation such as protection of victims and witnesses. The ICC Statute requires states parties to assist the Court with protection of witnesses and the ICC has developed a framework agreement on witness relocation, but so far too few states have agreed to do so. She did mention that some states have put in place the mechanisms to comply with these types of financial orders emanating from the court.

#### *Informal requirements*

Some of the informal requirements, Dr Ferstman observed, are premised on cooperation between domestic and regional systems to make sure there is no impunity. Even in situations in which the ICC is engaged, she said, the real responsibility rests with domestic courts. Witness and victim protection needs to capture the context of crimes against humanity and war crimes. She also added that victim participation is envisioned by the ICC Statute, though it can be a complex process when many of them are involved. She noted that there are aspects of victim participation framework in all legal systems and that it is not merely a product of a civil law system; in common law systems recognised at domestic level there is a right to provide victim impact statement; the right to challenge the decision of the police or prosecutor not to proceed with an investigation; there is also some recognition for

international crimes and a distinct need to ensure that victims feel part of the justice process. With civil law countries, she pointed out, it is civil parties which are instrumental in pushing forward for justice as was seen in Chad and DRC.

And finally, regarding reparations, Dr. Ferstman said the ICC process is limited to individual responsibility, so there is no state nor corporate responsibility. Cases will also be limited before the ICC. She said that though national processes which do not normally focus exclusively on criminal procedures are a good thing, criminal cases are also important as they capture different dimensions of the crime and different actors who might have been involved.

Dr Ferstman concluded by giving some general principles for reparations, including the importance of consulting victims as to what their needs and priorities are; considering the variety and forms of reparations (restitution, compensation, rehabilitation etc.), ensuring asset tracing is part of the equation and that there is a state budget for reparations; involving victims throughout the process.

After thanking AFLA for organising this meeting, **Joseph Akwenyu** then proceeded to make his presentation on victims' participation in his capacity as victims' legal representative in the Ongwen Case before the ICC. He introduced his team as being composed of 2 legal representatives for victims, 2 legal assistants, 1 case manager; 3 are Ugandan and the rest from other legal jurisdictions. He said they represent 2600 victims and the number that has been admitted to participate is limited to 4000 victims. He said a number of victims who applied to be part of the case were rejected because they must each show nexus that they were harmed by the accused and also, the application needed to be concluded around November, so many could not make the deadline. He said he usually meets people who ask him why they only represent a limited number of victims; given the number of charges, the prosecutor will not extend them so only 4000 victims have been admitted to participate, though there are more.

He said they learnt from interacting with victims that they are very interested in accountability. Between 2005 when the LRA left and 2015 when Ongwen was arrested, he remarked that one would be shocked to find that victims often asked for accountability for Ongwen.

Akwenyu said victims are usually interested participating in proceedings during pre-trial. Also, they were often concerned about the non-disclosure of their identities for fear that after his term, he would come back and commit crimes against them. He said they have a commitment to hold monthly meetings, understand the kind of victimisation and make victim participation practical. Views that they gather from victims they have applied in questioning witnesses. He said that through this engagement they have built the confidence and trust of victims. During the application process, he mentioned that a couple of applicants were able to come out and talk about the gender-based crimes they suffered, some of them including males confiding to female colleagues. He served this served to show that the women were not the only victims of such crimes.

Akwenyu then concluded by listing some of the challenges, including the cutting back of the date that restricts victims from applying to participate in proceedings; financial costs for

facilitation; the way the Trial Chamber appreciates certain contexts; the fact that the judge might not allow certain questions to go through to the prosecutor; victims whose children are assigned to another team make it difficult to coordinate victim participation; information overload management.

**Patricia Bako** proceeded to make a presentation on the challenges to victims' participation at the International Crimes Division (ICD), of the High Court of Uganda.

Bako noted that when the ICD was established there was nothing about victims' participation, the Court simply used normal rules of procedures. Around 2014, *Avocats Sans Frontières* was approached by the ICD to address issues on how to carry out some operations. She said issues of victim participation and a need for special rules were raised and subsequently, in 2016, rules were adopted. She made reference to Rule 51 which states that it is the registrar who provides assistance to the victims e.g. through advice, legal representation and participation in the various stages of proceedings. She pointed out that it is the registry, that is one person alone, that manages all the work, and thus it was hard to handle all the work when dealing with a huge number of victims.

In the *Kwoyelo* case she noted, when the pretrial phase started, the victims were unknown and this is still the case though the pre-trial phase is winding up. Bako also noted that prolonged court proceedings were a problem as it caused anxiety among the victims. Moreover, financial resources are a major challenge since the court has no resources to support victim counsel who are basically doing pro bono work; she said this was why she asked *Moudeina* how they managed in Chad. The judiciary does not understand that the ICD is a new system and needs enough resources to function, she said. Bako remarked that the ICD was complementing the ICC, but asked what sort of complementarity they were looking at. She said victims' lawyers have to rely on civil society, which then creates a thin line between being a civil society organisation and victim lawyers.

Bako said a special form was developed in victims' participation procedure but that it was not accessible to the public, only lawyers and judges. She further observed that they did not have any witness protection law in Uganda in spite of very sensitive cases like that of *Jamil Mukulu*; victims were afraid to speak before the relatives of *Kwoyelo*. She highlighted the fact that even lawyers need protection, taking *Moudeina's* attack as a prime example. She pointed to the indictment being quite long and in English, and not in the victims' local language. Lastly, Bako observed the lack of a reparations law in Uganda.

**Scott Bartell** was the next panelist and gave an account of the victims' assistance experience in the CAR, DRC, and Uganda.

Bartell thanked AFLA for the invitation to speak at this meeting. He recalled this month of July as being the 20<sup>th</sup> anniversary of Rome Statute and was pleased to be talking about complementarity in the first country to have made a referral to the ICC. He said the Rome Statute created the Trust Fund for Victims (TFV) in order to address injuries caused to victims, and that this is an important development.

While the TFV was created by Art. 79 of Statute, he stated that it is not part of the Court but operates in parallel to the Court. It is governed by a board of directors chosen by the Assembly of States Parties to the ICC. Bartell mentioned the TFV's two mandates which are reparations after conviction, and assistance to victims and their families. The latter, he said, is much broader and assists victims beyond those participating in the case; it even provides assistance to perpetrators who have not been identified. He noted that the TFV gets its funding from individuals, organisations and states, but that the TFV was not a charity. The Trust Fund, Bartell observed, can only operate in countries in which the Court is in operation. He mentioned that the assistance they provide does not replace the responsibility of the state to conduct an assistance program.

Regarding reparations, he said assessments are looked at in terms of complementarity and if there is a gap in remedies for victims, the TFV will chip in. The TFV is further required to communicate to the Pre-trial Chamber the nature of their activities and review whether the program will interfere with the trial.

As for assistance, Bartell said this included physical and psychological rehabilitation. The fund has been working in Uganda and DRC for several years and he said they hope to launch a program in Côte d'Ivoire and Georgia. Due to limited human resources, Bartell said they relied on partnerships with local NGOs and humanitarian organisations which for the most part have been through the conflicts themselves to provide rehabilitation. He added that the Trust Fund has a mandate to provide reparations which only go to victims of convicted individuals and so with Bemba having been acquitted on appeal, there will be no reparations for his victims.

The TFV has implemented reparations in various cases e.g. 10 million dollars in the Lubanga case and 1 million dollars in the Katanga case. The Chambers said there are 3000 direct victims in Lubanga case, but Bartell says they do not know how many victims there will be in the Ongwen case.

Bartell concluded by saying that the Fund's work is very important for victims because it is a form of justice and accountability for them.

#### Floor discussion

A comment came from the floor regarding Bako's presentation and specific remark about the indictment; the speaker said the indictment is big but that is because there are several counts, and also because there are several stages in the indictment which is first done under the penal code, and then under crimes against humanity. He added that the indictment is translated and understood by the victims.

Lord Justice Mukiibi thanked Joseph Akwenyu for his work and expressed fears about Ongwen returning. He said Ongwen was a commander, and that many of Ongwen's commanders have had amnesty and live with the victims, so where is the fear? Akwenyu said they were communicating about the reality of this fear; indeed, his lawyers had even filed an application for his release. He said he had expressed the view that Ongwen should rather

serve his term out of the country. He added that the threshold for every crime prosecuted is high and so there should be sufficient evidence to meet that threshold.

Nkandha Sarah asked Dr Ferstman to share some challenges the ICC has faced. Dr Ferstman mentioned some challenges such as early requests for cooperation. She also mentioned witness protection as one particularly challenging area. She said it is important to put in place legislation to reflect the UN Security Council sanction process, such as that of identifying assets e.g. Bemba's assets were frozen.

H.W. Lillian Mwandha observed that it is important to distinguish between a victim and a witness because it appears that the two were being mixed up. Bako agreed that the victims are different from witnesses and so there is need to get training on victims' participation.

A question was asked to Bartell on how far the ICC follows up on domestication. He said the TFV works with several local organisations for sustainability by providing capacity building and improving technical aspects of their projects as well. Dr Ferstman added that it would be great if the ICC would advise states to set up a TFV in their states to promote international justice.

Alain Tolmo asked Bartell whether the definition of 'damages' had evolved over time. In the Bemba case, damages were to be provided but was this only from a financial perspective? And is it possible to raise funds not only from ICC member states but also from other parties? Bartell replied that reparations include compensation, rehabilitation, access to surgery, community services, etc. and not just money.

Jackson Odong asked Akwenyu the extent to which traditional justice mechanisms enhance or discourage victim participation. These mechanisms operate under cultural institutions, and traditional leaders are often for traditional mechanisms, but victims prefer justice. Akwenyu said it is a tedious process if we are talking about mass violence etc. He said they have had numerous consultations to discuss what the Ugandan assistance program looks like.

### ***Panel 3: The Special Criminal Court in the Central African Republic and the Proposed Hybrid Court for South Sudan***

**Jane Adong** chaired the session and introduced each of the participants. She then gave the floor to **Roland Amoussouga** to make a presentation on the United Nations' contributions to the ongoing fight against impunity in the Central African Republic (CAR).

Amoussouga particularly thanked Evelyn for this meeting and said he was honoured to be able to participate and bring contributions on the UN's work in CAR. He introduced the CAR as being marked by poverty and successions of armed conflict, and affected by political instability. Unfortunately, impunity has been prevalent in the CAR for a very long time.

He gave the example of Jean-Bédél Bokassa who was brought to justice in 1986 and sentenced to life, but then granted amnesty in 1993. His accomplices in government and armed forces were never brought to justice.

Amoussoga then illustrated the United Nations' contribution to the ongoing fight against impunity in the CAR through 3 main selected achievements which he presented:

The International Commission of Inquiry on the Central African Republic: This Commission, he said, was established by the UN Security Council under Chapter VII to investigate reports of violations of international humanitarian law, international human rights law and abuses of human rights committed since 2013, identify the perpetrators and make sure they are held accountable. He remarked that the Commission was not a judicial body, but viewed its work as a vital step towards encouraging and facilitating criminal investigations and prosecutions. Amoussoga then gave four recommendations of the Inquiry Commission which have been implemented:

- high priority accorded to a high functioning legal system with investigative capacity; the reach of these institutions must be national;
- a transitional justice framework to be developed by the people themselves;
- appointing an independent prosecutor for the Special criminal court and ensuring he plays a critical role;
- for government of the CAR alongside with MINUSCA to develop a concerted policy for responding to, and seeking to deter, violations of humanitarian neutrality.

According to him, those were the grand achievements of the commission. There was a previous political setting. The Security Council decided to create a mission which would be an integrated mission. The first thing it did was to negotiate and have a memorandum of understanding creating the court.

The Special Court: This Court, Amoussoga observed, is not one imposed on the people, but is a national court. It is special in that it has accepted to have among its membership judges and experts who are both national and international prosecutors and judges. He remarked that this is the 1<sup>st</sup> time they ever have such a national court within the court system of a country; this is, according to him, the best expression of complementarity. He further recalled that this court was introduced through discussion between a mission and a country but pointed to another challenge regarding the financial costs; he said they called upon all member states to contribute, and many EU states are contributing, while the UNDP has been called upon to mobilise resources to cover running costs. He said he glad to see that the Court was able to draft rules of procedure and evidence together with the government. He thus added that yesterday Judge Kimberly Prost asked what role the UN was playing, and he can confirm that the UN has committed itself to setting up this court in CAR and will provide resources.

The mapping report of the MINUSCA and the OHCHR: The mandate and objectives of the Mapping Project, he said, were to conduct a mapping of serious human rights and international humanitarian law violations committed on the territory; to identify existing transitional justice mechanisms; to propose priority areas for future investigations by the Special Criminal Court based on this mapping.

In conclusion, Amoussoga said that the contributions of the United Nations to the fight against impunity in CAR are multifaceted and geared at establishing peace, justice, security and reconciliation in the CAR, which is a central activity of the UN.

**Alain Tolmo** then proceeded to make a presentation on the work of the Special Criminal Court in the CAR.

Tolmo thanked AFLA and all participants. He started by introducing the CAR as being among the poorest countries in the world. It is a former French colony, rich in natural resources including crude oil, diamonds and gold. The history of CAR is extraordinarily marked by coups and civil wars. Since its independence, he said the country has witnessed five coups, twenty-eight governments, seven presidents of the National Assembly, eight dialogues and ten international interventions in the name of peace for serious violations committed. The Bangui Forum organised in May 2015 due to the recurring practice of amnesty laws, led to a strong popular consultation at the grassroots level which strongly recommended the establishment of the Special Criminal Court. After the coup in 2013 crimes against humanity and war crimes were allegedly committed by the Baraka; a special investigation unit was set up but did not survive. It was therefore decided to create the Special Court on June 3rd, 2015, merely one month after the Bangui forum.

Tolmo then talked about the Court's mandate. Regarding its material mandate, it must be exercised in total independence. The Special Court is competent to investigate and prosecute the most serious violations committed in CAR, including crimes against humanity, war crimes and genocide. It can also judge related offences and engage the liability of moral entities such as associations; this is an exception. As for the Court's temporal and geographical mandate, Art. 3 of the organic law indicates that the Court is competent to investigate and prosecute human rights abuses committed on the territory since January 1, 2003, as well as the crimes currently being committed, and any future crimes. He noted that the Court has jurisdiction over the entire territory of CAR and also looks into crimes committed in neighbouring countries. The Court's duration is 5 years.

Regarding the mandate's implementation process, Tolmo first evoked the staff: there is a total of 10 Investigation and Training Magistrates who have been appointed; 8 are currently active and 2 are about to be deployed, 3 are yet to be sworn in. Moreover, 10 clerks and 20 police officers were also sworn in. He then referred to the Rules of Proof and Procedure which were adopted on May 29, 2018 by the Parliament and is yet to be enacted pending a Decree of Promulgation. A strategy for victims and witness protection has also been adopted, which puts in place measures such as closed hearings and the protection of their identity. He said the rules of procedure of the finalised Court still remain to be adopted by the inaugural session. In terms of training and sensitisation, Tolmo added that capacity building trainings have been set up for judges, clerks and police officers on methods for investigation and the protection of victims and witnesses; there have also been outreach activities to address the very high expectations of victims and explain to explain the court's mandate.

In terms of challenges, Tolmo stated that there is much insecurity when carrying out investigations; precarious financial resources (current budget is only available for one year);

detention facilities of suspects; and reparations for victims. The setting up of the court is a progressive step by step process. He concluded by saying that it is not because things are difficult that we will not succeed, but rather because we do not dare to allow things to become difficult; he suggested we take the change by the sleeve before it takes us by the throat.

Tolmo then made a few remarks on the Special Court and its relationship to the complementarity principle. He said that in CAR, there are 3 interacting courts: the ICC, the Special Court and ordinary courts; all three are competent to judge crimes against humanity, war crimes and genocide. The ICC has pre-eminence over the Special Court, and the ordinary courts have to divest themselves in favour of the Special Criminal Court; there is therefore an inverse complementarity mechanism in place, he pointed out.

**Jackline Nasiwa** went on to make a presentation on the prospects and challenges facing the proposed Hybrid Court for South Sudan. Nasiwa began by providing some background information. In 2005, the civil war ended with Sudan but a comprehensive peace agreement failed to address the crimes though many violations had occurred prior to signing. The South Sudanese leaders decided to have a south to south dialogue in order to avoid division. However, the South Sudanese people had hope that the 2011 referendum would bring sustainable peace, prosperity and guarantee fundamental freedoms in an independent nation. Therefore, the people went to the referendum and agreed to have an independent state, following which a new constitution with a bill of rights was drafted in 2011. Tensions emerged between the political leaders and most areas of disagreement were about nominations by other tribes and the country's natural resources. According to Nasiwa, it was a political disagreement, not a coup.

She evoked the fighting which began in Juba in 2013, mainly in the form of an ethnic killing but there was no agreement as to whether it was a genocide. As a result, many people were displaced and many lives were lost in that conflict. She said that since 2014, the process has been going on but there still is not solution to the South Sudan crisis. She mentioned the outbreak of another fight between the same groups in 2015, with a fragmentation among the population and deep-rooted hatred.

Nasiwa then provided some more information about the establishment of the Hybrid Court. A peace agreement mandated the AU to create a court in consultation, but it required a Memorandum of understanding (MoU) between the South Sudanese government and the AU, as well as legislation. This should have happened by 2015 but she noted that very little had been done so far. The AU had a draft of the MoU which has remained with the government, and now there's a legal challenge and it is not moving anywhere. The process has gone mute. The second challenge she pointed out was that the MoU has been kept as a secret document and civil society has been pushing to be consulted on this document.

She stated that the Court has jurisdiction over war crimes, crimes against humanity and genocide, and therefore complements the ICC Rome statute. She noted that sexual violence is a huge weapon of war; from the outbreak of the fighting to date, more than 100 have experience sexual violence, including some men. The government has denied the rape cases

committed by its forces, asking where these women were otherwise and why they were not filing complaints. None of the senior commanders are being charged and the judges say they cannot proceed unless the victims are brought. Political will to prosecute is absent.

Some of the challenges mentioned by Nasiwa are legal mainly in relation to the fact that the government and the AU have to draft legislation together, while some in government are perpetrators; the lack of political will; and witness protection.

Naiswa said that when the AU started recruiting staff for the Court, there was hope that things were moving forward, but they still have not. She said it was necessary to think beyond the Hybrid Court and peace agreement and that there should be pressure on the government and the AU to move things forward.

**Jehanne Henry** took over and continued with a presentation on the same theme, on the topic of ‘Unilateral Establishment of the Hybrid Court: A New Path for Justice in South Sudan?’

Henry said that all of the work in South Sudan has been justice focused. She said the country had been at war for the past 4.5 years and it is still ongoing, in spite of a declared ceasefire. As Henry recalled, it started off as a political conflict and extended itself beyond. The magnitude is a disaster: large-scale massacres often based on ethnicities, looting, sexual based violence, etc. These crimes are committed by both sides but the government is responsible for more crimes, she noted. She pointed out that the peace agreement has not helped appease the war.

Henry noted that domestic courts are not an option especially because the judiciary lacks independence but also lack capacity. These few military cases have not been transparent. So what about the ICC?, she asked. At that time a hybrid court was already an idea but she noted that it would require a UN Security Council referral upon the demand of South Sudan and that is unlikely to happen. The Hybrid Court, she said, was first agreed in the peace agreement but also earlier by the AU commission. It is, according to her, an innovative idea as it envisions the participation of South Sudan and other African staff overseen by the AU.

However, she did point out a few challenges. She said things are not moving. AU Commission has tried for more than 2 years to engage the government of South Sudan on this. She said the South Sudanese government is blaming the AU, but it rather seems to lack political will. She pointed out that there is a proposal to have a directive unilaterally establishing the Hybrid Court on the basis of Chapter 5 of the peace agreement, which says that the Court shall be established by AU Commission and shall provide guidelines. She therefore does not see any obstacles such a unilateral establishment. One objection to such an establishment is that the government needs to pass legislation, but Henry pointed out there is nothing said on the timing. Most objections, she said, are grounded in the idea of whether this is necessary for justice, arguing that stability must take priority. However, according to her, experience shows that crimes are being fuelled by impunity; this is also true in other parts of Africa. She added that the unilateral creation of the Court by the AU is not ideal, but that the government will be involved in the recruitment process etc.

To conclude, Henry did reiterate that a unilateral court established by the AU is not ideal, but better than the status quo. She said the AU has already invested a lot in South Sudan through a hybrid court, and said it should not go to waste. This form of justice is close to home. She then asked the audience whether they thought this proposal sounded like a viable argument, and whether they thought this course of action could work. She suggested the victims can be galvanised if they see that something is being done.

#### Floor discussion

Moudeina asked Tolmo how he is organising his work at the moment with national and international organisations. He said there was a decision to make an investigation that could guide them through the first procedures. He said they hold consultations with several partners. The investigations have not started yet so there is no trial. In the case of CAR, there are cases currently before the ordinary courts which would interest the Special Court. Whenever they attend trainings he said, they go along with ordinary national judges. With respect to the protection of victims and witnesses, security measures have certainly been taken especially in such a context of high insecurity. Some measures include closed hearings and masking their identities.

Moudeina asked Nasiwa whether a truth and reconciliation commission has been considered as an option, as she thinks this could be a good solution given the various problems they are encountering. Nasiwa said that conditions are somewhat favourable for the establishment of this body, since the consultations are mainly with the government and not CSOs. Each month, they hold a public dialogue or forum, but sometimes permission is not granted. During these meetings, national security forces show up to intimidate the people who are afraid to speak up. The national dialogue is not inclusive of all parties.

Dr Eno gave some clarifications about what the AU has done regarding the Hybrid Court. Although the South Sudanese government has not yet formally submitted a MoU to the AU Commission, he said the AU has gone ahead to recruit key positions. Also, between 2015 and 2016, the AU Commission drew up a group of experts and a proposal was made to have the Court's seat in Arusha to use current staff of the African Court while recruiting. He said he thinks the AU is doing its part, so maybe the AU through its organs can see how to put pressure to make things move forward.

Another question came up regarding the Hybrid Court, about how setting up such a court by the AU would work without the backing of the South Sudanese government? Henry said the AU should be doing a lot more and asked how to galvanise the AU to make this a priority? She asked how long do we wait before we ask them to move forward? There are many scenarios which could be looked at but the question is really what is to be done when there is lack of political will?

#### ***Panel 4: Building Legislative, Investigative, Prosecutorial, and Judicial Capacity in Uganda***

Dr Carla Ferstman chaired this panel and after introducing each of the panellists, she gave the floor to **Sylvia Namubiru Mukasa** to make a presentation on ‘Identifying Gaps in Uganda Legislation Pertaining to Accountability for the Most Serious Crimes of International Concern’.

Mukasa thanked the chairperson and organisers for the opportunity to participate in this meeting. She said Uganda has made much progress in terms of promoting the principle of complementarity, as evidenced by the fact that courts and legislation are in place, though there are gaps in the laws. She said she will look at some of the challenges with the laws.

The Amnesty Act of 2000 and its Amendments concerns those involved in acts of war and grants amnesty to anyone who denounces rebellion. Mukasa pointed to the gaps and challenges in this law, which creates obstacles to the effective protection of fundamental human rights e.g. it focuses on needs of perpetrators and not on those of the victims, it does not even require them to confess or apologise for their crimes; it also does not take into account the nature of crime; the grant of certification of amnesty creates a violation of the duty to respect victims; It is silent on reparative justice for victims, and is not in alignment with transitional justice mechanisms in Uganda.

Mukasa referred to another law, the ICC Act of 2010 which implements the Rome Statute in Uganda. This Act operates under a number of laws such as the Extradition Act or the International Crimes Code Act. However, she pointed out, the law does not provide witness support and protection mechanisms and there is no effective witness protection act. Also, Mukasa stated, there is a lack of transitional justice policy and of a comprehensive legal aid law. As a result, it is civil society that facilitates and fills in this gap.

She concluded by noting that there is a need for a comprehensive law and that the objective of such legislation is to strengthen the justice mechanism.

**Justice Elizabeth Nahamya** then proceeded to do a presentation on ‘Complementarity: Padlocks, Keys, and Bottlenecks in the Criminal Justice System in Uganda’.

Justice Nahamya welcomed the opportunity to address the audience on this dynamic topic, before providing a brief definition of the meaning of complementarity. She said it is apparent from the Rome Statute that there is no clear definition of complementarity. As a result, she pointed to the fact that complementarity has now taken two dimensions: the first, which refers to the admissibility of a case before the ICC in Article 17, and the second dimension which comes from individual definitions people come up with themselves, such as that of positive complementarity. She said one of the definitions of this second dimension she likes is by Prof Carsten Stahn, who defines it from the point of view of the relationship between the national jurisdiction and the ICC as: ‘a managerial concept that organises the relationship between the Court and national jurisdictions on the basis of three cardinal principles: the idea of a shared burden of responsibility, the management of effective investigations and prosecutions and the two pronged nature of the cooperation regime’.

Justice Nahamya then gave some definitions of padlocks, chains and keys which affect the Ugandan justice system. By padlocks she addressed the challenges that the implementation of

the complementarity principle faces. The first one concerns financial difficulties; indeed she noted, the ICD, initially known as the war crimes division, was meant to be set up as a hybrid court similar to the Bosnian War Chamber, with international judges. However, this did not happen because of limited funding or lack of support. She pointed out that the ICD is funded like a regular division of the High Court without taking into account its peculiar needs; for instance, she highlighted the Kwoyelo trial which has greatly been delayed as a result of lack of financial resources. Justice Nahamya also noted additional padlocks, such as the differential ways of sentencing; the ICC Statute provides a difference in sentencing for states and the ICD is free to look into at laws since there is no core position. She also noted retrospectively as a challenge to the prosecution of international crimes because the ICC Act of 2010 does not cover crimes committed before 2002, while the most serious crimes in Northern Uganda were committed between 1986 and 2002, and the ICC Act only came into effect in 2010. She further noted the lack of witness protection, the rotation of judges and registrars, and the absence of legislation on victims' participation and reparation as additional padlocks.

Regarding the keys, Justice Nahamya addressed the attempts made to ensure the effective investigation and prosecution of international crimes in Uganda:

1. The creation of the International Crimes Division (ICD), which is fulfilling the complementarity principle of the Rome Statute and has attached to it the DPP international crimes unit and a police special investigations unit.
2. The enactment of the Rules of Procedure for the ICD in 2016, which notably cover issues of victim participation during all phases of the proceedings.
3. The enactment of pertinent laws such as ICC Act of 2010 and the Geneva Conventions Act which domesticates and criminalises grave breaches of the four Geneva Conventions.
4. Transitional justice policy adopted by the government as a commitment to national reconciliation, peace and justice.

Justice Nahamya then gave a few suggestions of how the complementarity principle could be furthered within the Ugandan judicial system. She mentioned the training of Ugandan judicial officers and greater collaboration between Ugandan and international judges, which will create, according to her, opportunity to exchange experiences and gain knowledge regarding unique methods of problem solving.

She concluded by stating that as we commemorate 20<sup>th</sup> anniversary, Ugandans hope to see this principle of complementarity fully realised.

**Venis Baguma Tumuhimbise** delivered a presentation on the challenges in investigating international crimes in Uganda.

He set the tone for his presentation by providing a definition of international crimes. He noted that prior to 2007, the police had not been investigating international crimes. In 2007 however, an agreement on accountability and reconciliation was signed to create the

international crimes division, which then set the ball rolling for him to start investigating such crimes in 2010.

He said his mandate is to investigate crimes committed by both parties, the LRA and UPDF. During the war, many crimes were reported as ordinary crimes at police stations because people did not know these were crimes of an international nature. He said they would get clues after interviewing captured rebels and victims. He said cases were also opened for investigations after outreach activities, they went on local radio talk shows and people call so they could start investigations.

Some of the challenges raised by Tumuhimbise were that there is a need to train the staff in appropriate investigative techniques or international crimes; he said the DPP went to the ICC in 2011, to observe the Court and see how it was functioning. Other challenges he mentioned, are the difficulties in prosecuting authors of crimes; the failure to get pattern evidence because war police does not operate well; arresting suspects across boarder e.g. Ceaser Achellam was arrested/surrendered in the DRC and they had to go and investigate; also, because most of the incidences investigated occurred when the victims were in internally displaced persons camps, the tracing of victims becomes difficult; the lapse in time also poses a problem because some victims have died whereas others are aged and suffered memory loss; there are difficulties in ascertaining the number of victims since there is no documented account; the varying interests and purposes of NGOs that worked with victims as well as lack of cooperation by NGOs; finally, the crime of terrorism in Uganda is punishable by death, and this brings the problem of extraditing terror suspects.

**Charles Richard Kaamuli** then gave a presentation on the ‘Obstacles to Prosecution of International Crimes in Uganda’.

Kaamuli thanked Evelyn Ankumah for bringing the meeting in Kampala. He then started by mentioning that the Kwoyelo pre-trial ruling will be issued soon, noting that the indictment was a hybrid indictment because it combined international and municipal law. Kwoyelo’s indictment, he added, has 90 counts including rape and attempted murder, with 20 counts for war crimes. The investigations linked him to 8 incidents.

He further added that there is a huge number of witnesses, with some having grown old while others have died, and most being traumatised. He said they have to get social support to help them testify.

The main challenges they face, according to Kaamuli, include financial resources, but he said they are supported by civil society organisations. Also, Kwoyelo’s original indictment did not contain any gender-based crimes because the victims had been married and were reluctant to testify in court as it might hamper their social status. He also mentioned that there is a church which believes the solution is not prosecution but reconciliation, and is therefore influencing the witnesses. Finally, there is a delayed transitional justice policy and so it is unclear where the victims will get reparations from. He said it was necessary to push the government to set aside funds for the victims.

Floor discussion

Bako asked Kaamuli how he intended to handle the witnesses and what measures were taken to protect them? He said most witnesses are safe and that the sexual offences standard of proof is different from those in municipal law e.g. there is no requirement of medical documents.

A question was asked to Justice Nahamya about how the informal politics wanting to pull out of ICC have an incident on the operation of the ICD. She responded by saying that she would expect Uganda to make the ICD a very strong court, and even encouraged the Malabo Protocol Court to establish itself in Uganda. As prosecution how do you determine certain acts especially since there are no witnesses

Kassa asked Tumuhimbise whether they were able to investigate both sides, and whether that is still a challenge. Tumuhimbise replied that though they try to, it is a major challenge because many rebels are still in the bush.

Mirjam Blaak-Sow said she was very proud of what has been done in Uganda regarding complementarity measures, has learned a lot and says Uganda is very much ahead of many African countries. She says she is often in touch with the ICD's registrar as well as Justice Nahamya to get information on what the needs are. She said she will continue to lobby for funds.

A question was asked to Mukasa regarding former LRA leaders who have been given amnesty as well as jobs by the government. She was asked what her take was on that. She said her view is that transitional justice policy comes into play and she said it was necessary to make sure that fairness and inclusiveness is for everyone.

Justice Nahamya was asked how the issue of plea bargaining could be applied for witness protection. She answered that plea bargain is possible on the side of victims' counsel and illustrated her answer with a case of human trafficking in which she had to apply restorative justice. She gave a 12-year sentence to the perpetrator, which is half of what she would have normally given. She however said she is still waiting for the Chief Justice to speak on this situation.

#### ***Panel 5: Situations in Burundi, Ethiopia, Eritrea, Gabon, and Kenya***

This panel was chaired by Sarah Kihika. After introducing the panel and panellists, she gave the floor to **Mathieu Sake** who make his presentation on the situation in Burundi.

Mathieu Sake started by introducing his NGO, Community Association for the Protection of Human Rights (ACPDH), an NGO for the promotion and protection of human rights created in 2002 and approved in Burundi by Ministerial Order No. 530/315 in March 13, 2003. He said their vision is to create a society where the universal rights of individuals are protected and respected; and their aim is to defend fundamental rights and promote social justice. Sake then gave a brief summary of the situation in the country.

Since 2015, there has been a political and social crisis in Burundi, provoked by the candidacy of the president for a 3rd term, which had been deemed unconstitutional by most of the

opposing political parties. A vague of demonstrations against this mandate erupted in Bujumbura and its surroundings, and in other parts of the country, followed by a failed coup on May 13, 2015. These demonstrations resulted in about 500 000 refugees, more than 1,000 murders, over 3,000 people arrested, detained and imprisoned, cases of enforced disappearances continued to be reported, cases of torture, searches followed by arbitrary arrests and imprisonment, etc.

26 April 2015 marked the beginning of humanitarian crisis in Burundi, with large amounts of people fleeing the violence, the majority of whom are women and children who have left the country to neighbouring countries. The international community has attempted to bring light the human rights situation through investigations conducted by a group of 3 UN experts; however their report was strongly rejected by the government and this prevented a final investigation into allegations and prosecution of the perpetrators before competent courts such as the ICC or regional courts.

Following the 2015 crisis, Sake noted, a national dialogue took place that allowed the creation of a dialogue commission established in a non-democratic process because only the members of the ruling party were key stakeholders; this dialogue led to Burundi's withdrawal from the ICC. Also, the Code of Criminal Procedure was revised to include the possibility for police, the SNR and other associated groups to conduct searches at any time.

Sake then asked the question why grave human rights violations are still being committed and yet nothing is being done? He made some recommendations as follows:

- Information on services and protection mechanisms for more access, as well as communication and awareness strategies that aim to prevent violations by targeting their root causes are necessary for fair justice.
- The capacity of institutions as well as community networks to set up protective systems and safe spaces must be strengthened.
- Burundi must restore the right to a universal form of justice by reviewing its withdrawal from the ICC and allowing victims of the 2015 crisis to have access to justice before national courts, those of the EAC community, etc.
- Social inclusion projects for vulnerable people, with a community and participatory approach.
- The establishment of community-based conflict management mechanisms.

Some of the major challenges Burundi faces according to Sake, are lack of funding and partnerships to strengthen justice advocacy and respect for universal principles, and the country's political challenges that require strong mobilisation of the local, regional and international community.

At the end of this regional consultation, Sake said he hoped to find partners who will be willing to collaborate and work with his organisation. Indeed, he noted, the need is huge in terms of advocacy, resource mobilisation as well as the strengthening of organisational and

institutional capacities, project financing and activities in the field of human rights and justice in Burundi.

**Getahun Kassa** proceeded to bring some perspectives from Ethiopia regarding complementarity.

Kassa started by giving the previous and present experience of response to international crimes in Ethiopia. The 1995 Constitution of the Federal Democratic Republic of Ethiopia made explicit provision that crimes of torture, crimes against humanity, disappearances and summary executions cannot be barred by statute of limitation and may not be commuted by Amnesty or Pardon. He however noted that although Ethiopia actively participated in negotiating the Rome Statute, it eventually refused to ratify it due to impartiality concerns among other reasons. Kassa also noted that Ethiopia is among the African countries that actively promote the idea of mass pull out from the Rome Statute and increasingly became a suitable destination for the ICC fugitive Sudanese President Omar Hassan Al Bashir.

Although Ethiopia ratified a handful of international human rights treaties and undertook legal reform through its Penal Code to criminalise genocide and war crimes, Kassa remarked that the fact that Ethiopia is a non-party to the ICC Rome Statute and not a signatory to the Malabo Protocol, creates a significant gap in its legal framework that was ought to deal with grave crimes.

Ethiopia managed to conduct a very extensive trial which took 18 years, with over 1000 people convicted in absentia. In spite of this, Kassa pointed to the various weaknesses of the trial e.g. the huge delay of 18 years. Also, victims' participation was very minimal and there were no reparations for them. As well, one of the objectives of this trial was to prosecute and document what had happened, and this was not done, Kassa noted.

He noted some of the challenges the country faces regarding the complementarity principle:

- There is almost no discussion about the fight against impunity in Ethiopia.
- Ethiopia is not a party to the ICC Rome Statute and neither a signatory to the Malabo Protocol.
- Lack of political will to fight against impunity.
- The national judiciary as things stand now does not seem to have the much-needed independence and capacity to deal with international crimes.
- The existing national legal framework is not adequate to deal with the evolving principles and scope of international criminal law.

Kassa concluded by stating that Ethiopia cannot continue ignoring the impunity and that complementarity in the country is yet to gain ground. He said it has a lot to learn from Uganda.

**Daniel Mekonnen** gave his presentation on the situation of gross human rights violations in Eritrea. He began by highlighting a report of a commission of inquiry mandated by the UN Human Rights Council published in June 2016, which depicted a picture of complete lack of respect of the rule of law and officially accused the country of committing a broad category of crimes against humanity. He then gave some background information about the country before the relevance of the principle of complementarity for gross human rights in Eritrea.

He remarked that Eritrea is a small country of about 5 million people which got its independence in 1991 after breaking away from Ethiopia, following a bloody liberation war of 30 years. Ever since, it has been ruled by only one political party, People's Front for Democracy and Justice (PFDJ). He further added that during the first 7 years, there was a relatively peaceful but sluggish transition to a much-anticipated democratic order that never materialised almost three decades now since the country's independence. Between 1998 and 2000, a border conflict with Ethiopia erupted and was officially resolved in 2002, though a number of residual matters remained unresolved. Effectively, Mekonnen added, the country has been ruled under unofficial state of emergency under the pretext of the unresolved border conflict with Ethiopia. This had drastic consequences on the enjoyment of fundamental rights and freedoms, leading to a complete breakdown of the rule of law, including widespread practice of detention without trial and enforced disappearance (with more than 10 000 victims only on these categories of violations).

Mekonnen then went on to talk about the ongoing situation of gross human rights violations in the country, recorded by the UN Human Rights Council following intense investigations which started from July 2012. In its second and most important report of June 2016, the Commission of Inquiry said that there are reasonable grounds to believe that crimes against humanity have been committed in Eritrea since 1991 with the knowledge or acquiescence of high-ranking Eritrean government officials. The catalogue of crimes against humanity documented include: enslavement, imprisonment, enforced disappearance, torture, persecution, rape, murder and other inhumane acts. The report, he added, also identified some key government entities and high-ranking officials as the most responsible individuals or suspects for crimes against humanity in Eritrea.

Mekonnen further pointed out to the country's state of judicial independence which, according to him, portrays some unique attributes of abnormality that make it a bizarre example of a state in the modern history of nation-states; he made reference to the fact that Eritrea is the only country in the world which neither has a working constitution nor a functioning parliament. He further remarked that the judiciary is the most enfeebled of all state institutions and can be considered as non-existent and as such, with the most responsible individuals or suspects as the helm of political power, the only viable option for the prosecution of crimes against humanity committed in Eritrea would be foreign national courts through the application of the principle of universal jurisdiction given that Eritrea is not a party to the Rome Statute of the ICC. He finally opined that the matter may also require, to the extent possible, a robust action on the part of the AU (the highest political organs of the AU) based on the newly introduced concept of 'intervention' defined by Article 4(h) of the Constitutive Act of the AU. Mekonnen finished his presentation by emphasising that in order

to entrench the rule of law as a bulwark against insecurity, poverty, capricious and arbitrary government, there is a need to immediately put a halt to the on-going situation of crimes against humanity in Eritrea.

**Paulette Oyane-Ondo's** presentation was read on her behalf by Jose Dougan-Beaca, as follows:

On the occasion of the 20<sup>th</sup> anniversary of the International Criminal Court (ICC), I am greatly honoured to have been invited by Africa Legal Aid to participate in this conference on: 'Emerging trends on complementarity: Consultation with Stakeholders from Central and Eastern Africa', to present the situation in Gabon.

We will first look at the process Gabon underwent in recognising the ICC, which will then lead us to examine the domestication of international crimes legislation by Gabon (I). This will allow us to get a better understanding of how complementarity is applied between Gabonese courts and the ICC (II).

#### I-On the recognition of the ICC's jurisdiction by Gabon

On December 22, 1998, the Gabonese state signed the Rome Statute creating the International Criminal Court. It ratified it two years later, on September 20, 2000.

#### II- On the domestication of international crimes by Gabon

According to the provisions of Article 5 of the Rome Statute, the ICC has jurisdiction over the following crimes: the crime of genocide; crimes against humanity; war crimes and the crime of aggression. All these crimes are called 'international crimes'.

a) -The crime of genocide appears for the first time in the Convention for the Prevention and Punishment of the Crime of Genocide of December 9, 1948. This crime of genocide was taken over by Article 6 of the Rome Statute.

The question is whether Gabon provides for and punishes the crime of genocide within its national legal order.

Genocide is indeed a criminal offence. The only instrument in Gabon that provides for and punishes criminal offences is the Criminal Code, adopted by Law No. 21/63 of 31 May 1963. However according to the Gabonese Criminal Code, no provision punishes the crime of genocide.

b) Crimes against humanity are a concept, a notion. It was not provided by a specific text. It was during the Nuremberg trial in 1945 that this notion found its first official legal codification. The ICC subsequently broadened its definition by adapting it to a multiplicity of crimes that target humanity. This offence is provided for by Article 7 of the Rome Statute.

It is important to ask whether crimes against humanity are included in the national legal order.

The answer is no. In Gabon, crimes against humanity are neither provided for nor punished by any text. Therefore, crimes against humanity do not exist in Gabonese domestic law.

(c) War crimes are provided for by the Geneva Convention of 12 August 1949 and its Additional Protocol of 1977. They are reproduced in Article 8 of the Rome Statute. War crimes are multiple, fall into several categories of crimes and are provided for in various conventions. Gabon has only ratified one category of war crimes contained in Geneva Convention III pertaining to the treatment of war prisoners. This ratification took place on February 26, 1965. Other war crimes are not recognised by Gabon.

The question to ask is whether war crimes are punished under Gabonese law. No such legal provision exists under Gabonese criminal law.

(d) The crime of aggression, also called a crime against peace, falls under the text of United Nations General Assembly Resolution 3314 of 14 December 1974. In the Rome Statute, this crime is cited in the Article 5.

Has Gabon domesticated the crime of aggression?

Article 61 of the Criminal Code provides for the crime of aggression. However, Gabon does not view the crime of aggression in the same way the ICC does. As an international crime, the crime of aggression is defined by Article 1 of United Nations General Assembly Resolution 3314 of 14 December 1974 as: 'The use of armed force by a State against the sovereignty, territorial integrity or political independence of another State, or in any other manner inconsistent with the Charter of the United Nations'. In Gabon, the crime of aggression is understood as: 'The act of a Gabonese national whereby he maintains intelligence with a foreign state in order to engage them in carrying out hostilities against Gabon or by providing them with the necessary means, either by facilitating the penetration of foreign forces on Gabonese territory, or by undermining the loyalty of the armed forces, or in any other way'.

It is therefore clear that Gabon does not have the same understanding of the crime of aggression as the ICC does.

All the above clearly demonstrates the lack of domestication of international crimes legislation by Gabon, which brings us to look at the complementarity principle in relation to the Gabonese justice system.

### III- On the principle of complementarity

The complementarity principle that has brought us here together in this beautiful African country of Uganda, means that every country, as a sovereign state, must be able to deliver justice and deal with all the crimes that are committed against the country itself as an entity, as well as against citizens or groups of citizens of the country. The ICC will only act if the country is unable to cope with and try these international crimes. This is what we refer to as the complementarity principle.

Without it being necessary to ask whether the ICC can intervene in Gabon in the name of complementarity, we need only look at what happened during the presidential elections of August 2016. These elections were strongly contested and the country has been shaken by various episodes of violence resulting in several deaths. The Gabonese State did not deem it necessary to open an investigation into these crimes, so that public opinion would take the measure of the reality of the situation. The Gabonese government referred the situation directly to the ICC.

Therefore, it clearly appears from this approach of the Gabonese State that the complementarity principle is applicable in Gabon.

**George Kegoro** delivered the final presentation on this panel entitled ‘Kenya, after the Handshake: A Civil Society Perspective’.

Kegoro began by giving some background information on the handshake which took place between Uhuru Kenyatta and Raila Odinga on March 9, 2018.

In August 2017, Kenya held a presidential election but, in an unprecedented development, the Supreme Court nullified the results of the election, having established that ‘the presidential election was not conducted in accordance with the constitution, rendering the declared results invalid, null and void’. The Court ordered new elections within 60 days in conformity with the Constitution. The period leading to the repeat elections witnessed a significant deterioration in the political atmosphere of the country. There was violence in many parts of the country, especially the strongholds of the political opposition. In reaction to the annulment of the presidential results, the incumbent president, Uhuru Kenyatta, and members of his party embarked on a campaign of severe vilification of the Judiciary. As part of this campaign, the political leadership characterised the justices of the Supreme Court who had voted for the annulment of the election as “wakora” (Swahili for ‘crooks’ or ‘criminals’), and, defying the security of tenure that the justices enjoy, commenced removal proceedings against them.

Amid massive confusion and significant amounts of violence in parts of the country, where voting failed to take place, the repeat presidential election saw a reduced voter turnout, 38 per cent compared to – percent in the initial election. The incumbent president was declared winner with 98 per cent of the vote, a victory that was viewed as vacuous, given the circumstances under which it happened. On 30th January 2018 Odinga declared himself the ‘people's president’ at a controversial ‘swearing-in’ ceremony in Nairobi, witnessed by thousands of his supporters, despite a government warning that it amounted to treason. The swearing in set the stage for what would have been a power struggle between Kenyatta and Odinga, and which the handshake now abrogated. Kegoro said this handshake was done when the country was on the verge of being torn apart and it served to bring a sense of calm to the situation; it had the consequence of removing a sense of crisis. Kegoro further noted that in the previous mediation in 2007, the sense of crisis kept everyone true to the commitment to be addressed.

Kegoro then went on to identify the problems underlying this handshake.

The first problem he pointed out is there is no definition of the crisis Kenya is trying to address; the substance of their agreement remains work in progress. While there was another significant amount of violence accompanying that election, he remarked that Kenyatta maintained this election fair and square.

The second problem, he noted, is that there is no shared idea, no process clarity. Mystery still surrounds the process by which the settlement between Kenyatta and Odinga was reached unlike in 2008, when the African Union and the international community intervened to establish an elaborate mediation process, which ensured that nothing that was ever discussed or agreed on would be a surprise.

The third, is about the personal position of key political actors. He noted that there might be no demonstrable benefit for the elites in the Kenyatta and Odinga camps and the two Kenyan leaders are likely only looking at the handshake, not at their personal ambitions.

The fourth problem, Kegoro noted, was that in 2007 the crises shocked the country just as it shocked the world, but now the public has become cynical about what is going on and so they know not much will be going on following this hand shake.

Finally, Kegoro made reference to the post-election violence which took place in 2007, and which has caused deep seated hatred along political lines just waiting to be reactivated. He said Kenyans would just have to wait to see what happens next.

#### Floor discussion

Tolmo asked Kegoro how many years has it been since these two rivals have not had a handshake, and whether this handshake continue. Another question was also asked about what it is that led the two rivals to shake hands and calm down the situation: was it about their own interests? Kegoro said Kenyans do not know what led to the handshake but because of the economic crisis there was much pressure, and a need for appeasement; he remarked that it was threatening to marginalise both Odinga (who does not have the necessary power to maintain control over the part of the country he was controlling) and Kenyatta (who needed legitimacy to support his candidacy), so basically this was the basis on which to remain in control. He said it did not bring peace but that it did bring calm without going to the core of the problems. He added that Kenyans were trying to establish alternative leadership because the current one is totally bankrupt.

Tolmo asked Mekonnen whether in Eritrea, a constitution is in place as well as a constitutional court. Mekonnen said Eritrea does not have a constitution; a process had begun but the government did not put it into effect. He added that there is also no constitutional court and no recourse to justice in case of arbitrary detention.

Justice Nahamya asked Kassa why Ethiopia chaired the AU while it is neither signatory to the ICC nor to the Malabo Protocol. On the situation in Eritrea, she noted that it is interesting but asked whether it only shows a failed state. She asked Sake what was being done in Burundi at the national level? Kassa said that in Ethiopia there is little discussion about

impunity because it has the harshest approach to civil society. Sake observed that Burundi had national courts which were not equipped to prosecute crimes against humanity, and that the capacity of judges had to be strengthened.

***Panel discussion: The Bemba Acquittal, and What it Means for International Criminal Justice***

**Evelyn Ankumah** chaired this last panel on the Bemba acquittal. She recalled that on 8th of June 2018, by a 3-2 majority, the Appeal Chamber of the ICC acquitted Jean-Pierre Bemba Gombo from the charges of war crimes and crimes against humanity. The majority, namely Judges Van den Wyngaert, Morrison and Eboe-Osuji, decided to reverse the 2016 decision of the Trial Chamber that Bemba was responsible for crimes his subordinate soldiers committed in the CAR. Judges Monageng and Hofmanski dissented.

She noted the varying responses to this decision from legal practitioners and academics, stating that there appeared to be more at stake than the classic, simple question of 'guilty or not guilty'. Ankumah further made reference to the separate concurring opinions, and the dissenting opinions which reveal widely diverging views of the judges, on a number of legal issues that have a potentially great impact on the functioning of the Court, and its capability to deliver justice. It appears, in her view, that the Judges have wholly different views on how they perceive their task as judge, and the mandate of the entire Court. The bones of contention concern important issues, she said.

Firstly, how broadly may charges be, or how must they be defined? The majority requires much more specificity than the Trial Chamber and the dissenting Judges do. Second is the standard of review. To put it simply, how does one apply the notion of 'beyond a reasonable doubt'? She opined that the Trial Chamber was satisfied when the Prosecution submitted evidence in support of the best plausible explanation of what actually happened in the case at hand and the role of the accused. The Majority of the Appeals Chamber, however, seems stricter and demands evidence that excludes any other explanations.

She raised a third issue, which is related to the second one and concerns the relationship between the Trial Chamber and the Appeals Chamber. When it comes to factual findings, how much deference should the Appeals Chamber show vis-à-vis the findings of the Trial Chamber? Cases before the Appeals Chamber do not entail an entire re-trial, but, in essence, how grave must an error of a Trial Chamber be for it to be reversed by the Appeals Chamber?

The Trial Chamber found Bemba to be liable as a commander for crimes his subordinates committed because he failed to take the necessary and reasonable measures within his power to prevent or repress the commission of the crimes. The Appeals Chamber disagreed. As regards command responsibility, which in many ICC cases is so relevant, how much control should the commander have over the acts of his subordinates, asked Evelyn Ankumah.

She said these are crucial questions or issues for international criminal justice which force us to think about the question whether we should apply in the field of international criminal

justice, the same standards of evidence, the rights of the accused, and more generally the rule of law, as we do in national criminal law.

Ankumah made a final comment that some legal commentators are of the view that the Appeals Chamber's decision in the Bemba case partially departs from the case law of international criminal law as developed in previous ICC cases, and by other tribunals. If this is so, they opine, is it then not very problematic that such a change in jurisprudence is only backed by a narrow majority of 3-2? Does this not undermine the legitimacy of the decision, they ask? In fact, is the Bemba decision not a reason to rethink the desirability of the system of majority decisions, concurring and dissenting opinions?

As Chair, she then introduced the panelists and gave the floor to Njonjo Mue.

### **Njonjo Mue**

Mue said the Bemba case represented the first conviction of sexual violence as a war crime. He remarked that the Appeals Chamber's decision is surprising because this case has been before the Court for the past ten years. The appeal majority was based on two main grounds:

The conviction exceeded the charges: Mue noted the judges' decision which stated that what Bemba was convicted for, was not what he was charged for. Also, the majority in the Appeals Chamber say the charges have been framed incorrectly. The Office of the Prosecutor ascertained certain facts that they could not prove, similarly to what happened in the Kenyatta case.

Issue of command responsibility: He further noted that the Appeals Chamber was divided on the definition of 'all reasonable measures'. The majority said this means 'all means at their disposal at the time', but minority says this is selective. The majority said Bemba was a remote commander and that this not only shelters Bemba, but also those who sent cross border troops.

### **Paul Ngeleka**

Ngeleka began with a disclaimer, saying he dared to believe that he was asked to participate in this panel not because he is Congolese, since his analysis will be one of a lawyer and not of a Congolese.

He said Bemba was the first to be convicted by the Trial Chamber for the crimes of rape and looting. During his appeal, Bemba advanced 6 grounds of appeal but he said he will only dwell on the 2 main grounds raised by the appeals chamber:

- The charges against Bemba
- Necessary and reasonable measures for crimes committed by Bemba's troops: he noted that the Appeals Chamber confirmed that Bemba's appeal was receivable. Bemba was far from the area where the crimes were committed. They say he was away from the crime scene and

could not have committed the crimes. As Ngeleka further noted, the Appeals Chamber said that the Trial Chamber did not take into account an important piece of testimony. It also considers that the Trial Chamber did not empower persons to investigate and made several errors that vitiated the decision.

He said he thought the judges did a good job. While he said he understood the disappointment of the victims, the question according to him is why the prosecutor did not pursue direct perpetrators such as Jean Felix Patassé?

### **Alain Tolmo**

Tolmo began by stating that it would be odd for a prosecutor to comment the decision of an independent international court. Indeed, as he noted, case law is an informal and indirect source of law. He recalled the criminal law principle of the individual nature of penalties; we can have constant case law and then witness an overturn.

Compared to the situation in CAR, he remarked that in the Bemba case, several victims were heard and organised, especially the victims of sexual violence. The mandate of the ICC is different from that of the Special Criminal Court, even though the latter is derived from the principle of complementarity.

He concluded by saying that with this decision, an investigating judge can examine both incriminating and exonerating facts and as for acquittals, there have always existed.

### Floor discussion

Sake asked Ngeleka whether some of the state officials were being investigated. Ngeleka said he wished to answer Sake in private because his answer is linked to his first presentation. But he added that in the Bemba case, the judges gave clear legal arguments and there are no political considerations which might have influenced the decision.

Several other comments were made as to what the essence of this really is for victims. Mue said such an appeal's ruling was rather unfortunate. Tolmo added that when we are tried, we either win or lose and that the result had to be accepted.

Evelyn Ankumah heartily thanked all the panelists for their presentations, and all participants for being engaged till the very end. She thanked partner organisations for their support and then declared the meeting officially closed.