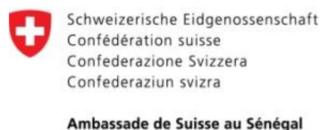
AFRICA LEGAL AID

Seminar Report on Complementarity, the Habré Trial and the Evolution of Universal Jurisdiction

Dakar, Senegal

30 May - 1 June 2016



A full house.

Prosecutor Mbacke Fall of the Extraordinary African Chambers (EAC) and Abdou Khadre Lo, Director for Africa, Access Partnership.

FEEDBACK AND COMMENTS

C'est avec un grand intérêt que j'ai suivi les travaux du séminaire et participé à un panel sur la paix la justice et le concept d'immunité. Les débats étaient riches et enrichissants parce que de haute qualité au regard des intervenants et des participants. Je vous prie de recevoir mes félicitations et mes sincères remerciements pour m'avoir invité à ce high level meeting.
Bonne continuation
Bien cordialement à vous

Mbacké Fall, Procureur général près les Chambres africaines extraordinaires

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*Je voudrais, au nom de son Excellence **Macky Sall**, Président de la République du Sénégal, de son gouvernement et de moi-même vous remercier et vous féliciter d'avoir choisi le Sénégal pour l'organisation de cette importante manifestation qui a connu un succès retentissant.*

Je vous renouvelle, en outre, toute ma disponibilité et mon engagement à vos côtés dans le cadre votre noble mission de défense des valeurs humaines et de promotion de la justice pénale internationale.

Dans l'attente de la réception du rapport final de vos travaux, je vous prie, madame la Directrice Exécutive, de croire à l'assurance de ma parfaite considération.

Sidiki Kaba, Minister of Justice of Senegal and President of the Assembly of States Parties (ASP) to the International Criminal Court (ICC)

C'est moi et le Consortium de sensibilisation sur les Chambres africaines extraordinaires qui vous remercions chaleureusement d'avoir organisé à Dakar cette conférence de grande qualité qui a brillamment réuni la communauté de ceux qui souhaitent que le droit prévale, pour les populations comme pour les mis en cause, en Afrique et dans le monde.
Un grand merci !

Franck Petit, Expert en Communication, Chef d'équipe, Consortium de sensibilisation sur les Chambres africaines extraordinaires (CAE)

Chers tous
Le Forum du Justiciable vous remercie également de l'avoir convié à ce séminaire instructif et espère éventuellement collaborer avec AFLA.
Bien cordialement.

Babacar BA, Juriste consultant, Président Forum du Justiciable

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The Prosecutor General and I wish to thank you again for the wonderful seminar in Dakar. We were very honoured to be among your guests and we have learnt a lot during these three days.
We wish you full success in your future endeavours and hope to have the pleasure of meeting you again soon.
Kind regards,

It was a great pleasure for me to participate in the conference.
Looking forward to reading the report,
Kind regards,

Chloé Gaden-Gistucci, Avocate, Bureau du Procureur Fall aux Chambres Africaines Extraordinaires

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Bonjour je tiens à vous remercier de m'avoir invité à ce Séminaire qui était enrichissant sur le plan personnel. Parce qu'il m'a non seulement permis de rencontre des personnes ressources dans le cadre de ma Thèse de Doctorat en droit international pénal sur la question de l'obligation de coopération des Etats africains avec les juridictions pénales internationales. Mais également les interventions des uns et les autres m'ont permis d'actualiser certains aspects déjà développés.
Bonne réception.

Ibrahima Mandiang, Doctorant en Droit Public et Sciences Politiques, UCAD, Sénégal

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Just wanted to quickly congratulate you on an excellent conference and to say thank you for the invitation. It was truly a special moment to be present for the handing down of the Habre judgment.
I look forward to you seeing you again soon.
Cheers!

Regards,

Manuel Ventura, Director, The Peace and Justice Initiative, The Hague

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I did enjoy attending your event in Dakar and participating in the final hearing of the historic Habre's trial. I made several useful contacts at the conference and have been thinking about what it will take to have mixed tribunals in Congo, DRC to enable the numerous survivors of violence to obtain justice there. Thanks so much for organizing this conference and getting us to reflect on issues of international justice in Africa. I won't be a stranger and will be sure to refer some of the Congolese activists I work with to your office while visiting The Hague.
All best wishes,

Rosalie Nezien, Program Officer, American Jewish World Service, New York

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I was proud to attend such a successful conference, a real success. I reported it to the Office. Thank you again for your confidence.

All the Best,

Amady Ba, Head of International Cooperation, Office of the Prosecutor (OTP), International Criminal Court

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Thank you for the letter, and thanks to Ms Ankumah and to everyone whose hard work made the conference a success. I look forward to reading the report.

Best regards,

Todd Buchwald, Head of Office, Office of Global Criminal Justice, US Department of State

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Thank you AFLA, in particular Ms Ankumah, for the invitation and hospitality. It's always a pleasure to collaborate with your esteemed organization. I look forward to a mutually beneficial collaboration in the immediate future.

Professor Nsongurua Udombana, Professor of International Law, Babcock University, Nigeria

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Dank voor je aardige bericht. Historische dagen waren het. Jullie doen belangrijk werk en ik vond het een eer daar deel van te mogen uitmaken. Al was het maar bescheiden.
Ik zie uit naar jullie rapport.
Veel succes.
Met vriendelijke groet,

Theo Peters, Netherlands Ambassador to Senegal

It has been a great pleasure and a highly informative experience to represent JRR at the Seminar in Dakar. I was impressed by the high-level of the panelists and speakers and by the perfect organization of the event. In the name of JRR, I would like to thank you for having invited us and I'm looking forward to being part of future events organized by AFLA.

Sincerely Yours,

Samuel Emonet, Director of operations, Justice Rapid Response

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Très sensible aux termes de votre aimable lettre, c'est à mon tour de vous réitérer à la fois mes remerciements très sincères pour votre généreuse invitation à participer aux travaux du Colloque international sur la compétence universelle que vous venez d'organiser à Dakar ainsi qu'aux activités afférentes, dont, notamment, la séance historique du verdict du Procès Hissene Habré, et mes félicitations pour la haute teneur des débats qui s'y sont déroulés sous votre égide, particulièrement éclairants sur la problématique en objet, ce dans une atmosphère d'heureuse convivialité.

Aussi c'est avec grand intérêt que je prendrai connaissance des documents pertinents issus de ces échanges et que je ne manquerai pas de m'informer dorénavant des activités ultérieures déployées par votre Association, au service de l'Etat de droit en Afrique et dans le Monde.

En espérant avoir le plaisir de vous retrouver, à la Haye, à Paris ou sur le Continent,
Avec toute ma considération,

Christine Desouches

Ce fut un plaisir. C'est moi qui vous dit merci pour m'avoir permis de participer à cette importante rencontre. Je suis toujours disponible. Et n'hésite pas à m'inviter pour d'autres réunions. Je suis également prêt à être panéliste durant vos prochaines rencontres si la thématique s'y prête

Encore merci et FELICITATIONS ; CONGRATULATIONS ;

Ali Ouattara, Ivorian Coalition for the ICC

This Colloquium was so good! Really! Congrats again.

Saskia Ditisheim, President, Avocats Sans Frontieres Suisse

I have seen the e Reporter and it looks like it was a fantastic seminar you had. The Habre case puts Africa on a pedestal and we are all so proud of ourselves. For some of us it is such a vindication since at the African Commission we fought the war with NGOs and victims to ensure that he finally had his day in Court.
Congratulations on the successful seminar.

Judge Sanji Monageng, Appeals Division, International Criminal Court

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Evelyn A. Ankumah, Executive Director, Africa Legal Aid (AFLA) and Jacqueline Moudeina, Chadian Association for the Promotion and Defence of Human Rights (ATDPH). Moudeina was a Voice for Victims in the Habré trial.

Reed Brody, left, was an immense support to Chadian victims and advocates in the Habré case and Professor Robert Dossou, former Special Representative of the Chairperson of the African Union Commission for the Habré Trial.

Evelyn A. Ankumah; Sidiki Kaba, Minister of Justice of Senegal and President of the Assembly of States Parties (ASP) to the ICC; Christine Desouches, Professor of Legal and Political Sciences, University of Paris I; and Professor Robert Dossou.

Ambassador Mirjam Blaak-Sow of Uganda; Manuel Vergara, Head of Legal Advisory Section, Baltasar Garzon International Foundation (FIBGAR) and Baltasar Garzón, 'the godfather of universal jurisdiction'.

OVERVIEW

OPENING SESSION

Chaired by Aminata Fall Cisse, Director of Cabinet, Ministry of Justice of Senegal, representing H.E. Sidiki Kaba, Minister of Justice of Senegal, President of the Assembly of States Parties (ASP) to the Rome Statute of the International Criminal Court (ICC)

Introduction of theme of Seminar by Evelyn A. Ankumah, Executive Director, Africa Legal Aid (AFLA): *Africa and the Evolving Regime of International Criminal Justice*

George Kegoro, Executive Director, Kenya Human Rights Commission: *Civil Society as Partners in International Criminal Justice*

Honourable Baltasar Garzon, President, Baltasar Garzon International Foundation (FIBGAR), Former Investigating Judge of Audiencia Nacional, Madrid, Spain. – Opening Address: *From Pinochet to Habré: The Past, Present, and Future of Universal Jurisdiction*

Professor Vincent O. Nmehielle, Legal Counsel, African Union (AU) Commission. – Keynote Address: *The Interface Between Peace and International Criminal Justice in Africa*

Networking Reception, hosted at the Netherlands Residence by H.E. Theo Peters, Netherlands Ambassador to Senegal

Don Ferencz, Visiting Professor, Middlesex University School of Law, Convenor, Global Institute for the Prevention of Aggression. – Keynote Address: *Criminalizing the Illegal use of Armed Force as a Crime Against Humanity*

Emerging Trends on Complementarity

Chaired by Professor Robert Dossou, Special Representative of the Chairperson of the African Union Commission for the Establishment of the Extraordinary African Chambers (EAC)

Reed Brody, Counsel and Spokesperson, Human Rights Watch: *The Habré Case as an Instance of Successful Complementarity*

Judge Elizabeth Nahamya, Judge and Former Deputy President, International Crimes Division of the High Court of Uganda: *Ongwen and other Examples from Uganda*

Roland Amoussouga, Head of Integrated Office, United Nations Multidimensional Stabilization Mission in the Central African Republic (MINUSCA): *The Special Tribunal for the Central African Republic*

International Criminal Justice from the Victim's Perspective

Chaired by Dior Fall, Human Rights and International Justice Expert

Jacqueline Moudeina, Executive Director, Chadian Association for the Promotion and Defence of Human Rights: *Victims' Participation Before the Extraordinary African Chambers*

Jeanne Sulzer, Senior Legal & Policy Advisor, Amnesty International: *Reparations for Victims before the Extraordinary African Chambers*

Kim Thuy Seelinger, Director, Sexual Violence Program, Human Rights Centre of the University of California Berkeley School of Law: *Fast Friends, Quiet Friends: Reflections on Filing an Amicus Brief on Crimes of Sexual Violence in the Habre Case*

Panel Discussion – Reflections on Peace, Justice and Immunities

Chaired by Mouhamed Kebe, Lawyer, Managing Partner of Geni & Kebe

Discussion by Panelists:

Hon. Mbacke Fall, Prosecutor, Extraordinary African Chambers (ECA)

Stella Ndirangu, International Justice Program Manager, Kenya Section of the International Commission of Jurists (ICJ - Kenya)

Don Deya, Chief Executive Officer, Pan African Lawyers Union (PALU)

Amady Ba, Head of Cooperation, Office of the Prosecutor (OTP), International Criminal Court (ICC)

Manuel Ventura, Director, The Peace and Justice Initiative, The Hague

Evolution of Universal Jurisdiction

Chaired by Judge Demba Kandji, Supreme Court of Senegal

Professor Nsongurua Udombana, Professor of International Law, Babcock University, Nigeria: *The Practice of International Criminal Justice in Africa*

Manuel Vergara, Head of Legal Advisory Section, Baltasar Garzon International Foundation (FIBGAR): *Attacks on Universal Jurisdiction: Myths and Lies*

Angela Mudukuti, International Criminal Justice Lawyer, Southern Africa Litigation Centre (SALC)*: Universal Jurisdiction and other Manifestations of Complementarity: The Zimbabwe Torture Case and the al Bashir Debacle*

The Role of the Defence in International Criminal Justice

Chaired by Helene Cisse, International Criminal Lawyer on the List of Counsel before the International Criminal Court

Professor Mia Swart, Professor of International Law, University of Johannesburg, South Africa*: The Defence as a Critical Feature for the Legitimacy of Criminal Justice*

Saskia Ditisheim, President, Avocats Sans Frontieres, Switzerland: *Does the Defence Matter in International Criminal Trials: The Hissene Habré Case*

The Future of International Criminal Justice in Africa

Chaired by Ambassador Mirjam Blaak-Sow, Ambassador of the Republic of Uganda to the Benelux Countries and the EU

Professor Robert Dossou, Special Representative of the Chairperson of the African Union Commission for the Establishment of the Extraordinary African Chambers*: The Extraordinary African Chambers (EAC): its Legacy and Contributions to International Criminal Justice in Africa*

David Deng, Chief Executive Officer, South Sudan Law Society (SSLS)*: The Hybrid Court for South Sudan: Prospects for Justice and Accountability in the Immediate Aftermath of Conflict*

Professor Charles C. Jalloh, Florida International University College of Law: *The African Criminal Court*

Gilbert Maoundonodji, Head of Outreach Program on the Extraordinary African Chamber in Chad: *African Union Policy towards International Humanitarian Law*

Summary of the Seminar

The theme of the Seminar was 'Complementarity, the Hissene Habré Trial and the Evolution of Universal Jurisdiction'. It was held in Dakar from 30th May to 1st June 2016.

On the morning of the 30th May, the participants were transported to the High Court to observe first hand the delivery of the judgment in the Hissene Habré trial. This was followed by the opening session of the Seminar in the afternoon. The Seminar was then separated into 6 themes, which were intensively discussed over the next two days.

The first three panels, 'Emerging Trends on Complementarity', 'International Criminal Justice from the Victims' Perspectives' and 'Reflections on Peace, Justice and Immunities' were held on the 31st May. At the end of the three panels, participants were treated to a dinner cocktail by the government of Senegal during which H.E. Sidiki Kaba, Minister of Justice of Senegal and President of the Assembly of States Parties (ASP) to the International Criminal Court addressed participants.

The following three panels, 'Evolution of Universal Jurisdiction', 'The Role of the Defence in International Criminal Justice' and 'The Future of International Criminal Justice in Africa', were held on 1st June.

The list of speakers included Aminata Fall Cisse, Evelyn A. Ankumah, George Kegoro, Honourable Baltasar Garzon, Professor Vincent O. Nmehielle, Don Ferencz, Professor Robert Dossou, Reed Brody, Judge Elizabeth Nahamya, Roland Amoussouga, Dior Fall, Jacqueline Moudeina, Jeanne Sulzer, Kim Thuy Seelinger, Mouhamed Kebe, Hon. Mbacke Fall, Stella Ndirangu, Don Deya, Amady Ba, Manuel Ventura, Judge Demba Kandji, Professor Nsongurua Udombana, Manuel Vergara, Angela Mudukuti, Helene Cisse, Professor Mia Swart, Saskia Ditisheim, Ambassador Mirjam Blaak-Sow, David Deng, Professor Charles C. Jalloh, and Gilbert Maoundonodji.

Hereinafter follows a detailed report on each of the above themes, as discussed by the speakers. This seminar was undoubtedly a resounding success, and AFLA looks forward to hosting the next one. AFLA extends its gratitude to the Planethood Foundation, the Baltasar Garzon International Foundation (FIBGAR), the Kenya Human Rights Commission, the Government of Senegal, the Netherlands Ministry of Foreign Affairs, the Swiss Embassy in Senegal, the Organization Internationale de la Francophonie, Trust Africa, Codesria, Access Partnership, and Consortium de Sensibilisation sur les Chambres Africaines Extraordinaires for their cooperation in the Seminar. AFLA also thanks all the Seminar's participants for their valuable input and for making the Seminar a successful one.

Report on the Seminar on Complementarity, the Hissene Habré Trial and the Evolution of Universal Jurisdiction

AFLA arranged for accreditation for participants to attend the delivery of the judgment in the Hissene Habré trial on the morning of the first day of the Seminar, 30th May. The Extraordinary African Chambers (EAC) sentenced Habré to life imprisonment, finding him guilty of crimes against humanity, war crimes, and torture committed in Chad between 1982 and 1990. He was also personally found guilty of rape. It was a landmark judgment in the area of international criminal justice. It is the first case of universal jurisdiction to be dealt with on the African continent, and Habré is the first former African leader to be prosecuted for international crimes by an African court.

Opening Session

The opening session was chaired by Aminata Fall Cisse who welcomed the participants and remarked on the historic occasion that had brought everyone to the Seminar. She also apologised for Minister Sidiki Kaba's absence, explaining that he had to accompany President Macky Sall on official business and informed participants that Minister Kaba will address the delegates the next day at a dinner cocktail he will host for delegates.

She introduced AFLA's Executive Director, Evelyn A. Ankumah, who began her address on 'Africa and the Evolving Regime of International Criminal Justice' by thanking all the participants for attending the Seminar, some of whom, she observed, had travelled from afar. She stated that the decision in the Habré trial was a positive one, certainly for the Chadian victims, but that criminal justice is not just about finding alleged perpetrators of crimes guilty. It is about holding such persons accountable, and doing so under conditions that are in accordance with rights to fair trial or due process. She opined, moreover, that the main victory

had been that the trial could, and indeed did, take place at all. The victory was that Senegal did not turn a blind eye on what happened in Chad.

She also said that, contrary to what is sometimes suggested the Habré trial demonstrates that Africa and African states do take criminal justice seriously. However, she questioned whether the ad-hoc tribunals approach was the most efficient way, particularly in terms of cost, to achieve international criminal justice.

She also spoke of her confidence in Africans being able to collectively move forward and do justice to the pain and damage done to their fellow Africans. She also stated that Senegal, which has a long history in promoting justice, has shown the rest of Africa, and the world, that justice - and criminal justice in particular - is not just a national thing. Justice crosses borders. Solidarity crosses borders, certainly within Africa.

She ended her intervention by calling on Africans to unite, using the feeling of community, solidarity, and kinship that led to the trial of Habré.

In response to Evelyn Ankumah's speech, the Chair remarked that the judicial system had worked in the case against Habré, and that the questions Evelyn Ankumah had asked are legitimate. She then asked her own question: where does international justice want to go?

The Chair then proceeded to introduce George Kegoro, Executive Director of the Kenya Human Rights Commission who spoke about 'Civil Society as Partners in International Criminal Justice'. He began by stating that what was once believed to be unachievable – trying Habré – had occurred at last, and that many organizations and individuals played a role in bringing him to justice: The African Union, and the government of Senegal, as well as experts and civil society who mobilized the victims and kept the issue alive.

He also said that the judgment comes at a time of concern for the future of international criminal justice. In the history of the cases before the ICC, advocates have struggled to find common ground in order to overcome the difficulties the court has faced. He stated that a renewed interest in universal jurisdiction – which allowed for Habré to be brought to justice - have put a responsibility on states to prosecute the perpetrators of grave crimes. It has also resulted in a reluctance to invoke the ICC's jurisdiction, as well as led to partnerships between states and civil society in the fight for justice. He opined that the Habré trial is a good way to demonstrate that despite all the difficulties, efficient and concrete solutions can be found.

He ended by referring to Baltasar Garzón, his fellow panellist, as the father of universal jurisdiction, and thanked him for his role in advancing the interests of this important principle of international criminal justice.

The Chair spoke next, taking the chance to thank the partnership that made the Seminar possible. She agreed with George Kegoro that civil society plays a big role in advancing international criminal justice. She then introduced the next speaker, Baltasar Garzón, the former Spanish judge whose 1998 indictment in Spain of Augusto Pinochet, the former President of Chile, for crimes committed in Chile, leading to Pinochet's arrest in the U.K. triggered discussions on universal jurisdiction. The Chair recognized that it was this action of Baltasar Garzon that brought national and international attention to the concept of universal jurisdiction.

Baltasar Garzón spoke on the topic of 'From Pinochet to Habré: The Past, Present, and Future of Universal Jurisdiction'. He spoke first of the victims, and how they had finally received the justice and reparation that belonged to them. He then praised Jacqueline Moudeina and Reed

Brody for representing all those who made possible the resolution that was given by an impartial, African tribunal, which delivered justice against those who took away the rights that belonged to their people, through violence, destruction, and torture.

He stated that universal jurisdiction is not a recent invention, and that he could not accept the honour of being termed the father of universal jurisdiction. During his time as a judge he had merely been an operator of the law, applying said principle, which is centuries old.

Baltasar Garzon then proceeded to give an account of the history of universal jurisdiction, from the UN War Crimes Commission to the atrocities committed during the second half of the 90s, which led to the creation of the International Tribunals for Rwanda and Former Yugoslavia, and the ICC.

He also spoke about the case he had initiated against Augusto Pinochet, which provided for judges of different countries to fulfil the obligation they never should have forgotten - that of prosecuting the most serious crimes. Such crimes, he stated, should not be susceptible to prescription or retroactivity otherwise impunity would thrive. With this case, he observed, the principle of the existence of universal victims took back its place. He then commended Judge Demba Kanji for initiating a similar case against Hissene Habré, who will now go down in history not as another dictator, but as the first African former head of state who was judged and found guilty by an African tribunal.

Baltasar Garzon stated that universal jurisdiction is a global instrument at the service of all the world’s victims to fight against impunity. He assured that universal values unite us all, and that we must preserve them in order to conserve the dignity that we are due as human beings. He then declared that Senegal had proven that the world is ever smaller for big criminals.

He remarked that the fight against impunity will never be easy or peaceful, and that it is now not only a battle against politicians and military personnel, but that it has also become one against transnational corporations. He then mentioned the Madrid-Buenos Aires Principles that the Baltasar Garzon International Foundation (FIBGAR) started drafting 2 years ago, and which include the crimes of ecocide, and economic crimes. In this connection, he cited relevant provisions in *The Cairo-Arusha Principles on Universal Jurisdiction in Respect of Gross Human Rights Offences: an African Perspective* adopted under the auspices of AFLA. He also brought to the attention of the participants the case that FIBGAR has recently presented against Boko Haram in Spain.

The Chair thanked Baltasar Garzon for his comprehensive address tracing the history of universal jurisdiction from its origins to present. She used the opportunity to thank him for the pioneering role he played in bringing universal jurisdiction to the attention of young people, scholars and advocates with his indictment of former President Augusto Pinochet of Chile.

The Chair called upon Professor Vincent Nmehielle, African Union Legal Counsel to deliver his keynote speech on 'The Interface between Peace and International Criminal Justice in Africa'. Professor Nmehielle began by saying that the verdict on the Habré trial represents a small victory for the AU in its quest to convince the world that there is a need to let Africans give African solutions to Africa problems. He proceeded to say that Africa faces challenges that are almost unique to it, since African culture is clearly distinct, including in ways of dispute resolution.

He stated that though the interface between peace and justice in Africa is an age-old debate, there is no choice to be made between the two. They are interdependent and any attempt to

choose between them is a forced dichotomy. However, he defended that scholars and civil society should begin to appreciate the complexity of how society works.

He gave the example of the hybrid court for South Sudan. Though a number of victims exist, there is a very fragile peace process, which is complicated by ‘interested’ parties. He therefore advocated for the AU to tread carefully in South Sudan.

Though he did not advise a withdrawal of African States from the Rome Statute, he reminded the participants that it is allowed by the Statute itself. With regards to the provision on immunity for heads of state found in Art. 46a bis of the Protocol of the Statute of the African Court of Justice and Human Rights, he reminded participants that it is not blanket immunity. It only applies to heads of state while in office.

He then gave the example of post-apartheid South Africa, which made a choice between peace and justice, choosing a peace process instead of retaliating against the white minority. A provision of the Constitution was set aside in order to build a better, stable society, and Nelson Mandela is celebrated for engineering truth and reconciliation.

Likewise, in Sierra Leone a tribunal was established after 10 years to deal with the conflict. Yet prior to the establishment of the tribunal there was a peace and reconciliation process. The tribunal was established because one of the parties reneged on the agreement. Another example was that of Uganda. A mechanism that was interested in peace above all was established, to the point of granting amnesty, though this is not recognized by the AU.

He defended that the role of the AU is not to work against the ICC in any way, and that we must be able reach a situation where we recognize peace and justice working together, while taking into account the particular context. Justice can only be deployed in a time of relative peace and when there are no chaotic government structures.

He concluded that peace is vital for justice to thrive, and that we must learn to know at what point in time justice should prevail. Stability will enable a justice mechanism to thrive. He stated that without the support of Chad and its membership in the AU, there would be no celebration of the Habré judgment. Likewise, without the support of the Senegalese President, who is also a member of the Assembly of the AU, there would be no celebration.

The Chair thanked Professor Nmehielle for his address and then concluded the opening ceremony by congratulating all the judicial actors who contributed to this trial that is a perfect example of universal jurisdiction: complementarity, cooperation and universality. She said victims should be able to keep hope and faith in justice when their own countries are not prosecuting international crimes perpetrators. The Chair then reiterated Minister Kaba's invitation to all the participants to a reception hosted by the Senegalese government the following evening.

Later that evening, at a reception hosted by Ambassador Theo Peters at the Netherlands Residence in Dakar, Don Ferencz gave a brief keynote address on 'Criminalizing the Illegal use of Armed Force as a Crime Against Humanity'.

Panel 1: Emerging Trends on Complementarity

The first panel was held on the second day of the Seminar and Chaired by Judge Robert Dossou.

The first speaker, Reed Brody, recounted how he became involved in the Hissene Habré case. At the outset he reminded the participants that Hissene Habré was brought to power by the Reagan administration. By way of background Reed Brody informed participants that 16 years ago Habré was arrested in Senegal and indicted for torture, crimes against humanity and barbarity. While Abdoulaye Wade was President the case did not advance, yet when he stepped down the case began in earnest.

In 2000, following political pressure, the Court of Appeals of Senegal stated that Senegalese courts are not competent to deal with crimes allegedly committed abroad. The Cour de Cassation upheld this. Though the victims considered filing a case in Europe under universal jurisdiction, in a case called Guengueng v. Senegal, the Committee against Torture issued a ruling stating that Habré should not be allowed to leave the country.

Victims also filed a claim against Habré in Belgium. The Belgian universal jurisdiction law was repealed, but the Habré case was saved. In 2005, Belgian Judge Fransen issued an international arrest warrant against Habré, which included an extradition request to Senegal.

In November 2005, the Dakar Court of Appeals ruled that it had no jurisdiction to rule on the extradition request. Senegal referred the matter to the AU. The AU established a Committee of Eminent African Jurists to consider options for Habré's trial. They chose a legal response, instead of a political one, and recommended that Senegal prosecute Habré.

Senegal amended its law after the Committee against Torture ruled that Senegal had violated the Convention against Torture. The Economic Community for West African States (ECOWAS) Court of Justice later decided that Senegal had to create a special court of an international character to try Habré. A donor round-table resulted in pledges of 8.6 million Euros for Senegal, fully covering the estimated costs of the proceedings. In January 2011, the AU proposed the Extraordinary African Chambers (ECA) in the Senegalese Courts. Senegal walked out on the meeting. Belgium took Senegal to the International Court of Justice (ICJ) and, by a 16-0 ruling the ICJ ruled that Senegal had a legal obligation to prosecute Habré without further delay or to extradite him. Around the same time, Macky Sall was elected Present, and the trial moved forward.

In March 2015, Chad tried Habré's accomplices. The Chadian government was told to pay the victims, but this has not happened yet. While Chad has supported Habré's trial, it has also limited its cooperation.

Reed Brody pointed out that the victims were the protagonists of the trial, and that the trial was the fruit of their labour. Many of the victims testified, as did various experts.

With regards to the sexual slavery component of the trial, it was only on the eve of the trial, when the victims saw that Habré was truly going to be prosecuted, that rape victims and sexual slaves came forward and testified. A major achievement of the case was that Habré was convicted for the rape of those women.

Another very important aspect of the trial was that it was broadcasted on TV. Chadians watched how their former dictator was prosecuted because the survivors had fought for it. He ended his intervention with the reminder that the next step will be to fight for reparations.

Judge Elizabeth Nahamya then spoke about Complementarity in Uganda, and how positive complementarity means that the ICC should actively assist domestic legal institutions to strengthen the rule of law. At the ICC review conference, a resolution was passed recognizing the need for additional measures at the national level for international assistance to prosecute perpetrators of the most serious crimes of concern to the international community.

With regards to the case against Ongwen, she explained that he was abducted as he went to school as a child. He became the Lord's Resistance Army (LRA) deputy commander to Joseph Kony. In 2005, the ICC issued an order of arrest for Ongwen for 3 counts of crimes against humanity. His indictment also included war crimes. Ongwen appealed.

His trial at the ICC has been historic, but people's reactions to his transfer were mixed. Some have resisted the ICC's intervention, fearing it would not allow for peace with the rebels.

However, Judge Nahamya clarified that under Uganda's Amnesty Law, amnesty would be conditional for lesser offences in exchange for the truth. Moreover, there is no amnesty for international crimes.

Judge Nahamya then spoke about the case against Kwoyelo, also an LRA commander. He was captured in the Democratic Republic of Congo (DRC), and while in custody he denounced the rebellion against the government and sought amnesty. The amnesty commission forwarded his application to the prosecutor for consideration. However, the director of prosecutions did not respond and instead charged him with crimes under the Geneva Convention.

Kwoyelo stated that he was being discriminated against by not being granted amnesty, and the matter had to be referred to the Constitutional Court. The Constitutional Court upheld that there was discrimination, but pointed out that Uganda's international treaty obligations were not breached by the existence of an amnesty law. The Attorney General also appealed, stating that amnesty could not be given to someone who had committed international crimes.

The Supreme Court of Uganda considered whether the Amnesty Act violated Uganda's international obligations, whether it was constitutional, and whether Kwoyelo was entitled to amnesty under the Act and the Constitution.

The Chief Justice expressed the view that when a country commits itself to international obligations, they do so lawfully and in the interest of their nation, and that a state should not shun its international obligations when it wishes. The Court ordered that Kwoyelo be tried.

The International Crimes Division's (ICD) Rules of Procedure that have since been developed will allow the court to try Kwoyelo. The hearing will be held on the 18th of July. Another case, against rebel leader Jamil Mukulu, is also coming up. His trial will start in mid-June.

The ICD's Rules of Procedure include victim representation. However, Judge Nahamya stated that the ICD is still grappling with the issue of reparations, which can only be resolved after the Court issues a verdict. Nevertheless, the ICD wishes to show that despite the restraints, Uganda is committed to trying the LRA.

Judge Nahamya ended by recommending that Ongwen's indictment be amended to include victims of other countries, and that the Witness Protection Act be passed and the legal aid system improved to aid the victims in the case against Kwoyelo.

Roland Kouassi AMOUSSOUGA, Head of Integrated Office, United Nations Multidimensional Stabilization Mission in the Central African Republic (MINUSCA) spoke about the Special Criminal Court (SCC) of the Central African Republic (CAR): A ground-breaking institutional innovation in the fight against grave violations of human rights. He informed participants that the concept of a dedicated court to address the most serious crimes, including violations of international humanitarian and human rights law, was introduced during the discussions leading to the conclusion of a Memorandum of Understanding (MoU), which was signed by the United Nations Multidimensional Integrated Stabilization Mission in the Central African Republic (MINUSCA) and the Government of CAR in August 2014. Resolution 2217 (2015) provides that MINUSCA should facilitate the functioning of the Special Criminal Court (SCC). MINUSCA contributed to the drafting of the law on the SCC which was promulgated on 3 June 2015. To address concerns of the United Nations, the law excludes application of the death penalty by this court, and parliamentarians are not granted immunity. The Special Criminal Court will investigate and adjudicate serious violations of human rights and international humanitarian law, including crimes against humanity, war crimes and genocide, committed in the territory of CAR (as well as any act of aiding and abetting committed abroad), since 1 January 2003. The SCC will exercise primary jurisdiction over these crimes. Despite the many challenges that will have to be addressed before the SCC can become operational, the establishment of this court provides a unique opportunity for the international community to support peace and stabilization efforts in CAR. In order to establish the court as soon as possible, MINUSCA together with the United Nations Development Programme (UNDP), both in the Central African Republic and the United Nations Department of Peace-Keeping Operations (DPKO) at the Headquarters in New York, are taking multiple steps. These include the creation of coordination mechanisms to drive forward the creation of the court, the rehabilitation of the court building, and the selection of magistrates. Concerning national magistrates, the Minister of Justice has created by decree a Committee to select national candidates for the Special Criminal Court. When it comes to international magistrates, these formally must be proposed by MINUSCA after a competitive recruitment process.

The floor was then given to the participants for questions. Mia Swart asked how it is possible to ensure judges objectivity in international justice. Roland Amoussouga replied that for the Special Tribunal for CAR the selection is very specific and that various steps will be taken to choose the Judges. She also asked a question regarding whether the *Ongwen* case in Uganda should be made an example of though he was a victim himself. Judge Elizabeth Nahamya of the International Crimes Division of the High Court of Uganda explained that the Prosecutor has promised that Ongwen will not be tried for offences he committed as a child, only for those he is responsible for as an adult.

Don Deya remarked that the Malabo Protocol (signed by 9 states so far) may fulfil the wish of criminalising the crime of aggression.

To a question coming from a representative of Amnesty International about the relationship between the ICC and the special court being set up in CAR, Roland Amoussouga responded that the ICC has the full cooperation of CAR's government. It referred the case to the OTP itself. Moreover, the prosecutor's visit to Bangui will be supported by the national authorities. He informed participants that the government and people of the CAR have renewed their commitment to support the ICC.

Alioune Tine, Regional Coordinator for Amnesty International expressed that impunity should not be seen as a fatality on the African continent. However, another participant

wondered if states really have the will to make sure that trials happen in African countries based on the principle of complementarity.

Reed Brody responding to a question remarked that though the AU was indispensable in making the Habré trial happen, the ICC is necessary because the AU will never organise a trial for a sitting head of state.

Panel 2: International Criminal Justice from the Victims' Perspective

The Chair, Dior Fall, began by reminding participants that the first judgement of the ICC to include a sentence for sexual violence was in the Bemba case. She mentioned how Reed Brody had spoken of the importance of victims during his presentation. She agreed, stating that a trial cannot conclude positively unless the victims are given the space to express themselves. Compensation is important, and not only in material terms. It is a matter of dignity. Victims must be supported, since on their own it is difficult for them to come before a court. She believes that the role of NGOs is also crucial.

The first speaker, Jeanne Sulzer, spoke about reparations before the EAC, stating that there are still grey areas that need clarification.

She remarked on the landmark character of the Habré trial, and how the procedure had been implemented by showing respect to the victims, as well as the witnesses. She praised Senegal for carrying out the trial in spite of the obstacles, and fulfilling its legacy of being the first country to ratify the Rome Statue.

With regards to the legal framework, the EAC Statute states that the EAC shall offer reparations as restitution, compensation and rehabilitation. The court can decide that the compensation be paid by a fund. Reparations are available for any person, whether they participated in the procedure or not. This is a move away from the traditional system in terms of reparation for damages caused.

She then stated that the grey area is in terms of procedure. The public and civil action procedures are separated, as is the case before the ICC. Moreover, the civil action is linked to a conviction.

Moreover, the Habré trial has shown the quasi-impossibility for victims to offer any material proof. In this case, the events took place over 20 years ago, and it was impossible for victims to remember specific dates. The Chambers should use the idea of presumption given a common prejudice. The burden of proof should not be on the victims. In the case of direct victims, the ruling proved that torture can be presumed to be applied to all those who have been imprisoned.

The first request of victims was that Habré be sentenced. To some extent the fact that victims were allowed to participate in the trial is a form of reparation. It is also a part of the healing process. Their second request was individual financial reparation. The Chambers should clarify the way in which the reparation procedure will be handled in the weeks to come.

Jeanne Sulzer then identified another grey area: the types of reparation. It can be via restitution, compensation or rehabilitation. She stated that though restitution is the best way of reparation, it is extremely difficult to achieve. The main issue is individual prejudice. How can it be proven? She suggested monitoring or assessing the different crimes for which Habré

was sentenced, in order to determine different categories of victims, and that the victims should agree with the categorisation of this prejudice.

She felt that rehabilitation could be an interesting form of reparation for Chad. Requests have mainly been for medical and psychological counselling and care. However, these are totally inexistent except for very recent programs.

The statute then states that the above shall be interpreted without prejudice of the rights acknowledged by international law. She said it will be interesting to see if the EAC will go further than the forms of reparation included in the statute by including, for instance, satisfaction or measures such as the commemoration of the event.

The last grey area she touched upon was the issue of establishing a fund for victims. The statute says it will be established, but it has not yet been done. The Chamber did not mention expropriating Habré's assets during his sentencing. According to her it would have been a good way to get some funds for the victims though. In this matter, she referenced the ICC's Lubanga case, in which the Court stated that the determination of the amount should be based on the availability of funds. She expressed that it would be better for the victims if judges were determining the amount based on their real damages, even though the funds are not available at the moment, or will never be available. Otherwise, it would mean that victims' damages are underestimated.

Moreover, Habré's sentencing was not the end of the road for the victims. Jeanne Sulzer called on NGOs, donors, and states to continue supporting politically and financially, and monitor the reparation procedure as closely as they monitored the trial.

The second speaker was Kim Seelinger. She spoke about the amicus brief she and her team submitted when, despite the big amount of evidence, the charges issued against Habré did not include sexual violence.

She recounted how many women decided on the eve of the trial that they would come forward to testify about the sexual violence they had suffered. Some women were forced to engage in sexual contact in exchange for food and medicine, children were raped, and soldiers engaged in sexual slavery and torture. Men were also victimised. However, Habré was not charged for any of the sexual crimes committed by himself or his agents.

Their amicus brief was aimed at bringing the attention of the judges to the ways they could revise the charges to include sexual violence. They suggested the inclusion of rape as a crime against humanity and as a war crime, the inclusion of slavery, including sexual slavery, as a crime against humanity or, alternatively, forced prostitution as a crime against humanity and a war crime. They also sought to criminalise other aspects of sexual violence, such as forced oral contraception. Their arguments were based on the EAC's statute, but their brief also had a basis in customary international law.

Though their brief was not officially accepted, the verdict re-qualified the charges in the sentence. Torture was categorised as an independent crime, and Habré was also found guilty of rape as a crime against humanity, sexual slavery as a crime against humanity, and torture as a crime against humanity.

Kim Seelinger then identified two main challenges. The first was showing that the EAC's statute and customary international law allowed the court to charge Habré for acts of sexual violence. This was difficult because rape is not an independent war crime under the statute. However, civil lawyers advised them to use the statute first. There was also a challenge of

legality. Habré's reign was prior to the establishment of the international ad hoc tribunals, so it was difficult to pinpoint when rape had been crystallised as a war crime under international law.

The second challenge was that of submitting the amicus brief to the court. Though there is no explicit prohibition, they knew it would be difficult to achieve. Though the brief was received by the Court, it was not formally admitted to the record due to time constraints. However, the brief received publicity when a journalist included a link to the brief in her article on the Habré trial. The victims' lawyers, moreover, relied on the brief for their closing arguments.

She ended her intervention by identifying the most important lessons learned. She believes that amicus briefs are very useful in cases of sexual violence. Though it is not a strategy used by the prosecution, and victims and witnesses may not be forthcoming for many reasons, it is a tool that should not be overlooked. It also provides another opportunity for practitioners and civil society organisations to highlight the main issues. She recommended, therefore, that a database of submitted amicus briefs on sexual violence be created, in order to enable ease of research and accessibility.

The floor was then given to the participants for questions. To a question about the fate of Habré's entourage, Kim Seelinger replied that since the nature of the brief was legal and doctrinal, the arguments are equally applicable to the commanders who acted under Habré. She also replied to another question that unfortunately the *amicus brief* they prepared did not help to get some funds for the Habre trial but that at least it helped the parties. It could as well be used in other similar cases.

Helene Cisse asked if it is realistic to take into account the real damages of the victims and not the financial resources available. According to her, there is a risk to give fake hope to victims because the Fund has not been established yet and in any case there are too many victims. Ms Sulzer replied that the determination should be reasonable but exact and independent of financial issues.

To another question about the stigma attached to testifying about sexual crimes, Kim Seelinger replied that stigma is a big problem, and that psychological support must be provided if we expect to get people to come forward. Currently, however, this is the burden of civil society.

Lucile Paupard brought up the issue of men who have suffered sexual violence and the stigma attached to its reporting and Kim Seelinger replied that a report addressed this issue, and that it is even harder to get surveys and testimonies from men on this matter.

Jacqueline Moudeina, one of the lawyers for the victims in the Habré trial, joined the panel after attending the hearing on reparations. She explained how the Chadian Association for the Promotion and Defence of Human Rights, for which she is president, initiated the case against Habré.

The Association had a program against impunity as one of its flagship programs. One was that of Hissene Habré. They were inspired by the case against Pinochet, and later decided to contact Reed Brody, who jumped at the chance of joining them in their fight. They later got in contact with Guengueng Soulemayne, who was developing a database of witness statements from Habré's survivors.

They tried to obtain statements themselves and encourage victims to seek justice. They had to go to many different areas in Chad, and explain that they had the possibility of prosecuting

those who had violated their rights. The victims made their statements very openly, but it was difficult to get the women to speak about sexual violence. Many women were deported to military camps as sex slaves, yet by 2013 only one of the women had implied to Jacqueline Moudeina that she had been raped.

Those who were deported to the north were raped daily. It was not until 2016 that they began to talk about it. They explained that two women were taken every evening in the camps, and before they got to the boss they had already been raped by other soldiers.

Jacqueline Moudeina stated that their statements before the EAC required a lot of courage because they were baring their stories to all those watching the trial, including their friends and families watching from home. She emphasised how important it was that the judges considered these sexual crimes as standalone crimes, and that this was thanks to the women who came forward.

She then explained how it took years of work on her behalf to get the women to talk to her (as a woman herself) about the violence they had suffered. No man had the courage to tell her that they had suffered the same treatment.

She ended by saying that had the sentence not been what it was, many of these women would not have been able to rest. However, now they can say that their honour has been restored. However, during the trial there was a lot of criticism from Chadians. They told some women they had dirtied the reputation of Chad by admitting they had been raped. But now others will be able to come forward, now that they have seen what has been achieved by other women who have done so.

To a question about whether there has been a discussion on using alternative methods to engage victims in Chad, Moudeina replied that the situation in Chad was quite exceptional. The regime that replaced Habré investigated his rule. The investigation was chaired by a magistrate who conducted it in very difficult conditions. It resulted in a report that the government did not take measures in response to. To the idea of a truth and reconciliation commission, the victims responded with calls for justice. They did not want another commission. If they had chosen a truth and reconciliation commission, impunity would have strived.

To a question about whether it has been possible to identify the military officers who raped women in the camps, Moudeina replied that they could not be identified. However, the agents of the political police have been sued. They also raped many women. There have also been suits filed against Habré's accomplices in high-ranking positions. Though it was not easy to try to prosecute people in power, some have been sentenced.

Vincent Nhmielle also wondered what were the reasons that justified public hearings in the Habre case even though there was a risk of identification and stigmatisation of victims coming to testify. Jacqueine Moudeina explained that the judge proposed to have private hearings many times but that she urged that the hearings be held in public sessions in order to demystify sexual offences, and help other victims to come and testify about sexual violence in the Habre case or in other trials.

Panel 3: Panel Discussion – Reflections on Peace, Justice and Immunities

The first speaker, Don Deya, spoke about de-facto and de-jure immunities and their implications for peace and practice.

He stated that since both exist, there is a class of persons who are above prosecution. He warned, therefore, that the legitimacy, credibility and cooperation with the international criminal justice 'system' will be judged by how we are able to confront both types of immunity.

For *de facto* immunity from prosecution for mass atrocity crimes, a combination of the UN Security Council's veto power and not being a state party to the Rome Statute confers a kind of immunity.

For *de jure* immunity, bilateral immunity agreements, under Article 98 of the Rome Statute, grant the assurance to a category of persons that they can avoid trial, at least before the ICC. As a result, the lowest American soldier has more protection than the highest African official.

At the national level, Rwanda has a unique provision, pursuant to a constitutional amendment, that only certain claims can be made against a head of state while in office, and they cannot be prosecuted even after leaving office.

It remains to be seen whether the legal instruments that will set up the hybrid criminal tribunals in the Central African Republic and South Sudan will shed light on whether policy or practice on immunities is shifting, and how they will play against any relevant provisions in their respective national constitutions.

He then wondered if the contradictions in international criminal justice could explain the change of heart in states that initially supported the ICC. He also asked the question whether we will be shocked if most states opt out of the Rome Statute if these contradictions are not addressed.

He lauded the work of litigation, even if it is slow and painstaking, exemplified by the work of Chadian survivors, Chadian civil society organisations, Reed Brody, many African lawyers, and a new generation of activists and litigators such as Angela Mudukuti and others.

He also drew attention to the importance of rulemaking and norm setting (and its implementation), even if it is also a slow and painstaking process. He mentioned the AU's sequencing policy in terms of accountability, of which the South Sudan Commission of Inquiry was a success. He also mentioned the African Peace and Security Architecture, the African Governance Architecture, and the Draft AU Transitional Justice Framework.

He ended by celebrating and acknowledging that many famous and unknown individuals and institutions, are working assiduously to shift global attitudes and policies on immunities and impunities, one painstaking step at a time.

The second speaker of this panel was Mbacke Fall, Prosecutor of the Extraordinary African Chambers. He started by stating that peace and justice are intrinsically related. He stressed that the absence of justice can lead to a threat to peace.

The issue faced now is the immunity held by high officials in power. Indeed, on the one hand, some people get access to power by committing international crimes; on the other hand, some in power can keep it by committing international crimes. And nothing can be done to prevent or to stop it due to the head of state immunity. Prosecutor Fall explained that some countries

such as France lifted the head of state immunity in case of international crimes. Those crimes are so grave that any impunity cannot be tolerated. The ICC also chose to exclude immunity for heads of state. Consequences of immunity for heads of state are that the longer we wait to prosecute, the more risk there are that proofs disappear, and witnesses become difficult to find.

However, Mbacke Fall stated that even when the immunity has been excluded, it is still difficult to prosecute heads of states due to state sovereignty. International crimes hurt international conscious, but most of the time jurisdictions must wait for the power to end.

The third speaker, Manuel Ventura, turned the conversation to the ICC's jurisprudence and Sudanese President Al-Bashir's head of state immunity.

He first gave some background information, beginning by how customary international law recognises immunity for heads of state indisputably. Though Sudan is not a party to the Rome statute, Al-Bashir travelled to countries that are, raising issues of his immunity versus a state's obligations under international criminal law.

When Al-Bashir travelled to Malawi he wasn't detained. Though a note verbale was sent to Malawi reminding them of their obligation to cooperate with the ICC, Malawi responded that as an incumbent head of state, Al-Bashir was entitled to immunity under international law. This, Malawi stated, was due to the fact that Sudan is not a party to the Rome Statute and, moreover, Sudan had not waived its head of state's immunity.

In December 2011, the ICC's Trial Chamber I stated that Al-Bashir was not entitled to immunity before international courts under customary international law. However, Manuel Ventura stated that the problem with this decision is that it makes Article 98(1) of the Rome Statute completely redundant. He therefore asked what immunity a head of state can rely upon if Article 98(1) is eradicated in practice.

The second issue with Al-Bashir's immunity came with the case's move to Pre-Trial Chamber II. It faced a similar issue with regards to the DRC, when Al-Bashir attended a conference at the DRC and was not arrested, even though the Chamber had notified the DRC it would have to do so. DRC filed observations that there was insufficient time to arrest him, and also that there was a complex and uncertain legal situation.

The Pre-Trial Chamber also ruled that Al-Bashir was not entitled to immunity. It stated that this was due to the text of United Nations Security Council (UNSC) Resolution 1593, which implicitly removed all impediments to Sudan's cooperation with the ICC under its powers granted by Chapter VII of the UN Charter. Manuel Ventura found the basis of this decision to be less problematic than the reasons given in the Malawi decision.

However, he believes that the issue has not been thought through as thoroughly as is merited. It sets a dangerous precedent for the exercise of the UNSC's power. The UNSC's resolution was not explicit about Sudan waiving Al-Bashir's immunity, since it merely said that Sudan should cooperate fully and provide any necessary assistance to the Court and the Prosecutor. However, the European Court of Human Rights (ECtHR) stated in *Al-Jedda* that if the UNSC intended a state to act in a manner that would otherwise be inconsistent with its international obligations then clear explicit language should be used. He therefore asked whether it is wise for the UNSC to be permitted to direct states to depart from/violate international law using unclear language. He stated that as a matter of principle, if international law is to be violated, then it should be authorised explicitly by the UNSC.

He ended by saying that there are other more worthy theories as to why Al-Bashir does not enjoy immunity, including the fact that Sudan is a party to the Genocide Convention.

The next speaker, Amady Ba, chose to speak about the link between peace and justice. He stated that when a peace process has been initiated, the justice process should not be in contradiction. There should be no competition between the two.

He cited Article 16 of the Rome Statute as the only provision that allows the ICC's Office of the Prosecutor (OTP) to suspend the Prosecutor's investigations in the name of the power granted to the UNSC. The OTP encourages peace and justice to work together, such as in Cote d'Ivoire. If there are genuine prosecutions on-going at the national level, the OTP will respect them.

He then explained that the Preamble of the Rome Statute provides a very flexible regime to allow peace and justice to work in harmony. The only time this should not occur, he stated, is when people commit the most heinous crimes.

With regards to immunities, he stated that they are very simple. Article 27 of the Rome Statute says that there is no immunity. He believes this is the most democratic provision in the world. Accordingly, the ICC exercises its jurisdiction equally for everyone – there is no hierarchy. A national provision cannot, therefore, be invoked to avoid prosecution. He stated that the ICJ confirmed this in the Yerodia decision: immunities enjoyed by certain bodies are not an obstacle to criminal liability, they can be prosecuted before international courts if they are deemed competent, such as is the case for the ICTR, ICTY and ICC.

In the particular case of Al-Bashir, he asked why the OTP should not be able to issue an arrest warrant if there is evidence against him and the UNSC has made a referral. His opinion was that Al-Bashir should be arrested, and that there is no issue of legitimacy because the ICC is acting on the basis of the UNSC's referral.

He ended by saying that he looked forward to the question of the relation between Articles 27 and 98 of the Rome Statute being resolved by the Appeals Chamber.

The final speaker, Stella Ndirangu, chose to frame the debate by providing further insight into immunity clauses in two African domestic jurisdictions.

She stated that there is a lot of uncertainty as to whether head of state immunity remains applicable when being responsible for international crimes, but that this is not the case in all African states.

Kenya, prior to 2010, experienced a very protracted constitutional review process that embedded an element of public consultation with citizens. In 2010, a new constitution was adopted. It was a historical moment for Kenya, and many Kenyans saw it as moving away from the previous regime. One of the issues addressed was the immunity of the President – he lost his immunity for crimes for which immunity has been waived. This includes the crimes found in the Rome Statute since Kenya is a state party.

Similarly, in the last decades South Africa has emerged from a history of repression, and a new constitution was adopted in 1996. One of its provisions allows for the equality of South Africans before the law. As a result, Jacob Zuma was prosecuted for rape while he was deputy president. South Africa has gone further than many countries and domesticated the Rome Statute, making an express reference to the lack of official immunity. Its membership of the Genocide Convention also waives immunity.

She then stated that both countries have made informed choices that are based on their past experiences, and that the AU encouraging them to contravene their domestic legislation and constitutions means that the AU is not taking into account their particular national contexts.

She ended by stating that the AU's position on immunities is largely informed by African heads of state, and is inherently imbalanced. She believes that the AU should engage African citizens more, and that waiting for heads of state to leave office before prosecuting them for serious crimes is wrong.

The panel discussion then continued with questions and comments from the audience.

First, Helene Cisse suggested that states domesticate the Rome Statute in order to clarify the confusion about the position of African states on the immunity issue.

Andrew Songa questioned whether the pre-emptive measures available to the AU to stave off conflict are as effective as the pending threat of prosecution.

George Kegoro stated that it is difficult to determine the objective conditions by which it can be construed that a threat to peace will occur as a result of bringing about accountability.

Another participant, Eric-Aime Semien, asked why Cote d'Ivoire is not raised when talking about complementarity. He also asked why, after 5 years of procedure, the OTP is only prosecuting representatives of one side. Amady Ba responded that the investigation into Cote d'Ivoire will take time, but that when there is enough evidence indictments will be made.

Caritas Niyonzima, a Gender and Human Rights Expert from Burundi wondered what should be done in a country where there is neither peace, nor justice. What should be the priority? Is the African solidarity the solidarity of heads of states supporting each other through the immunity of heads of states, or the solidarity of populations supporting each other when facing pain?

To claims by Judge Nahamya that the examples she had given were not good for various reasons, such as the fact that both countries have progressive constitutions but have an issue with implementation, Stella Ndirangu replied that, though this is true, they at least have the legal and normative framework in place to deal with certain challenges. For instance, ICJ-Kenya challenged the non-domestication of Al-Bashir's arrest warrant and was successful.

Amady Ba responded to criticism that the ICC is only prosecuting Africans by stating that sometimes political questions are asked that cannot always be given a legal response. He stated that the ICC has applied the rules to every specific situation, such as in Afghanistan, and Georgia, and that the legitimacy of the ICC cannot be doubted.

Referencing Stella Ndirangu's intervention, Don Deya stated that listing two positive examples out of fifty-four African countries cannot be used to show a trend. He also said that it is not always about legality, but also about legitimacy. Even if a withdrawal is legal, it may be contrary to its legitimacy of withdrawing from a positive obligation.

Panel 4: Evolution of Universal Jurisdiction

The third, and final, day of the Seminar began with the panel chaired by Demba Kandji, the judge who first indicted Habré in Senegal in 2000.

The first speaker, Nsogurua Udombana, gave an account of the international and regional treaties and laws that touch upon international criminal justice, and which African states have ratified. He sought to answer the questions of what the global, regional and national trends are on the practice of international criminal justice in Africa, as well as the challenges ahead.

African countries are parties to the Geneva Conventions and their two additional protocols. Under national legislation, some states have also adopted implementing regulations. A number of countries have also ratified the Genocide Convention.

Thirty-four African countries have ratified the Rome Statute, and Senegal was the first country to do so. He stated that this is quite remarkable, because it shows that Senegal has been an important player in developing international criminal norms from the beginning.

There are also several anti-terrorism conventions, as well as those on anti-mining, drug trafficking, and human trafficking. A number of African countries have played a big role in drafting and ratifying them. Senegal, for instance, ratified and criminalised the Convention against Torture at the national level.

At the regional level, several treaties have been widely ratified under the auspices of the AU. These include the Convention for the Elimination of Mercenaries in Africa, which 32 countries have ratified; the Convention on Preventing and Combating Corruption, ratified by 37 countries, which comprises 60% of the AU's members; the Convention on the Prevention and Combating of Terrorism has achieved almost universal ratification. It requires that Member States criminalise terrorism, determines the areas of cooperation among states, establishes universal jurisdiction for crimes of terrorism, provides a framework for extradition, etc. It has been ratified by 41 states. There is also the African Charter on Human and Peoples' Rights and the African Charter on the Rights of the Child, the Non-Aggression and Common Defence Pact, ratified by 20 states, and the Convention on Cyber Security and Personal Data Protection, ratified by no states.

With regards to national legislation, Botswana's Geneva Conventions Act punishes 'any person, whatever his nationality, who, whether in or outside Botswana, commits, or aids, abets or procures the commission by any other person of, any such grave breach of any of the [1949 Geneva] conventions" in Section 3(1).

Kenya also implemented the Geneva Conventions and section 3 of its implementing law provides for universal jurisdiction. Other states like Malawi, Uganda, and Zimbabwe have also done so.

Moreover, many countries have anti-terrorism laws that provide for universal jurisdiction: Nigeria, Kenya, Egypt, and South Africa. However, a number of African states, particularly post-conflict ones, do not have the capacity to prosecute these serious crimes. Most of their institutions are broken down. This occurs also in non-post-conflict countries.

However, Professor Udombana pointed out that there is a lack of political will. For example, before Charles Taylor was prosecuted by the SCSL, he spent a number of years in Nigeria. Under the Geneva Convention Nigeria has an obligation to prosecute war crimes, but Nigeria lacked the political will to do so.

There is also the challenge of impunity, when high-profile political offenders are involved.

Professor Udombana ended his intervention by recommending 1) that states domesticate their obligations under international treaties with provisions for universal jurisdiction, not merely ratify them, and 2) that African states ratify the 2008 Protocol that merges the African Court on Human and Peoples' Rights with the African Court of Justice so that it enters into force, as well as the 2014 Protocol on Amendments to the Protocol on the Statute of the African Court of Justice and Human Rights, without which there will be no court to apply the law if the 2008 Protocol enters into force. Though African states want to give the impression that they are serious about prosecuting international crimes, they have not been eager to ratify the Malabo Protocol.

The following speaker, Manuel Vergara, began by mentioning how Judge Demba Kandji opened the door to Habré's victims by issuing his indictment, and how the victims were inspired by the Pinochet case. Habré's sentence to life imprisonment was therefore a remote and unexpected result of the Pinochet case.

Back in 1998, universal jurisdiction was discovered as a new mechanism to fight against impunity. However, those who promote universal jurisdiction have had to defend it. Many myths and lies were fabricated against it.

In Spain, for instance, China, US and Israel pressured the government into denouncing universal jurisdiction. However, universal jurisdiction is not an exotic invention of judges. It is a legal obligation and a moral responsibility. Its sources are conventions, ius cogens and customary international law. Moreover, it is not about becoming the world's police. It is about ensuring that victims of universal crimes are considered universal victims. If they cannot find justice through the traditional principles of international criminal law, then they have the right to find justice elsewhere.

Manuel Vergara stated, moreover, that universal jurisdiction is not just a political tool or neo-colonial mechanism since victims are behind most universal jurisdiction decisions, not heads of state or prosecutors. In addition, states can avail themselves of more efficient means to pressure other states. It is also not a neo-colonial tool because there are examples of former colonies investigating colonial powers; such is the case with Argentinean judges investigating crimes committed during the Spanish dictatorship. It is not an instrument of powerful countries against poor states either because Spain investigated the US for its Guantanamo Bay, Spain is investigating China for the Tibet Genocide case even though China holds 20% of Spain's national debt, and Argentina is investigating Chinese officials in the Falun Dafa case.

With regards to its usefulness, universal jurisdiction is not only about retributive justice, it has other goals. Judgments or convictions cannot be the only measurement of universal jurisdiction's success. It has other goals, such as access to truth and reparations for victims.

Universal jurisdiction also has a mirror factor, since a case can bring the attention of the international community to a state and oblige it to prosecute its own crimes before another state does it for them.

Manuel Vergara then mentioned that there has been a case opened against Boko Haram in Spain. Though universal jurisdiction rules have been severely restricted in Spain, there is a provision on passive personality in the law against terrorism.

Universal jurisdiction also has a positive impact on judicial cooperation (mutual legal assistance). It can promote European and international cooperation in these matters. As a

result, universal jurisdiction leads to the creation of a smaller world for international crimes. A lack of safe havens will have a deterrent factor.

The Habré case proves that there is a future for universal jurisdiction. There has also been a proliferation of new cases in South Africa and Argentina. Moreover, there have been new efforts to develop universal jurisdiction through, for instance, the Princeton Principles, the Cairo-Arusha Principles, and the Madrid-Buenos Aires Principles on Universal Jurisdiction.

Angela Mudukuti, spoke next about the Zimbabwe Torture Case and the Al-Bashir debacle. She began by saying that states need to have the instruments in place to respond to the commission of international crimes.

South Africa domesticated the Rome Statute in 2002. It includes a provision on universal jurisdiction, though it is not framed as such. To give effect to this law, a priority crimes litigation unit was established. With this infrastructure in place, the Southern Africa Litigation Centre (SALC) identified the chance to seek justice for Zimbabweans, and the torture that opposition members had suffered at the hands of the state police.

SALC, in cooperation with a Zimbabwean group, documented a dossier of evidence on the torture and presented it to South Africa's National Prosecuting Authority (NPA), which was mandated to investigate the crimes. The NPA refused. SALC petitioned the High Court, which ruled that South Africa was obligated to investigate the crimes. The Supreme Court of Appeal upheld this ruling. The government then challenged it before the Constitutional Court. The Constitutional Court then definitively ruled that South Africa had the obligation to investigate the case, after establishing that universal jurisdiction was subject to two principles. The first is subsidiarity, which means that if Zimbabwe had been investigating the crimes, South Africa could not have done so. The other is practicability. It was reasonable for South Africa to investigate because it is close geographically to Zimbabwe, because the perpetrators travel to South Africa, and because many victims were also present in South Africa.

With regards to the Al-Bashir arrest warrant, Angela Mudukuti recounted how South Africa had stated in no uncertain terms that if Al-Bashir were to travel to South Africa he would be arrested. However, when he arrived he was not arrested. SALC filed suit. The court ruled that Al-Bashir could not leave until the case was resolved. Though SALC received assurances from the Attorney General that Al-Bashir would remain in the country, he was allowed to leave.

South Africa’s laws establish that there is no immunity for heads of state, so from a domestic perspective there is no ambiguity. South Africa’s duties were clear. The Supreme Court of Appeal subsequently ruled that South Africa’s failure to arrest Al-Bashir was unlawful.

She stated that this case is a clear example of how national systems have to be trained to respond to cases of universal jurisdiction correctly. The international community cannot respond to international crimes alone, since it does not have a police force. States must therefore play their role.

Angela Mudukuti concluded her intervention by issuing the following recommendations: 1) civil society and activists in the field need to push for the domestication of the Rome Statute and must include provisions for universal jurisdiction, and 2) training must be provided to judges, lawyers, and other officials so they can understand their responsibility.

When the floor was opened to questions and comments, Dior Fall asked whether there are sufficient mechanisms in place to make states accountable for the commitments they have

made. Professor Udomabana replied that there are none. However, states can be engaged. Civil society engagement with states is thus necessary. He also stated that the issue of economic development in Africa leads to non-implementation of regional instruments. In Europe, there is a price to pay for disobedience, including withdrawal of economic assistance to Member States. There are a lot of benefits that weaker Member States enjoy for joining certain instruments. This does not occur in Africa.

Ambassador Blaak also intervened, to comment on the fact that when African states wished to discuss the issue of immunity at the Assembly of States Parties (ASP) it was extremely difficult to get the item on the agenda. Non-Africans refused to allow it. She criticised that though no non-African states will have to deal with Al-Bashir's visits they refuse to discuss the issues that other states will face.

To this Angela Mudukuti replied that if states are not allowed to air their grievances, the result will be what is happening now – threats of withdrawal. All states should be able to use the forums that are available. Moreover, she pointed out the fact that the ICC will decide based on the evidence. An Al-Bashir trial does not entail a conviction.

Judge Demba Kandji explained that African systems are highly motivated but they need the economic, human and practical means to be able to implement complementarity.

David Deng enquired about the prospects of universal jurisdiction being expanded to economic crimes. He asked whether it is easier to capture money than people because money is tracked, or whether war crimes and crimes against humanity are easier to prosecute because they are more politicised.

Manuel Vergara explained that the principles are about building opinion juris on economic crimes. Certain activities like corruption or environmental damage by corporations have results analogue to those of crimes against humanity. The question is how universal jurisdiction can protect the victims of these kinds of atrocities even if the nature of the crime is purely economic.

Amady Ba ended by saying that geo-political interests should not supersede the interests of justice. There should be a focus on the judicial system, since governments may change their minds, but judges should uphold the law.

Panel 5: The Role of the Defence in International Criminal Justice

This panel was chaired by Helen Cisse, an international criminal lawyer on the List of Counsels before the ICC, and was related to the role of the Defence in International Criminal Justice.

The first speaker of this panel, Mia Swart spoke about The Defence as a Critical Feature for the Legitimacy of Criminal Justice. She noted at the outset that breaches regarding the defence can have consequences on the legitimacy of international criminal justice. Indeed, a tribunal can gain legitimacy when it is respectful of fair trial and due process rights.

She noted that there was no provision for defence in the Statute of the Nuremberg Tribunal and that only the Prosecution had access to the evidence archives. Moreover, the Tribunal was not bound by procedural rules of evidence. Unfortunately, this also occurred in the Tokyo

Tribunal where once again, the defence lawyers were side lined. According to the speaker, early judgments of the ICTY, ICTR, among others, were thus tainted by the way the defence was marginalised.

She however opined that we can now observe an over compensation regarding the role of the defence in international criminal justice. Indeed, the defence is now referred to as 'the guardian of due process'. But in her view, all parties should be the guardians of fair trial rights, not only the defence. She expressed the view that the defence is often treated in the way the media is treated in democracies – as the check on power. This, she said is wrong because the entire system, starting with the prosecutor, should be the check on power. Every participant in international criminal justice should take responsibility for that.

She said the ICC is not an example of a court that has given defendants the presumption of innocence, which would add more legitimacy to the court. According to Swart, the Prosecution often condemns the accused before the trial.

Swart also stated that the defence should not be subject to the vicissitudes of budgets even though this is unfortunately often the case in practice. In the same vain, the defence office should be independent and not subject to the whims of the registry, or other sections of a tribunal, as it has been the case before the Special Court for Sierra Leone.

In terms of the equality of arms, it was never interpreted in terms of exact equality of financial resources. However according to the speaker, if there is no equality of arms on a financial level, then there should be no court. Indeed, defence should be an organ like all others of a tribunal.

The speaker then underlined that the Special Tribunal for Lebanon presents advancement in the area of defence rights as they are expressly included in the documents that established the Tribunal. In particular, there are many references to the presumption of innocence. In terms of fair trial rights, it is still not perfect though.

She concluded her presentation by stating that when establishing new courts, one should ask themselves whether the early day euphoria of achieving convictions was the right way. She said the new African Court of Justice and Human Rights will be a house of justice, but only if it is built on the respect of human rights, including the rights of the defence.

The Chair, Helene Cisse, intervened and agreed with Swart's views. She underlined that, as it has been the case for the Nuremberg Trials, international justice is still sometimes a victor's justice. But justice should be the same for everyone and not only for the victors. She highlighted that financial issues are very important as it induces the way the defence is able to manage its investigations and its case. In this connection, she is of the view that equality of arms should be perfect, otherwise there is no equality of arms. Ms Cisse then stated that the Prosecution must be seeking truth, and should be able to admit when there are not enough elements to prosecute. She also recalled that in some cases before the ICC, the Prosecution dropped charges against accused.

The second speaker, Saskia Ditisheim, President of Avocats Sans Frontières Suisse, spoke about the Defence, taking as a starting point the just ended Hissene Habre trial. She stated at the onset that we cannot have an international criminal justice system without strong justice. Fundamental rules must be respected as they are the guarantees of a fair justice. Referring to

statements at a prior AFLA meeting after the acquittal of Mathieu Ngudjolo Chui by the ICC, any acquittal is proof of a healthy justice and not of its weakness. Nevertheless, she was of the view that since the establishment of international tribunals for the fight against impunity, the defence has often been forgotten due to that strong will to prosecute perpetrators of international crimes, and to offer justice to the victims. She said the decision in the Habre case was moving for everyone, especially for the victims and those who fought for many years to bring Habre to justice. So why would the rights of the defence be absolutely necessary? Saskia Ditisheim recalled that the ICTY and the ICTR acquitted 25% of the people prosecuted, which is the proof that a serious and skilful defence did its work to avoid any procedural mistakes. It also reminds us that it is not the judge's role to fight against impunity like the Prosecutor, but rather to make sure that parties' rights are guaranteed throughout the proceedings. All the procedural architecture is based on a balance with the rights of the defence.

She called for the establishment of a special fund for acquitted people because they suffer from a terrible procedural mistake that often ruin their personal and professional lives. They become victims and suffer from real and severe damages, requiring compensation. She asked Roland Amoussouga if they are planning to establish such a fund for the tribunal for CAR.

Ditisheim then posed the following question: was the Habre trial a fair trial, respectful of the rights of the defence? She highlighted the breaches to the fair trial principle encountered in the defence of Habre including the disparity of financial and human resources between the Prosecution and the Defence, the absence of an Appeals Chamber in case of procedural irregularities, the fact that lawyers appointed for Habre made statements on his behalf when Habre had clearly stated that he did not recognize the legitimacy of the Court, and many other breaches. She also addressed the issue of the right of the accused to remain silent- indeed Hissene Habre did choose to remain silent throughout the proceedings, and the hearings. His strategy was to emphasize the procedural irregularities without saying a word.

However, his lawyers, appointed by the Court to represent him when the ones that he personally chose did not show up, did not follow the procedural strategy and intervened many times on his behalf. Could they defend him against his express will? According to Ditisheim this is a problem of professional ethics because the lawyers had to follow their client's instructions. This rule applies to all lawyers regardless of whether they are chosen by the accused or appointed by the court. Thus, Ditisheim opined that the lawyers became the lawyers of the court and not the lawyers of the accused, which is a breach to the fair trial principle. However, she concludes that we can counter-balance this breach with the good faith efforts of Hissene Habre's lawyers who tried to represent and defend him.

The Chair, Helene Cisse, closed the panel after clarifying that in criminal law, lawyers do not represent but assist their clients. The choice to remain silent should be considered as a real defence strategy. She then wondered if it is in the best interest of justice to have lawyers appointed when the accused chose not to be assisted. Can we accept a defence that has not been chosen by the accused himself?

When the time for questions arose, Eric-Aime Semien stated that when talking about international prosecutions there is already the presumption that the accused is guilty. He said, however, that it is not the seriousness of the crime or the existence of victims that give legitimacy to international criminal justice, but rather that the accused is given a fair trial. He also asked why the ICC does not have a stand-alone defence department, instead of having the

defence within the Registrar. He ended by questioning the fight against impunity as an objective of international criminal courts, stating that they should not consider at the outset that they need to find someone guilty.

Another intervention came from Henry Comiss, who stated that the EAC judges should not be blamed for allowing Habré's lawyers to act on his behalf even though he did not want them to. In Senegal, courts cannot try a person unless they have a lawyer. The judges were put in a difficult position because the EAC had to take into account the Senegalese Code of Procedure. It is true, however, that the defence lawyers were given less time to prepare their case and study the archives. There was a weakness in the defence; it was put in a difficult position. Moreover, the lawyers should never have raised issues of exception outside the court. In addition, they were not trained in issues of international criminal justice.

Lucile Paupard intervened to say that in France there were not enough specialised lawyers in a recent trial that dealt with international criminal justice. However, the judges had been working in the area for many years and were specialised. She advocated for special thought to be given to training lawyers. She also stated that views were expressed during the Seminar about internalising international criminal law, but that it induces a risk of divergences in their implementation by each state. Thus, she proposed to harmonize the internationalisation of international criminal law.

Mia Swart stated that the neglect of the defence has led to a distortion of the historical records. Though the ICTY Appeals Chamber addressed equality of arms, it did not include equality of means, rendering its finding useless, since financial resources are so crucial to the ability to mount a proper defence.

Saskia Ditisheim agreed with Eric-Aime Semien regarding the shortcomings of the defence in international criminal courts. She asked Roland Amoussouga to take all of the issues raised during the panel into account as MINUSCA proceeds to establish the Special Tribunal for CAR.

All those present agreed on the importance of having a strong defence team, without which justice will not be achieved, particularly in international criminal justice.

Panel 6: The Future of International Criminal Justice in Africa

This session was chaired by Ambassador Mirjam Blaak-Sow who noted at the onset that there was a full house even on the last session of the Seminar, attesting to the timeliness and success of the Seminar. The first speaker, Professor Robert Dossou began by stating that the eradication of impunity in Africa is a very long process, and that it is related to the establishment of the Organisation of African Unity (OAU). He explained that it was necessary to build an African unity but that it was difficult to achieve due to a very divided Africa.

The fight for independence from colonialism was based on African unity. The independence process started in the 50s (with the exception of Ethiopia and Liberia). Africa was, among other factors, divided by the war in Algeria. The Monrovia group and the Casablanca group met to create the OAU. However, expectations were not met because the heads of state had the priority of stabilising their power.

The OAU was subsequently changed to the AU on the basis of the AU's Constitutive Act. This Act had two important provisions: 1) the right of the Union to intervene in Member

States in cases of war crimes, genocide, and crimes against humanity, and 2) the respect for the sanctity of human life, and the condemnation and rejection of impunity and political assassination, acts of terrorism and subversive activities.

Following the democratic liberation of society, civil society launched the process to bring Habré to justice. Senegal sent a file to the AU, who decided to set up a Committee of Eminent African Jurists to 1) Find the ways and means to try Hissene Habré and 2) Make recommendations on ways and means of dealing with similar issues in the future.

The report of the Committee of Eminent African Jurists of July 2006 paved the way for Habré to be tried by a continental tribunal, the Extraordinary African Chambers, established in 2013.They took inspiration from Cambodia since, for instance, rape was penalised as a crime. International justice is only a step to internalizing those crimes in domestic law.

Professor Dossou then identified the impact/consequences that can be identified after the trial:

- The emergence of a new conscience characterised by freedom and liberation
- The importance of the fact that many people did not believe in the trial, but that it became a reality
- The mobilisation of people and organs in other continents to join the fight

He pointed out that the AU took ownership of the trial, and that African states contributed financially to the cause, while others also offered to host the trial. He stated that the way forward has been paved by the existence of the EAC and the skill with which the trial chamber operated.

He believes that though complementarity is a principle of international criminal justice, subsidiarity is more in line with the real duties that states should have. He also called on African states to ratify the Malabo Protocol in order to have a continental court of justice and human rights, and for civil society organisations to engage those states that have not yet done so.

David Deng spoke next. He first mentioned the 2005 Comprehensive Peace Agreement, which was established in South Sudan as part of the peace building process. Indeed, it was an agreement to initiate a comprehensive process of national reconciliation and healing throughout the country. In 2012, the country celebrated independence. However, the peace agreement did not foresee what would happen after independence.

Another peace agreement was signed in August 2014, which was established around 3 institutions:

- The Hybrid Court for South Sudan
- The Commission on Truth, Reconciliation and Healing
- The Compensation and Reparations Authority

The Court is mandated with holding people responsible for international crimes offences committed after 2013. It is an AU body, so the AU has the authority to design it. Moreover, it is a hybrid court, so it will involve South Sudanese judges and international judges.

David Deng identified two key challenges:

1. Politics and the peace versus justice debate. However, he stated that there is little empirical basis for pitting the two concepts against each other. Particularly since indicting heads of state, such as Charles Taylor, Al-Bashir or Milosevic, has not stopped the implementation of peace agreements.

2. Citizen ownership: this peace agreement was negotiated in a foreign capital by an elite. It needs south Sudanese ownership if it is to work.

He then explained how the South Sudan Law Society, of which he is Research Director, has carried out various surveys in the country, and had surprising findings, including:

- When asked what should be done with those responsible for abuses, trials or tribunals were the most common response
- Many citizens were not aware of the on-going peace building process
- There was widespread opposition to amnesties
- When asked about court preferences citizens preferred national courts and the ICC. He highlighted that a minority was also in favour of a hybrid court even before the establishment of the EAC.

From this he concluded that there is little truth to the statement that, when international crimes are committed, Africans prefer peace processes over judicial responses.

Consequently, he identified several priorities: advocacy, civil engagement to bridge the gap between the peace agreement and what people know of how it is being carried out, and documentation. Moreover, his most important recommendation was that the AU should engage the transitional government to begin the process of establishing the court in consultation with Government. He also pointed out that there is a critical role for customary courts, using Rwanda as an important example of the meaningful impact of a customary court such as gacaca.

The next speaker was Charles Jalloh. He began by asking whether Africans are entitled to establish an African Criminal Court. He said that though the underlying assumption is that the existence of the ICC precludes African states from entering into an agreement that would create a regional court; the better view is that they have the right to do so. Proof of point is the UN Charter itself.

He also stated that the Malabo Protocol has many more provisions other than that of immunities, which is so often referenced. There are many interesting novelties in the Protocol:

1. A criminal component to a human rights court

2. Full equality of arms, with a full defence office

3. Corporate criminal liability

4. Sexual violence framed in gender-neutral terms

5. The list of crimes: piracy, mercenaries, exploitation of natural resources, corruption, etc.

6. Expanding the idea of complementarity to regional courts to establish a second level of complementarity

However, he also touched upon some of its shortcomings:

- Immunity for sitting heads of state
- Financial Constraints

Since the Protocol's success will depend on the people who run it, he advocated for civil society to push for having a strong institution.

The final speaker was Gilbert Maoundonodji. He began by questioning whether the establishment of the EAC is an isolated event or whether it is part of the AU's policy in the field of international criminal justice. He then acknowledged that the judgment is linked to the mobilisation of civil society, other states, individuals, etc.

He mentioned how Africa had to wait for the African Charter before the process of human rights protection at the regional level could begin. The process was difficult, but it has had major achievements, including giving the African Union the right to intervene in a Member State for the protection of peace despite the sovereignty of states, and the establishment of the EAC. Though other international courts were established in the framework of a UN resolution, or in an agreement between the UN and the country concerned, the EAC was established by the AU.

This framework exists and it helped establish the EAC. However, there is still a problem related to the heads of state immunity included in the Malabo Protocol.

After several questions were asked, including from Professor Udombana, who questioned why African states rush to establish treaties and then fail to comply with them, Don Deya reminded the attendees that there is an AU ministerial decision on universal jurisdiction, and that governments should therefore be asked to comply with their legal frameworks. It is also when it is time to implement treaties that states face unexpected difficulties.

Professor Dossou appealed to pessimists to be patient. The processes for establishing an African Court on Human and People's Rights was also difficult, but it was successful.

Gilbert Moundonodji explained that African states are reluctant to cooperate with the ICC because no consultation with local people have been organised.

Charles Jalloh remarked how if the ICC is overloaded with the cases that should be dealt with at the national and regional level, it will fail, and that we should therefore strive for a multilevel solution to international criminal justice.

Ambassador Mirjam Blaak-Sow thanked the panellists for their inspiring presentations and participants for the lively discussions, noting that the Seminar had been a Resounding Success.

Rachael Nelson-Daley, centre, seminar rapporteur at work and Lucile Paupard.