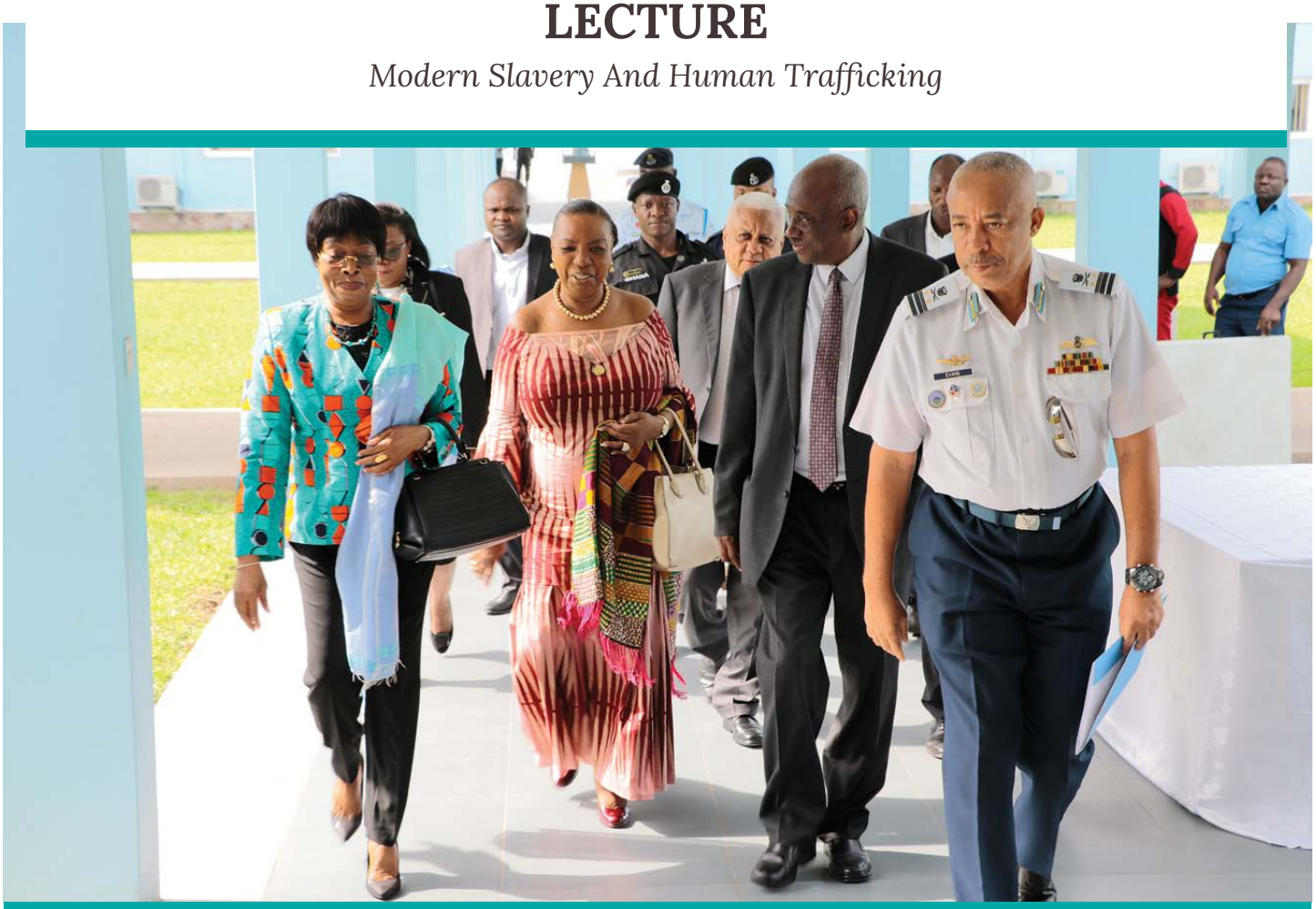
INTERNATIONAL JUSTICE SYMPOSIUM

West African International Justice –
Leadership, Challenges, And Opportunities

and

LECTURE

Modern Slavery And Human Trafficking



ACCRA, GHANA | 21 - 22 MARCH 2019

In collaboration with:

West Africa has been the scene of impressive activity in the fight against impunity for international crimes and merits scrutiny in its own right. It was this that prompted the ***Wayamo Foundation****, the* ***Africa Group for Justice and Accountability (AGJA)*** *and the* ***Konrad Adenauer Stiftung's Rule of Law Programme for Sub-Saharan Africa*** *to hold a symposium and a lecture in Accra, Ghana, on the wide-ranging topics of "West African International Justice – Leadership, Challenges, and Opportunities" and "Modern Slavery and Human Trafficking".*

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EXECUTIVE SUMMARY

West Africa has been the scene of impressive activity in the fight against impunity for international crimes and merits scrutiny in its own right. It was this that prompted the **Wayamo Foundation**, the **Africa Group for Justice and Accountability (AGJA)** and the Konrad Adenauer Stiftung's Rule of Law Programme for Sub-Saharan Africa to hold a symposium in Accra, Ghana, on the wide-ranging topic of *"West African International Justice – Leadership, Challenges, and Opportunities"*, with the aim of examining and exploring the contributions and ongoing challenges facing West Africa in the fight to achieve meaningful justice and accountability for atrocities in the region. A handpicked group of international and regional experts came together to assess West Africa's contributions to global justice and the continuing challenges to achieving this end.

THURSDAY 21ST MARCH 2019: INTERNATIONAL SYMPOSIUM

Held at Accra's Kofi Annan International Peacekeeping Training Centre (KAIPTC), the symposium was officially opened by **Air Vice Marshal Griffiths S. Evans** in his capacity as the Centre's Commandant, followed by Wayamo Foundation Director, **Bettina Ambach**, Chief Justice of The Gambia and AGJA Chairman, **Hassan Bubacar Jallow**, German Ambassador **Christoph Retzlaff**, and **Peter Wendoh** of the Konrad Adenauer Stiftung. These words of welcome were brought to a close by an appeal from Ghana's Chief Justice, **Sophia Akuffo**, who felt that, rather than concentrating solely on the atrocity crimes committed by *"political bigwigs"* that are of such concern to the wider international

community, attention should instead focus on the need for community-wide institutional arrangements to address the types of cross-border crimes that are currently plaguing the region.

This thought-provoking opening ceremony was followed by a conversation loosely structured around the topic of *"Leadership, Challenges and Opportunities"*, in which Wayamo moderator, **Joseph Roberts-Mensah**, guided his two guests, AGJA Members **Zainab Bangura**, Former UN Special Representative of the UN Secretary General on Sexual Violence in Conflict, and **Navi Pillay**, former UN High Commissioner for Human Rights, through a series of searching questions.

The remainder of the day was devoted to three panels which discussed topics ranging from *"The International Criminal Court in West Africa: Complementarity in Action?"* to *"The Future of International Justice and Emerging Contexts in the Region"* and *"New Challenges and New Opportunities: Investigating Human Rights Violations and Atrocity Crimes in the Region"*. Ably led by their Wayamo and AGJA moderators, **Angela Mudukuti**, **Mohamed Othman Chande** and **Fatiha Serour**, a team of panellists, all experts in their chosen fields, made brief presentations and then fielded questions from the floor. Sometimes coinciding, sometimes diverging, the opinions voiced reflected the panellists' respective experiences: as human rights activists, e.g., **Elise Keppler** and **Reed Brody**, both from Human Rights Watch, **Eric-Aimé Semien** from the Ivory Coast Human Rights Observatory, and **Adama K. Dempster** from the Liberian Civil Society Human Rights Advocacy Platform; as legal practitioners, e.g., Nigerian Complex Casework Group prosecutor, **Matthew Odu Una**, **Philipp Ambach**, Chief of the Victims Participation and Reparations Section at the International Criminal Court (ICC), and Kenyan High Court Advocate and AGJA Member, **Betty Kaari Murungi**; and as academics, e.g., **Kwesi Aning**, Director of KAIPTC's Faculty of Academic Affairs & Research.

The symposium was attended by an audience of over 100, which included AGJA members, former Attorney-General of Ghana, **Betty Mould-Iddrisu**, and Ghanaian deputy Special Prosecutor, **Cynthia Lamptey**.

TOPICS COVERED

OFFICIAL WELCOME

AIR VICE MARSHAL GRIFFITHS S. EVANS

Commandant, Kofi Annan International Peacekeeping Training Centre, Accra

Master of ceremonies **Joseph Roberts-Mensah** called the meeting to order and asked Air Vice Marshal Griffiths S. Evans to open the symposium.

In extending a warm welcome to all, **Air Vice-Marshal Evans** expressed his belief that the participants would team up to accomplish the symposium's designated objective: *"the fight to ensure justice and end impunity for international crimes cannot be achieved without the engagement and co-operation of individual states."* While West Africa had shown a commendable effort in developing and supporting international criminal justice systems, *"the need to build our national legal systems and reinforce our regional mechanisms is a priority that cannot be underestimated",* he said.

The emerging security challenges, human rights violations, and atrocities in the region call for constant

re-evaluation and updating of existing measures in the fight for international justice. The results of establishing the Special Court for Sierra Leone and the like *"should boost our interest and encourage us in the fight for international justice."*

He saw the symposium as *"a great step in harnessing our individual efforts for a better impact in the region."* The participants would spend the following two days not only highlighting the challenges facing the region in its fight for international justice, but also focusing on regional opportunities for promoting accountability and protecting victims and witnesses in the pursuit of justice.

Lastly, he wished to stress the importance of sharing professional and intellectual experiences, and strategies that would be beneficial in developing regional mechanisms.

OPENING REMARKS

BETTINA AMBACH

Director, Wayamo Foundation, Berlin

Bettina Ambach (BA) explained that the symposium, *"West African International Justice – Leadership, Challenges, and Opportunities"* had been organised by the Wayamo Foundation and AGJA in collaboration with the Konrad Adenauer Stiftung's Rule of Law Programme for Sub-Saharan Africa, with the support of the Kofi Annan International Peacekeeping Training Centre and the School of Law of the Ghana Institute of Management and Public Administration. It was a real pleasure to be in Accra: indeed, just the previous day, AGJA and Wayamo had had the honour of being received by President Nana Akuffo Addo. She felt that Ghana's recent peaceful and stable history should make it an ideal host for many more such events.

Turning to the participants, she first thanked the AGJA members who had travelled from across the continent to be at the symposium and attend the Group's 6th Strategic Meeting to discuss current challenges and future activities. Thanks were likewise due to representatives of Human Rights Watch, the ICC, Ivory Coast, Nigeria, Liberia and the Ghanaian justice and security sector, who had accepted the invitation to speak at the symposium. The following one and a half days would be devoted to exploring the contributions of West Africa to global justice, and the continuing challenges to achieving justice for atrocity crimes in the region.

BA proceeded to run through some of the questions which the different panels would be trying to answer:

- what makes **West Africa** an important player in the world of international justice? What can we learn from the experiences of West African states when it comes to justice and accountability in conflict-affected situations?;
- what role does the **ICC** have in promoting and achieving justice and accountability in West Africa? What is the record and potential of ICC preliminary examinations in terms of galvanising domestic accountability efforts?;
- following **Hissène Habré's trial** in the Extraordinary African Chambers in Senegal, what is the future of universal jurisdiction in West Africa?;
- **Ivory Coast**: in the wake of the acquittal of former President Laurent Gbagbo and youth leader Charles Blé Goudé, as well as the lack of accountability for crimes committed by both sides, what can be done to ensure justice for victims in the country?;

- **Mali**: what is the state of ICC activities and the potential for domestic justice in the country?;
- **Liberia**: what are the chances of a war crimes court being created, or are there other means of dealing with the past?;
- **The Gambia**: what is the state of transitional justice efforts and how real is the possibility of prosecuting former President Jammeh for crimes allegedly committed against his own citizens?;
- **Central African Republic**: what are we to make of a situation where there are two ICC investigations, two suspects at the Court in The Hague, a hybrid court known as the Special Criminal Court, and a fragile peace built upon the promise of amnesty for serious international crimes?; and
- lastly, the *"big question"* for the following day's lecture on modern slavery and human trafficking would be: *"How can states in the region effectively combat human trafficking and how does trafficking in persons intersect with the perpetration of core international crimes?"*

As always, the aim of the symposium would be to employ an interactive model, with brief presentations and enough time for questions and participation from the floor.

HASSAN BUBACAR JALLOW

Chair of the Africa Group for Justice and Accountability and Chief Justice of The Gambia

Informing the audience that it would be hearing from AGJA members who had come to the symposium from as far away as Algeria, South Africa and Tanzania, **Hassan Bubacar Jallow** explained that the Africa Group for Justice and Accountability (AGJA) had been founded some three years previously with a mandate to promote accountability on the continent. There was a need to establish and maintain a culture of justice because

"with justice and accountability lies the path to peace and progress!" The Group had been providing advice on a pro bono basis to African governments in the Central African Republic, and in countries across East and West Africa.

In its commitment to recognising the principle of complementarity, AGJA was seeking to strengthen justice at a domestic level through building and enhancing the capacity of national investigation and prosecution systems. In this regard, the Group was also fully committed to the ICC and international justice as *"a final option"*. He was pleased to see that Africa remained firmly committed to the ICC. Evidence of this could be found in the fact that the Ghanaian President had reinforced this message just the previous day, and that even his own country, The Gambia, had withdrawn its withdrawal. It is not enough just to build national courts of justice: it is necessary to maintain this commitment across Africa.

The week's event would be focusing on West Africa in general, and on issues of security, peace and justice in Ivory Coast and Mali in particular. He expressed gratitude to the international community and African countries for their support in ensuring a peaceful transition in Zimbabwe and The Gambia.

AGJA remained steadfast, not only in its support and training role, but also in its diplomatic role. He was happy to be in Ghana, a pioneer in African liberation and a model for others. *"Where better to hold the symposium than at a centre named after Kofi Annan?"*

AMBASSADOR CHRISTOPH RETZLAFF

Ambassador of the Federal Republic of Germany

Quoting his Minister of Foreign Affairs, Heiko Maas, **Ambassador Christoph Retzlaff** stated that *"Justice is the necessary condition for lasting peace"*.

Germany deeply regrets the fact that individual states have withdrawn from the Rome Statute. Indeed, one of Germany's central political aims is universality of the Statute. The German Parliament underscored the need for this in a resolution commemorating the anniversary, urging the government to promote further accessions to the Statute. *"We want to live in a society in which no individual and no government is above the law and in which everybody enjoys equality before the law."*

PETER WENDOH

Project Advisor, Rule of Law Programme for Sub-Saharan Africa, Konrad Adenauer Stiftung, Nairobi

Peter Wendoh began by explaining that promotion and protection of the rule of law is one of the Konrad-Adenauer Stiftung's top priorities, and so it was that in 1990 it rolled out its transnational Rule of Law Programme, at the core of which lie the twin concepts of justice and accountability.

The implementation and institutionalisation of international criminal justice in Africa has been surrounded by debate and controversy, partly because there tends to be a perception that justice and accountability mechanisms are intended to apply to everyone *except* the duty-bearers, mechanism formulators and pertinent enforcement agencies. Effective justice and accountability mechanisms cannot rest on the presumption that -unlike the elite- ordinary citizens are guilty until proven innocent. *"There can be no room for double-standards, and therefore any mechanism established must apply equally and fairly across the board."*

When it comes to the fight against impunity, the Foundation has been a strong supporter of effective, independent and efficient local mechanisms, with international mechanisms only playing a complementary role. To achieve this, people must be aware of their rights, be able to demand and defend such rights, and ultimately, have reliable means of seeking redress.

Certain fundamental ingredients are required: among others, these include *"effective and independent investigations and prosecutions, independent judiciaries, robust and secure witness protection mechanisms, and effective victim participation and reparations"*. Systems, mechanisms and institutions alone will not achieve much. Leaders must show unwavering commitment to fighting impunity, and citizens must be able to trust the people and institutions mandated to carry out these functions.

SPECIAL GUEST SPEAKER

JUSTICE SOPHIA AKUFFO

Chief Justice of Ghana, Supreme Court of the Republic of Ghana

Justice Sophia Akuffo felt that the theme of the symposium, *"West African International Justice - Leadership, Obstacles, and Opportunities"* suggested that it would focus on the high-profile perpetrators of crimes, i.e., mostly political leaders. Since the Rome Statute had come into force, most ICC trials had involved African leaders, leading to the suggestion that the Court was targeting Africans. Indeed, some member states had taken steps or threatened to withdraw from the Court. *"Is it only African leaders who have committed and continue to commit the so-called atrocity crimes?"*, she asked. If the answer was no (and it surely was), then

one had to ask why it was that African leaders were predominantly on trial before the ICC? *"The very survival of the ICC is at stake!"*

Furthermore, whilst one tended to look at *"atrocity crimes committed by political bigwigs"*, which are naturally the focus of the wider international community, one should not lose sight of the fact that West Africa has problems of criminality which affect the daily lives of the people and are of concern to them. The symposium therefore offered an opportunity to take a critical look at the institutional framework and other measures required to deal with crimes — and cross-border crimes in particular — committed in the ECOWAS [Economic Community of West African States] space:

- there was no community-wide investigation or prosecution institution in place to deal with such crimes;
- the Community Court of Justice, ECOWAS [CCJE] does not have jurisdiction in criminal matters, something confirmed by case precedent; and,
- in addition, the adoption of the ECOWAS Revised Treaty and the Protocol on Free Movement of Persons, Residence and Establishment and related Conventions meant that a lot of cross border crimes could be anticipated.

Even so, *"the Community has been slow in dealing with problems associated with the resultant regime of free movement of persons and goods in the zone".* For instance, the Inter-Governmental Action against Money Laundering had largely focused on sensitising member states and institutions about the harmful effects of money laundering. There was no mechanism in place to investigate and prosecute offenders. Similarly, other equally serious cross-border crimes continued to proliferate in the ECOWAS area and yet once again, there was no institutional framework to tackle a problem which was adversely affecting people's lives and diverting resources that were needed elsewhere.

Returning to the issue of atrocity crimes largely committed by political leaders, **Justice Akuffo** noted that not every country had signed up to the Rome Statute. The absence of an acceptable institution had compelled member states to resort to ad hoc measures to try alleged perpetrators of heinous crimes, notable examples being the Special Court for Sierra Leone and the trial of Hissène Habré in Senegal.

In conclusion, she therefore asked the gathering to look at the following seven recommendations:

I. creating an institutional framework capable of inspiring confidence in the people and designed to achieve speedy cross-border investigation into alleged crimes and expeditious trials. *"The era of ad hoc solutions should be a thing of the past. When member states have a harmonised judicial and legal system, fighting crime becomes a shared responsibility and results are easier to achieve. Whilst the crimes of money-laundering, smuggling, human trafficking and trafficking in arms may not qualify as crimes of genocide, war crimes, crimes against humanity or crimes of aggression so as to bring them within the jurisdiction of the ICC, their effects are devastating*

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enough to engage the attention of the international community". In this regard, consideration might well be given to expanding the mandate of the African Court of Justice and Human Rights and the CCJE, or establishing an international tribunal to conduct criminal trials in cases not coming within the jurisdiction of the ICC;

II. pending the establishment of an international tribunal, granting domestic courts extra-territorial jurisdiction over nationals of other states whose criminal activities cut across borders;

III. finding ways of strengthening existing domestic institutions, by resourcing them to fight cross-border crimes, which have devastating effect on the economies, peace and security of member states;

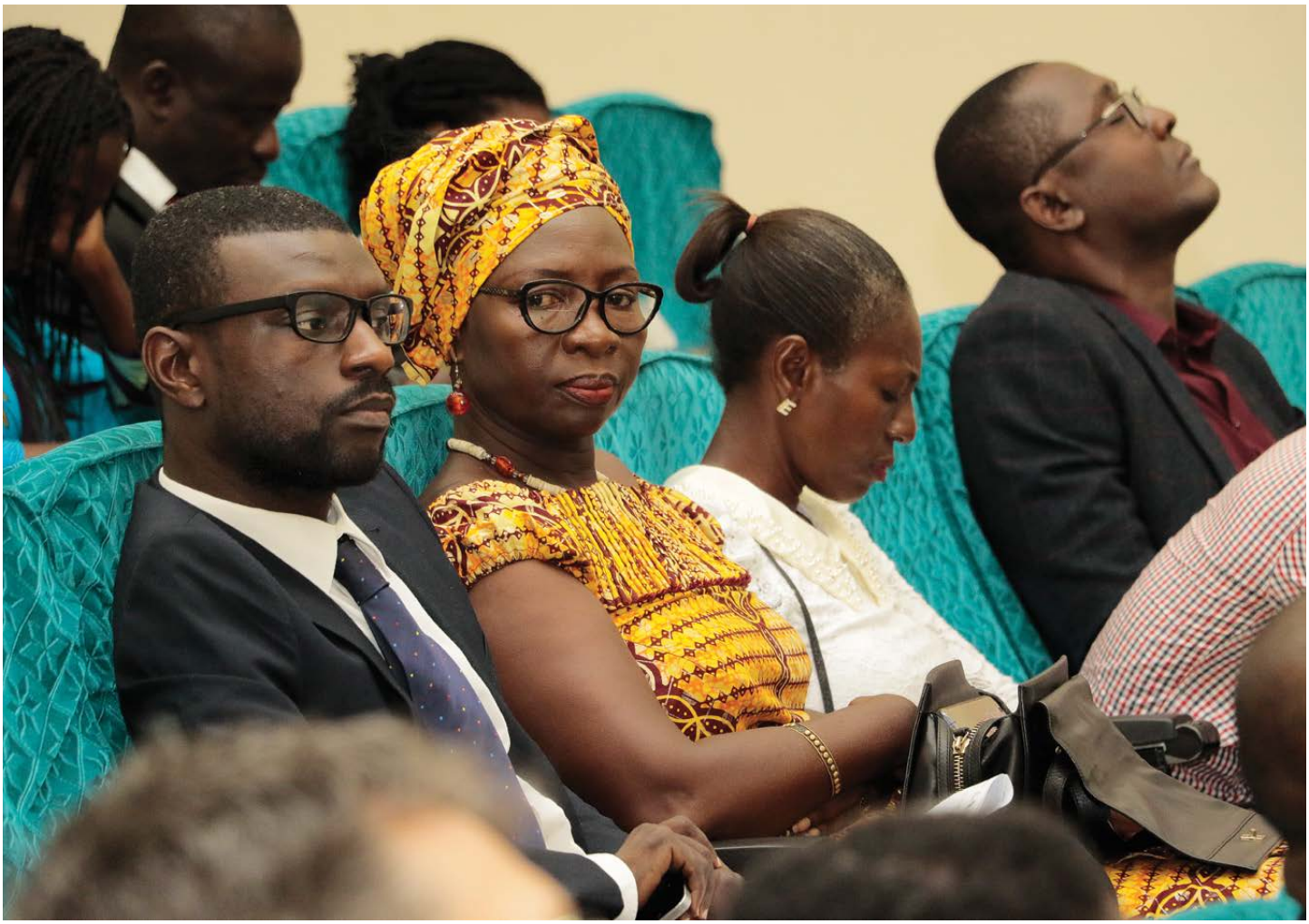
IV. putting in place an AU- and ECOWAS-sponsored early warning system to alert member states to the activities of criminal syndicates, especially with regard to human trafficking, arms trafficking and smuggling;

V. making use of mass communications to encourage people to detect and report criminal activity, without compromising the safety of whistleblowers;

VI. encouraging ECOWAS civil society groups to act as watchdogs over the rights of the respective communities and demanding accountability from their governments, especially in cases that address atrocities within their communities. This would minimise the issue of political entanglement in West African international criminal justice; and lastly,

VII. persuading ECOWAS governments to deal with impunity by passing national legislation to admit universal norms into the national legal systems and putting measures in place for their enforcement. They should also co-operate with the international community in cases where national prosecutions are not feasible and international involvement becomes necessary.

Instead of waiting for atrocity crimes to be committed and for the international community to protest and come up with ad hoc measures, such measures would serve to help the people.



CONVERSATION

Leadership, Challenges and Opportunities

MODERATOR

JOSEPH ROBERTS-MENSAH

Africa Director, Wayamo Foundation

A CONVERSATION WITH

ZAINAB BANGURA

AGJA Member and Former UN Special Representative of the UN Secretary General on Sexual Violence in Conflict

AND

NAVI PILLAY

AGJA Member and former UN High Commissioner for Human Rights

Joseph Roberts-Mensah (JRM): A comment from both of you, if you will, on the symposium theme, particularly what you see as challenges to leadership and where the opportunities exist to improve accountability measures, both regionally and across the continent.

Zainab Bangura (ZB): In the field of justice and accountability, leadership at all levels is important — local, national, regional and international. While impunity is a big problem, an even bigger problem is how to ensure justice. It is here that leadership can play a big role and can be a major challenge. **ZB**'s personal experience of making sure that countries in conflict or coming out of conflict take responsibility and ownership to address the problem of accountability and ensure justice for victims had shown her how easily this could be done with the right political will. Invariably there is a huge culture of silence and denial about atrocities that have been committed. In most cases this is followed by the serious challenge of capacity in many of these countries in addressing these problems. There is a lack of capacity to investigate and prosecute these crimes by the required entities, and in the case of sexual violence, this is further complicated by the mix of traditions, heritage and culture and, sometimes, by the lack of an adequate legal framework to define these crimes. *"The challenges are huge but there is nothing that can't be done."* The most difficult of these is breaking the culture of silence and denial. Until a country and its leadership agree that they have a problem, they will not make any effort to seek help or support to address it.

Navi Pillay (NP): *"There is no shortage of bad eggs in Africa"*, and underlying this there is a very bad example with *"Donald Trump being a macro-issue that affects us all"*. Hence, the situation has to be seen in this context. Indeed, she had found US students to be anxious about what they could do to counteract bad leadership. Recalling the likes of Nkrumah, Nyerere, Mandela, Gandhi and Mother Teresa, she asked gloomily, *"So who are today's role models when it comes to leaders?"*

Passing on to other matters, **NP** said that one hears about atrocity crimes but there are also many economic crimes, such as the looting of state assets to the tune of billions in South Africa. Indeed, dysfunctions in South Africa encompass basics such as power and water. Here too there was an evident lack of leadership.

While West Africa could look forward to a more positive side in the shape of ECOWAS, as exemplified by the organisation's initiative in The Gambia, she nonetheless agreed with Sophia Akuffo as regards the lack of regional mechanisms dealing with cross-border crime. In addition, there was the issue of neo-colonialism being blamed for African problems, including that of *"getting the money back"*, i.e., money is only being received in the form of development aid, and yet *"outflows exceed inflows"*.

However, AGJA's focus is on justice and accountability. Although a large number of African and West African countries support the ICC, there had been some degree of backlash in the wake of the release of Laurent Gbagbo. In Liberia, George Weah is reluctant to answer demands for a war crimes tribunal, raising the old topic of peace or justice, when the truth of the matter is that victims want both!

Reiterating her support for Justice Akuffo's call for regional mechanisms, **NP** summarised some of the main issues in the area as being: the destruction of national heritage in Mali; the Guinean authorities' reluctance to begin the trials pertaining to the 2009

stadium massacre; the closure of the ICC's preliminary examination in Gabon, due to the alleged offences being found to fall short of the threshold for Rome Statute crimes; and the *"success story"* of Hissène Habré's trial in the Extraordinary African Chambers. That said, however, there had been no new initiatives in the region. She felt that ECOWAS should be encouraged to do much more in the same direction that it had taken in The Gambia, with Guinea providing the necessary opportunity. *"So a push is needed to get on with accountability!"*

JRM: What effect do you think failed prosecutions at the international level — for whatever reason — of African leadership (Ivory Coast and before that Kenya) have on the reputation of the ICC and its credibility amongst African populations?

NP: When it comes to international criminal justice, victims are asking questions about how investigations are being conducted and how witnesses are being protected. *"We have to be very vigilant!"*

ZB: Victims who have taken the risk to give evidence will have to deal with the consequences of a failed trial and with the stigma associated with being identified as rape victims. They agreed to give evidence because they felt that their evidence would lead to prosecution of the perpetrators. Unfortunately, now they do not only have to deal with the stigma associated with the crimes but also with the trauma of realising that the perpetrators are going to be set free. To most people, this just serves to reinforce their perception of the Court.

JRM: Survivors of sexual and gender-based violence are often shunned and ostracised by their communities. Is there a role for governments and civil society organisations in improving education on this... what steps should they be taking to prevent such stigmatisation?

NP: In recognition of the need for a definition of sexual violence which included male victims, a gender-neutral definition was at last required. To illustrate the point, **NP** mentioned two examples: UN access to a little

known area of the Democratic Republic of Congo had revealed *"the case of a man who had suffered sexual violence and had been thrown out by his wife!"*; and Uganda where attitudes to homosexuality were akin to those formerly shown to left-handers, i.e., when beating was viewed as the best way of dealing with what was perceived as an aberration. *"Education is the answer"*, she insisted.

ZB: Instead of hiding victims of sexual violence, it would perhaps be better to give them visibility and make them *"champions"*. Accordingly, it is important for a man to champion their cause, as in the case of the Yazidis in Iraq, where their spiritual leader, Baba Sheikh, became a champion for the victims and asked for the *"girls to be brought back and accepted by the community!"* It has been very different in many cases, especially in Africa where rape victims are abandoned by husbands, rejected by families and ostracised by their communities. Resources should be allocated to sexual violence victims to give them space and opportunity to allow them to pick up the pieces of their lives and make a living for themselves and children that will enable them to survive.

JRM: The President of Sierra Leone has just declared a state of emergency with regard to the perpetration of sexual violence, particularly against minors. Is this something other West African countries should consider emulating? Would a stronger public political stance on the issue be helpful? Do you see any problems with this approach?

ZB: While she thought that he should be applauded for taking an interest in this issue, she nevertheless disagreed with him in declaring a state of emergency just to address it. A state of emergency cannot be declared lightly, since it gives the president enormous power to make, suspend and create laws. Personally, she would prefer to see the Sex Offenders Acts reviewed. In addition, the laws should be tightened, both to make the non-reporting of sexual violence a crime in itself, and to ensure that local courts and traditional leaders do not deal with these crimes under any circumstances.

NP: All that governments have to do is to consult the victims, *"they'll tell you what they want!"* In South Africa,

Cyril Ramaphosa has declared zero tolerance towards sexual harassment.

JRM: There has been some criticism of the ICC Office of the Prosecutor's handling of sexual violence generally. Do you agree, and what can the Office of the Prosecutor do to improve their investigation and prosecution of sexual violence?

NP: The complaint is that prosecutors do not take sexual violence seriously. Methods of investigation have to be improved and sexual violence must be treated as seriously as other crimes.

JRM: Within the UN exists a zero-tolerance policy for sexual and gender-based violence that you are both aware of, yet time and time again the UN, and most recently the AU, have been found wanting. How can international organisations that are supposed to be setting the right example in places of conflict improve their record?

> *"The challenges are huge but there is nothing that can't be done"*
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> *— Zainab Bangura*
>
> **AGJA Member and Former UN Special Representative of the UN Secretary General on Sexual Violence in Conflict**

NP: The UN is not short of standards but one would like to see them implemented. In conflict situations, sexual violence and rape occur, and are committed even by UN peacekeepers. The UN acts like any other institution in protecting its good name. The police of member nations should be told to investigate these incidents but the truth is that nations do not want to see their armed forces discouraged.

ZB: Since the UN has no standing army of its own and relies exclusively on member states to contribute troops to any force required, this makes it very challenging when it comes to pursuing sexual violence committed by its peacekeepers. Moreover, member states have made it clear in agreements signed with the UN that peacekeepers can only be prosecuted by their home countries. Hence, when it comes to prosecuting peacekeepers who have committed sexual violence, the onus is on the troop-contributing country to do so. Despite these challenges, the UN has taken some steps to alleviate these problems. Firstly, it has established a trust fund for victims, and has ensured that there is more pressure on troop-contributing countries to investigate and prosecute such crimes properly at home. Secondly, victims' rights advocates have been put in place in all missions and at headquarters, to ensure that victims receive the necessary assistance, whether medical, psychosocial or legal, etc. However, one of the biggest challenges lies in *"re-hatting"* troops in any one country, i.e., when AU troops who have been operating as AU peacekeepers now have to be *"re-hatted"* as UN peacekeepers. The AU is still behind in addressing this issue and needs to put adequate mechanisms in place.

Comment

Although there was insufficient time for a full Q&A session, AGJA member **Fatiha Serour** rose from the floor to further emphasise and endorse what had been said. In addition to constraints being placed upon troops, the governments of contributing countries must have rigorous vetting. In Somalia training for generals had been instituted, with sessions on sexual violence and children's rights. While this would not eradicate the problem, it would, she felt, serve to reduce violations and encourage people to report.

PANEL I

The International Criminal Court in West Africa: Complementarity in Action?

MODERATOR

ANGELA MUDUKUTI

Senior International Criminal Justice Lawyer, Wayamo Foundation

***Angela Mudukuti (AM)** introduced her three panellists and explained that they would be discussing domestic and international criminal proceedings, and the impact, if any, of the latter on the former in light of the situations in three countries — Nigeria, Ivory Coast and Guinea. Each speaker would have 10 minutes to make his/her initial address, after which there would be time for questions.*

ELISE KEPPLER

Associate Director, International Justice Program, Human Rights Watch

Elise Keppler (EK) confessed that it had been *"music to her ears"* to learn that AGJA and Wayamo were turning their attention to West Africa, the scene of impressive advances in accountability in Africa and around the world, ranging from the Special Court to Sierra Leone to the trial of Hissène Habré, and its vocal support of the ICC. Even so, there were places where more was needed to make accountability a reality, and other places *"where countries were on the cusp of making major advances on behalf of victims"*.

She would be focusing on one of those places, Guinea, and in particular, on the stadium massacre of 2009 when security forces opened fire on peaceful protesters, killing 150 and subsequently subjecting dozens of women to brutal sexual violence.

Guinea is relevant, not only in terms of the opportunity it provides for justice at a domestic level, but also for the fact that the ICC preliminary examination has been helpful in spurring domestic efforts. Guinea has had a

long history of impunity, something that partly accounts for what happened in 2009. Just six days after the ICC announced that the situation in Guinea was under preliminary examination, the Foreign Minister indicated that the country would hold the criminals to account domestically.

Whether the cases pertaining to the stadium massacre will proceed is still *"an open question"*, the truth is that *"progress has been considerable and has surpassed expectations"*. After taking testimony from over 400 victims, interviewing members of the security forces and bringing charges against high-level suspects, a panel of judges has announced the conclusion of the investigation. A steering committee (comité de pilotage) has been formed to oversee the organisation of the trial. To ensure the necessary cohesion, this committee includes donors plus other relevant players and stakeholders. However, each time the process advances, it then seems to slow or even regress: far from being independent of local politics, this start-stop pattern ties in with the timing of elections.

International engagement and civil society activity have been instrumental in seeing the process advance. In this regard, **EK** picked out two of the key players as being:

I. **the ICC**, which visits the country approximately twice per year. These visits have coincided with increased activity, highlighting the value of the preliminary examination process and how it can be used to foster domestic proceedings; and
II. **the Office of the Special Representative of the Secretary-General on Sexual Violence in Conflict** whose multiple visits have played *"a unique and invaluable role"*. It has enabled the deployment of an international expert to help the judges, a *"unique development in international criminal justice"*. Not only does this ensure that expertise is brought to bear on the process, it also shows that the international community is monitoring the situation. The appointed expert, Tidjane Bal, a former Minister of Justice from Mauritania, has the necessary gravitas and status to move the process along with his peers.

Human Rights Watch has long pursued a strategy of encouraging the local authorities on a step-by-step basis. What is needed now, however, is the ultimate political discussion to allow the process to move forward, and AGJA, as an elite body of elders, could do a great service by lending its support to advancing justice in Guinea.

ERIC-AIMÉ SEMIEN

President at Observatoire Ivoirien des Droits de l'Homme, Abidjan Côte d'Ivoire (Ivory Coast)

Eric-Aimé Semien (EAS) described the Ivory Coast as being in a complex post-conflict situation and undergoing a process of transitional justice. *"Things"*, he said, *"are still very difficult"*, with elections being scheduled for the following year.

The country had experienced two decades characterised by a cycle of violence that culminated in the armed rebellion of 2002 and the 2010-2011 post-election crisis which involved over 20,000 people. In 2011, the ICC opened an investigation into the actions of former Ivorian President Laurent Gbagbo, his wife, and his former sports minister, Charles Blé Goudé, marking the first time that a former head of state had been tried after his mandate. Gbagbo and Blé Goudé were charged with four counts of crimes against humanity for acts allegedly committed during the post-election violence. In view of Gbagbo's recent acquittal, the country was now asking the ICC, *"What happened?"* It would seem that the prosecution failed to prove the defendants' connection to the violence, with the evidence produced not being deemed relevant for the purposes of obtaining a conviction. *"So"*, asked EAS, *"what was the ICC doing all this time?"*

Furthermore, even though both sides were involved, only one side has been prosecuted, and while an investigation of the other side has been announced, to date not a single person from the opposing camp has been, or is expected to be, prosecuted. The situation is even more serious at the level of national justice, since all the domestic proceedings so far have targeted the former president's supporters and some of his former ministers. Prosecuting only one side means that not enough attention is being given to victims' groups, and has left many people feeling frustrated. All this presents a challenge for the justice process in Ivory Coast, where there has been a lack of co-operation between domestic and ICC prosecutions.

Gbagbo has a lot of supporters in the country but has been convicted and sentenced in absentia for economic crimes and thus cannot return. Moreover, his release is conditional, in that he must report to the authorities weekly, avoid contacting witnesses in Ivory Coast and refrain from making public statements about the case. Here again, EAS paused to throw out a challenge: *"Why"*, he said, *"has the judge's decision not yet been rendered in writing?"*

To sum up: there is social and political tension in Ivory Coast, where there has been little justice for the victims of post-electoral violence. Approximately one

thousand people have been prosecuted but since they were all from one side of the conflict, this has led to the perception of the ICC being one-sided and *"promoting the concept of victor's justice"*. Despite the fact that President Ouattara has announced an amnesty, two points must be borne in mind: firstly, it is not a blanket amnesty but is limited to 800 persons; and secondly, under Ivorian law such a step is irregular because an amnesty may only be granted by Parliament, and not by the President acting in his executive capacity. Lastly, in reference to the upcoming elections, EAS indicated that there were already *"signals of violence"*.

MATTHEW ODU UNA

Prosecutor, Complex Case Work Group, Office of the Director of Public Prosecutions, Nigeria

Matthew Odu Una (MOU) stated he would be approaching his subject from *"a prosecutor's point of view"*. Like Ivory Coast, Nigeria also presented a complex picture, since it had signed and ratified the Rome Statute but had not yet domesticated it, something that posed a major challenge when it came to prosecuting certain serious crimes.

2010 marked the first major terrorist attack on Nigerian soil. This was followed by a series of similar incidents, including the 2011 and 2014 bombings, all of which served to *"put Nigeria on its toes"* with regard

to terrorism. However, when **MOU** and his colleagues started to prosecute these crimes, *"other issues came up that were outside Nigerian law"*. They realised that they were not meeting standards, especially when it came to sexual offences, which affect women and men alike. In recognition of the fact that Nigerian laws do not address crimes in exactly the same way as the Rome Statute, his solution was to apply domestic law in line with the Rome Statute, without mentioning the Statute by name.

In view of the specialised expertise required, in 2016 the Complex Case Work Group (CCG) was created to prosecute terrorism and related offences, and received training from a number of organisations, including the Wayamo Foundation. In terms of legislation, Nigeria has two anti-terrorism acts -the Terrorism (Prevention) Act 2011 and the Terrorism (Prevention) Amendment Act 2013- with plans afoot to harmonise the two. For the bulk of their work, the CCG prosecutors rely on these statutes in tandem with the country's Economic and Financial Crimes Commission Act and Administration of Criminal Justice Act.

The CCG has been involved in the prosecution of all major terrorism cases in Nigeria, some of which have resulted in convictions and some of which are still ongoing. With over 20,000 people killed and over 5,000 in detention, the trials of detainees had to be held in three batches or phases. Initially, the trial statistics gave rise to criticisms and *"questions about what the prosecutors were doing"*. **MOU** explained that military information is not the kind of evidence needed for a court of law, and it was this, in part, which accounted for the high number of cases discharged. Furthermore, arrests were made by Nigerian Army personnel who are not trained investigators: as a result, cases were poorly investigated, meaning that in many instances the actual act of terrorism could not be charged for lack of sufficient evidence and detainees had to be charged with lesser offences. To further complicate matters, non-domestication of the Rome Statute obliges investigators and prosecutors to contextualise so-called *"ICC crimes"* within similar provisions of national laws: for example, as prosecuting rape under the country's Terrorism Acts is difficult, this tends to be treated as *"an attack on the human body"*.

q&a

A brief sampling of comments on some points of interest from the floor.

GUINEA

Floor - (AGJA member, Zainab Bangura): One problem that comes out clearly is that of *"capacity"*, in terms of things like computers and the type of people needed to change the law.

Floor - (former Attorney-General, Betty Mould-Iddrisu): The case of Guinea shows that the time taken is the real issue.

EK: As regards capacity, **EK** said that on her first trip to Conakry, she had been struck by the commitment of judges and the glaring lack of resources: for instance, there was no money for petrol, and there was only one filing cabinet. In such cases, Human Rights Watch strategy is to address these minor capacity problems, so as to enable the issue of political will to be targeted.

SEXUAL VIOLENCE

Floor - (AGJA member, Zainab Bangura): Incidents of sexual violence normally happen when vulnerable people are crossing borders, or are detained and abused. Victims of sexual violence are men, women, boys and girls ...but men don't talk about it. The fact that a lot of information is collected for documentation but not for evidence purposes is a problem. The need for a combination of skills and expertise calls for a team on sexual violence: the problem then is whether you're going to have successful prosecutions.

Floor- (former Attorney-General, Betty Mould-Iddrisu): Weaknesses of regional bodies like ECOWAS must be taken into account when it comes to sexual violence.

ICC/GBAGBO CASE

Floor - (former Attorney-General, Betty Mould-Iddrisu): Speaking as a supporter of the ICC, she felt that the scenario in Ivory Coast throws up *"ponderables"* concerning the ICC, and raises questions as to whether the ICC is the solution for Africa. She agreed with the opinion that Gbagbo's acquittal throws doubts on the ICC and its judges.

Floor: To think of the years taken by ICC to prosecute Gbagbo, only to see him acquitted! Can he really not return to Ivory Coast?
EAS: The Ivory Coast's position is that *"the ICC prosecutor concentrated too much on the people and not on the facts"*. Crimes were committed but it is not known who was responsible for these crimes. It should be noted that the Trial Chamber did not say that Gbagbo had not committed the crimes but that there was not enough evidence to convict him.
The future will be determined by whether or not Ivory Coast's President stands for a third term: it is legal for him to do so but it will nevertheless create problems. The victim issue has not been addressed, and many victims are hoping that Gbabgo will return in order for them to get justice.

Floor - (AGJA member, Navi Pillay): To clarify the position surrounding the ICC's decision in this case, **NP** rose to explain that under the terms of the Court's decision, Gbagbo cannot leave Belgium at present.

"There can be no room for double-standards, and therefore any mechanism established must apply equally and fairly across the board"

— *Peter Wendoh*

Project Advisor, Rule of Law Programme for Sub-Saharan Africa, Konrad Adenauer Stiftung, Nairobi

INDEPENDENT JUSTICE STRUCTURES

Floor: Highlighting *"the challenge that appears to be a pattern across the West African region"*, the speaker referred to *"the need for independent mechanisms that engender public trust"*. What did the panel see as opportunities that could help develop strong, independent justice structures without resorting to the ICC, i.e., *"solutions that are responsive to our needs"*.

EK: On the subject of national judiciaries, **EK** said that Human Rights Watch is deeply committed to enabling domestic judiciaries to try crimes. Possible ways included: encouraging the AU to assist countries to set up their systems, *"instead of merely attacking the ICC"*; and forging partnerships between international expertise/experience and national judiciaries, as in the Central African Republic, where the hybrid court is placed within the domestic system. This mix of the international and the national allows for exchange and learning.

MOU: Africans should not be frustrated and can be part of the solution. There is a need for a new national prosecution strategy that includes principles of international justice in the national legislation. It's not only the terrorists who are committing the offences: the military is also involved. *"The military tries alleged culprits under military law but this is not enough and creates a lot of dissatisfaction!"*

Floor - (Peter Wendoh, Konrad Adenauer Stiftung): Commenting on the point made by Elsie Keppler about opportunities for bringing in the AU to help with capacity building, **PW** said, *"If we put our hopes at that level then not much is feasible. Nations themselves should devote resources to this. Just look at how much they devote to elections which are perceived as important! The future belongs to the young people!"* They cannot allow the present institutions to use resources in this way instead of teaching the youth about civic duty. *"We've got to get the balance right!"*

PANEL II

The Future of International Justice and Emerging Contexts in the Region

MODERATOR

MOHAMED CHANDE OTHMAN

AGJA member and Former Chief Justice of Tanzania

***Mohamed Chande Othman* (MCO)** *introduced his panel, explained that Fatiha Serour would be sitting in for Catherine Samba-Panza, and said that the panellists would be discussing the future of international justice and the situations in specific regions, namely, Liberia, Mali, the Central African Republic, East Africa and South Sudan. In some of these situations security was "very fragile". The panel would be touching on the dynamics and progress of justice and accountability, and the fight against impunity.*

ADAMA K. DEMPSTER

Secretary General, Civil Society Human Rights Advocacy Platform of Liberia and Lead Justice Campaigner for the Establishment of a War Crimes Court in Liberia

Adama K. Dempster (AD) explained that his Platform covered a network of over 30 human rights and justice groups that worked to promote and protect human rights in Liberia, and that the symposium was exactly the type of forum his organisation sought.

One of the key areas for intervention is the establishment of a war crimes court to deal with the terrible crimes committed during Liberia's civil strife, which had left a trail of death and mass graves in its wake. The 2009 recommendation of the Truth & Reconciliation Commission to establish such a court has never been implemented, and none of the perpetrators have been held to account. Victims are therefore still seeking justice and reparations.

In 2018, the Civil Society Human Rights Advocacy Platform of Liberia presented the first shadow report to the UN Human Rights Committee on the Implementation of the International Covenant on Civil and Political Rights, arguing that the administration of justice in Liberia should be challenged because no-one had been held accountable and the matter of reparations had not been addressed. Some 76 groups comprising international, regional and national human rights and justice institutions wrote a letter to the UN Human Rights Committee, asking it to take the necessary action for the Government of Liberia to set up a mechanism that would address past human rights violations. Based on this advocacy, the UN Concluding Observations recommended that, as a matter of priority, the Liberian Government should set up a mechanism that would prosecute past gross human rights violations and bring those who committed atrocities to account.

The first *"landmark"* national justice conference was held in Monrovia in November 2018. National and international justice and human rights actors met under the aegis of the national platform for justice to call for

implementation of the Report's recommendations and discuss the way forward to bring justice for Liberia. In addition, that same week saw a *"March for Justice"* along the streets of Monrovia, in which over three thousand protesters took part to demand justice and reparations for war victims. These included a huge number of refugees who had fled to Ghana and other countries.

Liberia had received UN support but no regional support, and **AD** had therefore *"come to this meeting to rally regional support"*. Reminding his audience that the victims -women, children and young girls- had still not received any form of reparations, **AD** made a last appeal for help and support. His organisation believed that AGJA had an important opportunity to support the quest for justice for Liberia: *"we encourage you to use your networks to reach out to the Government of Liberia, particularly President Weah, and encourage him to back a war crimes court for the country"*. On a personal note, **AD** very much regretted that *"a suspected war criminal is sitting on ECOWAS"*. *"Removing such a person would speak volumes!"*

PHILIPP AMBACH

Chief of the Victims Participation and Reparations Section in the Registry of the International Criminal Court

Taking up the subject of Mali, **Philipp Ambach (PA)** began his overview by observing that in 2012, the situation had been marked by two main events. These were:

I. firstly, the *"Tuareg rebellion"* in the north, which resulted in northern Mali being seized by armed groups, followed by an offensive by jihadist rebel groups; and
II. secondly, a *coup d'état* by a military junta.

In terms of international crimes committed, these included war crimes (murder, summary executions, rapes, forced disappearances) and crimes against humanity, including murder, torture, with women in particular being targeted through sexual violence.

In 2013, French and Malian troops regained control over the north but in 2018 there had been a further serious deterioration in the human rights/security situation. Attacks by armed Islamist groups against civilians had *"spiked"*, the army had committed atrocities during counter-terrorism operations, and intercommunal violence had killed hundreds, precipitating a humanitarian crisis. The peace process intended to put an end to the 2012-2013 political-military crisis in the north made scant progress. A truth commission came into existence but not much else.

Current ICC activities

Resulting from the ICC investigations, there had been two main cases in Timbuktu.

- **Ahmad Al Faqi Al Mahdi**
  The Trial Chamber sentenced Al Mahdi to nine years' imprisonment for the war crime of directing attacks against historic monuments and buildings dedicated to religion in Timbuktu. In addition a Reparations Order was issued to the Muslim community of Timbuktu in the sum of 2.7 million euros, in what **PA** described as a *"showcase scenario"*.
- **Al Hassan Ag Abdoul Aziz Ag Mohamed Ag Mahmoud**
  Mr Al Hassan was charged as the de facto chief of the Islamic police in Timbuktu. Charges against him went beyond what had been levelled against fellow Malian, Mr Al Mahdi in the aforementioned case. Charges against Al Mahdi only concerned intentionally directing attacks on buildings dedicated to religion and historic monuments as a war crime. The charges against Mr Al Hassan, in turn, include a number of crimes against humanity, and other war crimes in addition to the destruction of religious monuments, and notably rape and sexual slavery. If the charges are confirmed by the Pre-Trial Chamber later in 2019 for the case to go to trial, it would represent the first time victims of sexual violence in the Mali conflict have been heard in any court. *"This"* said **PA**, *"gives you an idea of how difficult it can be to pursue certain offences"* .

Status report

PA ticked off the following points:

- Following relevant NGO and other public reports, *"scant progress"* has been made by the judicial authorities in investigating over 100 complaints filed by victims of alleged abuses committed during the armed conflict;
- According to these reports, there has been insufficient security for the Truth Commission to carry out its mandate, and the International Commission of Inquiry has only just got started;
- In June 2017, the government passed a *"national consensus law"* extending amnesties to certain members of armed groups involved in the 2012-2013 hostilities who had not been accused of violent crimes;
- the Malian courts have heard two key cases:
  - Aliou Mahamane Toure, former Chief of Islamic Police in Gao (MOJWA) was tried and sentenced to 10 years in prison for attacks on state security, aggravated assault and criminal conspiracy. This has been hailed as an instance of functioning complementarity vis-à-vis the ICC (i.e. that national courts assume their primary responsibility to try and prosecute violence committed on their territory or by their citizens), and a demonstration of national judicial capacity to deal with high profile cases yet the prosecution did not include war crimes and torture. A key problem is that often national law enforcement has *"little grasp of what a war crime consists of"*, leading to prosecuting authorities charging 'only' national as opposed to international crimes.
  - The *"red berets case"*, involving disgruntled Malian soldiers who attempted a coup against the then Malian President Touré. The trial is being held in Sikasso, far away from Bamako, and is still on hold, *"so complementarity is not so much in action"* if and where national judicial proceedings do not proceed; and lastly,
- The Specialised Judicial Unit for the fight against Terrorism is in operation and by the end of 2018 had already dealt with 5 cases.

Still, it was noted that Rome Statute crimes have yet to be incorporated into the national law.

FATIHA SEROUR

AGJA Member and Senior Adviser to the Global Alliance for Humanitarian Innovation

Fatiha Serour (FS), appearing on behalf of Catherine Samba-Panza, said she would *"summarise the gist"* of the original presentation. In her considered opinion, the Special Criminal Court (SCC) of the Central African Republic stood as *"a real example of leadership"*, in that the law was passed at the time when Madame Samba-Panza was the transitional President.

FS intended to deal with the topic under three heads:

(i) context and creation of the court;
(ii) challenges; and,
(iii) the fight against impunity through peace agreements

1. Context and creation

On 3 June 2015, the SCC was created to investigate, prosecute and adjudicate serious violations of human rights and serious violations of international humanitarian law committed in the Central African Republic since 1 January 2003. The Court has a five-year renewable mandate but cannot deliver a death sentence. It applies Central African criminal and procedural law, with the possibility of resorting to international norms and standards to fill gaps or inadequacies in national law. It enjoys a primacy of competence vis-à-vis other national jurisdictions and will work in complementarity with the ICC.

The Court has been inaugurated, and has both an office and a team. In fact, following the July 2017 symposium in Dakar (Senegal), Wayamo held a capacity building workshop for SCC personnel, during which they met and consulted with the team that had dealt with the Hissène Habré case.

2. Challenges

One year after the first oaths of office were sworn, investigations into crimes committed in the Central African Republic have not yet begun, due to:

- insecurity, which complicates the work of the investigators
- lack of capacity; and,
- lack of resources.

More than 620 crimes have been reported in the country but the Court has not been able to progress, with two years of its five-year mandate having already expired!

On the subject of human capacity, **FS** noted:

(a) that even though the Court might be able to recruit the necessary numbers, there is no in-depth understanding of what is involved; and,

(b) that there is a lack of representation of the various communities and sub-groups around the country.

Moreover, there is little support for victims to build their cases and take them forward.

3. The fight against impunity through peace agreements

February 2019 saw the signing of the most recent peace agreement between the Government of the Central African Republic and 14 armed groups controlling 80% of the territory. This marks an attempt to shift the focus away from seeking justice to establishing peace. Referring to this development, **FS** agreed with Catherine Samba-Panza *"that nothing should prevail over the search for justice"*, and that *"no matter who the perpetrator might be, he/she should be tried"*.

Since the signing of the peace agreement, there have been some incidents, skirmishes and abuses, and these should be addressed.

BETTY KAARI MURUNGI

AGJA Member and Advocate of the High Court of Kenya

Betty Kaari Murungi's (BKM) review covered a vast swath of territory stretching from East Africa to South Sudan.

Beginning with Burundi, she noted that the country had *"gone through with its threat to withdraw"*. In her opinion *"the future of international justice in evolving situations across the continent is bleak"***.**

There had however been progress in rule of law, jurisprudence and protection of human rights, and strengthening of the justice sector in countries such as Kenya and Tanzania. In the case of Kenya, there had also been some progress in the area of victims' rights and right to reparations, both in national and international courts (in this respect she cited a case of sexual violence which occurred during the country's post-election violence and is awaiting judgement). Even so, *"there is a big 'but' in talking about the strength of national systems"*, since the majority of the population does not have access to justice. Furthermore, in Kenya there had been a *"backlash"*, with petitions levelled against 6 of the 7 Supreme Court Judges (alleging corruption, etc.), something, she ventured to suggest, might be partly due to *"pushback"* after the Court's historic decision concerning the 2017 elections.

South Sudan

In 2013, the Sudan People's Liberation Movement split into two main factions. In August 2015 a Peace Agreement was signed: this included a full chapter on transitional justice, which envisaged a Hybrid Court,

a Truth & Reconciliation Commission, reparations, and the vetting of military and government officials. However, the court has not come into existence. By April 2016, a transitional government had been formed, only to see war break out again a few months later. The reawakening of the war saw a proliferation of armed groups and an explosion of sexual violence by both groups, something that struck **BKM** as *"endemic"* and signalled a new evolving context. In 2017, new negotiations began. In the interim, no-one has been held accountable for any of the crimes committed.

Part of the failure must be laid at the door of the AU Commission. Although it concluded that crimes had been committed in South Sudan and that a hybrid court should be set up, **BKM** felt it had nonetheless been hypocritical, for the simple reason that, when it comes to brokering a peace agreement, there is a feeling that *"you can't reach peace and prosecute the same people who are negotiating the terms of that agreement"*. Inevitably, such people will seek *"stabilisation"*, which makes it impossible to investigate and prosecute high-ranking officials.

Universal jurisdiction would properly mean that the above crimes could and should be prosecuted in Uganda and/or Kenya, yet the culprits are allowed to reside, operate and school their children in both those countries *"whilst busy sacking their own countries"*. This leads to a lack of public confidence in the justice system.

"The focus should not be on the future of international justice but rather on justice in our region".

In conclusion, **BKM** made four points:

- **some** thought should be given to *"the advance in stabilisation in justice in conflict-afflicted countries that is being pushed by the West on Africa and weaker states, on states in conflict, and on countries like Kenya which hold out the promise of regional stability and is a partner on the war on terrorism"*. As long as there is such a *"stabilisation agenda"*, it is going to be very difficult to start thinking about the application of international justice norms insofar as these pertain to the highest-ranking perpetrators;
- the need to expand access to justice;
- the need to promote accountability through transitional justice measures other than the usual *"cut-and-paste"* measures. To underscore her point, **BKM** highlighted the questionable record of Uganda's International Crimes Division to date (one case in eight years!); and,
- diminishing democratic development contributes greatly to the lack of capacity and lack of political will to advance international justice.

q&a

A brief sampling of comments on some points of interest from the floor.

The panel now faced a veritable volley of questions posed by members of the audience, including Elise Keppler of Human Rights Watch, Mark Kersten of the Wayamo Foundation and Femi Falana of AGJA, among others. Since many of the questions converged on the same topic areas, these have been grouped as follows:

SOUTH SUDAN / HYBRID COURT

BKM: In answer to Elise Keppler, who described the AU as *"dragging its heels"*, **BKM** reviewed the thorny question of what could be done to encourage the AU Commission to set up the hybrid court. There is a memorandum pending signature and a cross-country agreement to set up a court in Arusha, both of which have to be approved by South Sudan's Parliament. Describing the position as being *"back to ground zero"*, **BKM** said that the government now has to establish a new parliament consisting of 10 parties. *"This calls for an exercise of political will by South Sudan and the AU to stick to the deadline!"*

SEXUAL VIOLENCE

BKM: In reference to a comment made by a member of the audience earlier in the day, **BKM** was adamant on the point that *"sexual violence has nothing to do with biology- it is a criminal act"* and, as such, those responsible for it must be held accountable in accordance with the law.

VICTIMS / REPARATIONS

BKM: Reparations are not just about compensation. Victims' priorities include education and skills building. It is not merely a matter of restitution either, since *"victims want to be in a better place",* with access to justice, schools and the like.

PA: The ICC definition of victims asks whether the victim has been subjected to personal harm. The concept of restorative justice involves victims being part of the proceedings as victims in their own right, and, ideally, receiving reparations in the case of a conviction, theoretically from the party or parties responsible.

FS: Concurring with her fellow panellists, she said succinctly, *"reparations are not about money but about what the victims want"*.

PEACE AND JUSTICE

BKM: One can never tell what the result of investigating and prosecuting high-level officials might be. The new strategy is therefore to target mid-level officials.

FS: Although it is a *"chicken and egg"* issue, it always seems that there is a much more immediate focus on peace, with the achievement of justice being left to later. She took the view that *"equal emphasis on the two is required"*, while alerting her listeners to the tendency to see truth and reconciliation as a substitute for justice.

LIBERIA

AD: With respect to *"the landscape in Liberia"*, **AD** said that the burden rested on the government. Unfortunately, the President had *"entered into agreement with extreme bedfellows"* and that was why he was struggling at present. Efforts were under way to get civil society to hold a legislative conference to advise Members of Parliament on how to address the problem of war crimes (i.e., what they are and who is responsible). He felt that there was a problem of prosecuting criminals owing to the lack of witnesses and evidence.

ICC VERSUS NATIONAL/REGIONAL JUSTICE SYSTEMS

BKM: She agreed with Femi Falana on the need to make more use of regional courts.

PA: The whole question of whether and when national jurisdictions should prevail is subject to scrutiny of the stability and integrity of relevant national investigative authorities and all actors in the courtroom. Where a fair trial cannot be expected, national authorities require help and assistance, including capacity, from others. Hybrid national/international courts, regional as well as international courts can be part of the solution, but national judicial capacity will remain key for a sustainable justice solution.

As regards the timing of establishment and the roles of the respective mechanisms, he felt that in trying to work out how the ICC fits in with other national and regional systems in terms of cooperation, three key issues at play. These were:

- co-ordination among the various bodies, where information can be shared and any other assistance rendered mutually, relevant for national proceedings as much as for ICC proceedings;
- capacity in terms of how to investigate and try international crimes, which the ICC enjoys and should be able to transfer to national/regional systems;
- and security – a challenge for all courts alike, where highest levels of confidentiality and close cooperation between all actors will remain key.

"Sexual violence has nothing to do with biology- it is a criminal act"

– Betty Kaari Murungi

AGJA Member and Advocate of the High Court of Kenya

PANEL III

New Challenges and New Opportunities: Investigating Human Rights Violations and Atrocity Crimes in the Region

MODERATOR

FATIHA SEROUR

AGJA Member and Senior Adviser to the Global Alliance for Humanitarian Innovation

*Introducing what she described as the "last-but-not-least panel", **Fatiha Serour** said that she felt that this was an important discussion to have at a time when conflicts were becoming ever more protracted and when justice for human rights violations could become increasingly jeopardised: "We should not miss an opportunity to reconfirm our commitment!"*

REED BRODY

Counsel and Spokesperson for Human Rights Watch

Reed Brody (RB) chose to talk about the Hissène Habré case, in which he had acted as counsel for the victims. The case is unique in two respects: not only is it the only case in history in which the courts of one country prosecuted the head of state of another for human rights crimes, it is also the only universal jurisdiction case in Africa to go to trial.

Of particular importance was the victims' role as protagonists, influencing and mobilising the campaign to bring their dictator to justice. Indeed, *"it would never have happened but for the determination of a small group of victims and survivors!"*, said **RB**. Wanting to do what they saw was being done in the Pinochet case, the victims rallied hundreds of other victims to the cause, and in doing so gained notoriety, with their names becoming known throughout francophone Africa. To illustrate the political importance of the victims' role, **RB** explained that between the ICC prosecutor and a president, many citizens might well side with their president, but this would not apply where the choice is between victims and a president. It was the personal appeals by the victims that moved policy-makers in Senegal, Belgium, and the African Union.

- hundreds of victims were pivotal in evidence-gathering, spending 15 years bringing together the evidence;
- *"victims shaped the contours of the trial"* by refusing to allow narrowly tailored charges for prosecution and insisting that crimes against all groups be included; and,
- *"victims of sexual violence stood up in court and looked Hissène Habré in the eye!"*

A *"bizarre"* ruling of the ECOWAS court imposed the need for an *"international court"*. This was a *"blessing in disguise"*, since it led to the AU coming up with the inexpensive 10-million dollar solution of a domesticised internationalised Senegalese court tailor-made for the trial. By affording protection for insider witnesses while allowing for the concept of command responsibility, and permitting the recording and broadcast of the trial, this amounted to *"the best of both worlds"*.

When Jammeh was forced out of The Gambia, his victims were inspired by the Habré case, and organised a meeting with Habré's victims. Here RB noted that there was an important difference between the two cases, in that Jammeh is in exile in Equatorial Guinea under the protection of President Obiang. The political, security and institutional conditions do not yet exist for a trial in The Gambia and bringing Jammeh back now would be dangerous. The Gambian Government has chosen to create a Truth & Reconciliation and Reparation Commission (TRRC), which is engaged in creating a record for eventual prosecution and in *"deepening political will"*.

In fact the worst atrocity in Jammeh's Gambia was committed in July 2005, not against Gambians, but against 56 Ghanaian and other West African migrants bound for Europe. All but one were killed: this sole survivor jumped out of the pick-up truck that was taking him and the others to their death. There was an audible gasp of surprise from the audience when RB announced that this survivor, Martin Kyere, was actually present among them. It was he who had rallied the families to fight for justice. After Jammeh's demise, Human Rights Watch had gone back and confirmed that Martin's companions had indeed been murdered by Jammeh's henchmen, a unit known as the *"Junglers"*.

The Government of The Gambia is ready to assist the Ghanaian Government, should it choose to pursue the case. One possibility would be to hold the trial in Ghana, another would be to use a regional court: *"everything's possible once there is jurisdiction!"*. Many countries have an interest (since the migrants came from five countries and were killed along the Senegal-Gambia border) and there should be a way of ensuring justice, concluded **RB**.

KWESI ANING

Director, Faculty of Academic Affairs & Research, Kofi Annan International Peacekeeping Training Centre, Ghana, and Clinical Professor of Peacekeeping Practice at Kennesaw State University, Atlanta

The all too wide gap between fine words and acts received the brunt of Kwesi Aning's (**KA**) outspoken eloquence and frankness. The true issue, he said, was *"how to move from fancy signing and talking to practicality"* and stop *"lying to ourselves!"*

Despite reform proposals to affirm the centrality of human rights in the prevention agenda, the current political climate remains hostile to the implementation of human rights agenda. One of the biggest challenges in investigating human rights and atrocity crimes has been *"the lack of clear articulation of the nexus between human rights protection and counter-terrorism operations. Human rights and atrocity prevention seem to take a backseat when a situation is characterised as a terrorist or extremist threat!"* Recourse continues to be had to countries like Chad to supply troops. One only has to look at what is happening in neighbouring countries like Mali and Nigeria, or in Burkina Faso where the response to militancy has been to carry out summary executions and make arbitrary arrests. *"Those who commit atrocity crimes go unpunished by hiding under the cloak of national security"*.

The state is not playing the role we expect it to play. The enduring failure to establish the right balance between justice and political stability has served to promote impunity, which in turn *"enables human rights violations and atrocity crimes to fester"*. In Ivory Coast, concerns about atrocity crimes were compromised in favour of political stability when the international community supported the implementation of victor's justice, even

though both sides had clearly been involved. Similar compromises had been made in Liberia and Guinea.

"The deliberate desire to overlook the ruling of the ECOWAS Community Court of Justice by member states is a major impediment to atrocity crime and human rights prevention across Africa. Indeed, systematic disregard for the Court's decisions and inability to elicit compliance with regional norms are major challenges and an obstacle to addressing human rights and atrocity crimes in West Africa."

"There are enough instruments that we can and must use". Even so, there is a danger of what he termed *"democratic authoritarianism"*. *"Voting and fancy ways"* do not make governments respect human rights: conversely, too often it is the fact that governments are officially democratic which makes it impossible to get a hearing. Partially offsetting this is the greater liberalisation of the media landscape, which has heightened awareness of people's rights and served to ensure that news of rights violations spreads quickly.

q&a

A brief sampling of comments on some points of interest from the floor.

What is needed is a *"level playing ground"*.
Summing up, **Fatiha Serour** remarked that they had heard *"two powerful interventions"*: on the one hand they had been told that the power of the people can be much greater than the power of institutions; on the other, they had been warned that, *"we should not fool ourselves"*.

COST OF INTERNATIONAL JUSTICE

Floor: Is the cost sustainable?

RB: The Hissène Habré case cost US$10 million, *"which was not that much money"*. Now that the principle had been established, ways of making these mechanisms less expensive must be found.

TRADITIONAL JUSTICE STRUCTURES

Floor (AGJA member, Femi Falana): When Africans talk about justice it's about a type of justice practised by the elite, when in reality the majority use the traditional forms of justice. Don't we need to go back and learn from traditional justice systems?

KA: He agreed with the questioner that it was necessary to go back to see how traditional systems can respond to people's needs.

> *"The enduring failure to establish the right balance between justice and political stability has served to promote impunity!"*
>
> — *Kwesi Aning*
>
> **Director, Faculty of Academic Affairs & Research, Kofi Annan International Peacekeeping Training Centre, Ghana, and Clinical Professor of Peacekeeping Practice at Kennesaw State University, Atlanta**

PEACE, JUSTICE AND JAMMEH

Floor (Wayamo Deputy Director, Mark Kersten): For capacity reasons The Gambia is no choice: does this give credence to those who favour sequencing?

RB: Each situation is different in terms of sequencing. There is no formula. What the Gambian Government has done is *"very wise"*. *"We went to them with this Ghana idea: The Gambia wants to try Jammeh at some time, but with the killing of the migrants makes the Ghana idea a sensible one."*

Floor (Wayamo Deputy Director, Mark Kersten): By refusing to surrender Jammeh, Obiang is doing international justice a favour: he is the convenient bad guy. What needs to happen for Jammeh to return?

RB: The return of Jammeh poses great risks. At present no-one is asking Equatorial Guinea to do anything for strategic reasons. The Gambian Truth & Reconciliation and Reparations Commission is opening people's ideas but they don't want to see him prosecuted right now. Time is always an element.

KA: No-one is going to challenge Obiang because he's got a number of leaders in his pocket.

FUTURE OF HUMAN RIGHTS

Floor: The entire West African region is at risk in terms of security and judicial structures where the executive has too much control. Listening to you gives me the impression that all hope is lost. What do you think we can do now given this platform?

KA: Human rights need to be made more accessible to ordinary people.

CLOSING REMARKS

HASSAN BUBACAR JALLOW

Chair of the Africa Group for Justice and Accountability and Chief Justice of The Gambia

Hassan Bubacar Jallow observed that though it been a long day, it had provided a useful period for discussion, during which quite a number of international criminal justice issues in West Africa had been identified.

The general sentiment was that overall one was looking for justice as such…not just *"legal"* justice but *"justice in the community"*. When it came to legal justice, it had to be said that, while local justice had its advantages, by the same token, international justice was useful *"because of its reach"*. Although one should not pin all one's hopes on the ICC, one should nonetheless support international justice. That said, *"local justice where feasible is always preferable"*, and capacity building at the local level is therefore essential. *"It's not just a matter of law. Without political will it won't work!"*

Traditional justice systems do have a role and have been neglected. In The Gambia the traditional customary courts are still in existence and handle

a large amount of domestic matters. Rwanda too is another example where the revival of the traditional Gacaca court systems made it possible to address many of the genocide cases.

During the presentations and discussion, **HBJ** had noted a lot of concern about sexual violence. Ways of stopping it had to be found. According to the UN Report on Genocide, over a quarter of a million women had been assaulted in Rwanda, and it was true to say that the International Criminal Tribunal for Rwanda (ICTR) had been unable to handle all these cases. On the specific matter of sexual violence committed by UN peacekeepers, he had sat on a panel which drew up a series of recommendations, one of which was to bar anyone with a record of sexual violence from becoming a peacekeeper. The panel had also recommended that this issue be monitored by a high-level person.

In thanking the moderators, panellists and participants, **HBJ** assured the public that AGJA remained *"committed to helping across West Africa!"*

Navi Pillay admitted that it *"alarmed"* her that people extolled traditional law. She felt that traditional law should only be recommended, if it complied with international law and standards.

NAVI PILLAY

AGJA Member and former UN High Commissioner for Human Rights

As an AGJA member it was *"such an education"* to listen to the discussion on leadership issues, challenges and opportunities. She and her fellow AGJA members had a sense of admiration at the way in which the region had supported international justice initiatives. However, she did see leadership as still posing a challenge, in that there was the need for leaders to have the necessary will to protect their people. AGJA wished to work with governments and with civil society. Just the previous day, an AGJA delegation had met with Ghana's President Nana Akufo-Addo to get his support.

Some of the challenges she saw as *"depressing"*, describing the choice between *"peace or justice"* an *"old saw"*. Kofi Annan had always insisted that *"the two go together".*

As regards the opportunities, it had to be said that while victims in Chad and Sierra Leone had finally obtained justice, in Liberia 3,000 people had taken to the streets to demand the creation of a war crimes tribunal. In Colombia too, the people had insisted on having justice and accountability in the peace formula.

AGJA is in solidarity with people's struggle in every country: *"We can take encouragement from these things!"*

EXECUTIVE SUMMARY

LECTURE

Modern Slavery And Human Trafficking

FRIDAY 22ND MARCH 2019

Moot Court, Faculty of Law, Ghana Institute of Management and Public Administration (GIMPA), African Centre of International Criminal Justice

On 22 March 2019, a well-attended lecture and discussion on *"Modern Slavery and Human Trafficking"* was held at the Faculty of Law, Ghana Institute of Management and Public Administration. The proceedings were formally opened by **Justice Dennis Adjei**, **Dean of the Law school**, accompanied by **Victor Brobby** and **Edmund Foley**, Heads of the Private and Public Law Departments respectively.

Coming from a legal and humanitarian background in the case of **Rahel Gershuni**, UNODC Consultant and former Israeli National Anti-Trafficking Co-ordinator, and from a legal background in the case of **Philipp Ambach**, Chief of the ICC's Victims Participation and Reparations Section, the two guest lecturers tackled this troubling and all too common phenomenon, whose tragic effects are now being felt in virtually every corner

of the world. Issues such as underlying values, practical tools, victim consent, and the feasibility of prosecuting trafficking as an international as opposed to a national crime were just some of the aspects covered before the subject was opened to the floor. As expected, the topic aroused passions, and the questions and comments were both vigorous and heartfelt. The event was seen as timely and hailed as a success by participants and speakers alike. The event was opened by Wayamo's Africa Director **Joseph Roberts-Mensah** and by Dean of the Law School Justice **Sir Dennis Adjei**. The panel and subsequent discussion was moderated by Wayamo Deputy Director **Mark Kersten**.

WELCOMING REMARKS

JUSTICE SIR DENNIS ADJEI

Dean of the Law School

Master of ceremonies, **Joseph Roberts-Mensah** formally opened the morning's proceedings by introducing the panellists and distinguished guests and announcing that Justice Sir Dennis Adjei would say a few words by way of welcome.

According to Adjei, human trafficking has been with us from time immemorial in the guise of slave trading, raising the questions of why we trade human beings and how to enforce the law. There are competent laws on the statute book and the necessary law enforcement agencies are in place. Yet even so, he exclaimed, *"we need a robust police force and immigration service to help combat this canker!"*

The courts in Ghana have universal jurisdiction over human trafficking irrespective of where it is committed. It is *"a global canker"* which nations have to come together to fight. Indeed, the phenomenon can be currently found in Ghana, which begs the question of how the victims were conveyed to their present location. The situation is notorious, both in the West African subregion and internationally. The entire world should condemn human trafficking. After all, if it was possible for the slave trade to be abolished, then it is high time to speak up about human trafficking.
One has to look at who is making use of these human beings, since this will provide a way of putting a stop to the trade... *"first and foremost we must fight the users!"*
With this, **Sir Dennis** thanked Wayamo for organising the debate and wished all present *"a fruitful seminar"*.

LECTURE AND DISCUSSION

MODERATOR

MARK KERSTEN

Munk School of Global Affairs, University of Toronto and Deputy Director, Wayamo Foundation

GUEST LECTURER

RAHEL GERSHUNI

UNODC Consultant and former National Anti-Trafficking Coordinator from Israel

MARK KERSTEN

Munk School of Global Affairs, University of Toronto and Deputy Director, Wayamo Foundation

RAHEL GERSHUNI

UNODC Consultant and former National Anti-Trafficking Coordinator from Israel

Human trafficking is not geographically focused: it is universal. This is a particularly good time to discuss it as the European Union (EU) seeks ways of containing migratory flows from the Middle East, the Horn of Africa and North Africa. At the United Nations Human Rights Council, human trafficking is currently a *"hot topic"*. Even at United States airports, announcements about reporting human trafficking seem to be taking the place of the usual warnings about leaving one's luggage unattended. Wayamo too has included the matter among the topic areas to be targeted under the twin heads of transnational organised crime and international crime. Thanks to their respective backgrounds, the panellists are ideally placed to discuss the linkages between these two types of crimes.

UNDERLYING VALUES

By way of a declaration of intent, **RG** said that she would be focusing on the values that underlie the prohibition on slavery and, by extension, on its modern form, human trafficking. These values – the autonomy, dignity and freedom of the human being – require protection. Her overview took in a number of disciplines, ranging from sociology across to philosophy.

WHAT IS TRAFFICKING?

Trafficking is a process that amounts to commodifying human beings and making use of them as though they were tools for personal gain, and as such comes into direct conflict with philosopher Immanuel Kant's injunction to *"act in such a way that you treat humanity, whether in your own person or in the person of another,*

never merely as a means to an end, but always at the same time as an end." People from poor countries want to improve their lot, and globalisation has meant that moving across borders has become relatively easy.

What **RG** termed, *"this quest for hope"*, leads these people to want to believe traffickers' stories. The classic trafficking case is often characterised by recruitment based on deception, threats or violence, with victims ultimately being manipulated and humiliated on arrival at their destination, where they typically face conditions that are wholly different from what was promised. They may have to work for long hours, with little rest and for no or little compensation. Furthermore, victims are often subject to debt bondage, whereby the value of their services is withheld in order to pay off an alleged debt where the value of the debt and their services is set arbitrarily by the trafficker. Alternatively they may be forced to pay exorbitant prices for basic goods and services, such as rent, food and clothing. Restrictions may be placed on their freedom (movements supervised, passport detained, and contact with the outside world severely limited).

A sociological study of modern slavery entitled *"Disposable People: New Slavery in the Global Economy"* by Kevin Bales, compares trafficking to *"classical"* slavery and concludes that in some respects, modern-day slavery is worse. While in the past, slavery was based on legal ownership, modern slavery is based on control. Whereas an owner had incentives to care for his slave, who tended to be an expensive acquisition, in the era of modern slavery, the trafficker does not own his slave and has no such incentive. Moreover, there are thousands of vulnerable persons waiting to replace each slave. Thus the modern day trafficker has more incentive to exploit him to the limit. In a sense, therefore, the modern slave becomes a *"disposable person"* who can be worked until he dies or is incapacitated.

To illustrate the point, **RG** cited a passage from the book in which a person travelling upriver sees corpses of young women trafficked for prostitution: *"On more than ten occasions I woke early in the morning to find the corpse of a young girl floating in the water by the barge. Nobody bothered to bury the girls. They just threw their bodies in the river to be eaten by the fish."* The lives of these girls were so cheap that the traffickers did not even bother to bury them.

It is this socio-economic phenomenon which led to the adoption of the United Nations Protocol to Prevent, Suppress and Punish Trafficking in Persons, especially Women and Children, and to the enactment of Ghana's 2005 Human Trafficking Act.

VALUES AS PRACTICAL TOOLS

RG maintained that it is important to understand the values at the base of trafficking in order to investigate, prosecute and adjudicate cases. As an example of the practicality of using values in trafficking cases, **RG** contrasted two cases in which trafficking charges were heard in court.

- **Belgian case**[1]: an illegal immigrant complained of excessive work hours and claimed that his employer, a construction company, had not provided him with safety clothes. Overruling the Court of First Instance, the Court of Appeals held that, even if the alleged victim was illegally in the country, he was free to come and go as he liked. This, coupled with the fact that the value underpinning the law was human dignity, led the Court to find that mere violation of workplace safety laws was not enough to constitute trafficking.
- **Greek Case (Chowdury v. Greece)**[2]: Migrants without legal residence or work permits were recruited to work as agricultural workers on a farm in Greece. They worked from dawn till dusk under the supervision of armed guards, lived in inhuman conditions without toilets or running water, and were not paid for months at a time. In addition, they experienced constant humiliation and threats. Taken together, these clearly constituted violations of freedom, dignity, and autonomy and were thus held to amount to trafficking and forced labour by the European Court of Human Rights.

Interestingly, the Greek courts did not view this situation as trafficking, probably because people grow accustomed to migrants working under these conditions, thus normalizing them.

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1 Court of Appeal Antwerp, 23 January 2013, Belgium. The Case is available in the UNODC Human Trafficking Case Law Database (UNODC Case No. BEL003).

2 Chowdury and Others v. Greece (App. no. 21884/15), ECHR, 30 March 2017, the European Court of Human Rights.

VICTIM CONSENT

RG observed that the question of victim consent is another illustration of the importance of understanding values at the base of trafficking in persons. This topic is an extremely complex subject in criminal law in general and in trafficking in persons in particular.

In criminal law in general, in some instances, consent can negate the commission of a crime. Examples are rape and assault. On the other hand, in others, consent is irrelevant. These include cases of murder and grievous injury. It seems that the distinction is between crimes which violate fundamental human values, where the criminal law does not allow consent to matter and other crimes which violate less fundamental values.

As an example of a crime which violates fundamental values, **RG** turned to the German case of Meiwes, who advertised on the Internet for a young man who would consent to be killed and eaten by him. An engineer answered the advertisement, and Meiwes proceeded to kill and eat him. His defence to the charge of murder included that the victim had freely consented. The German Courts did not accept this plea, ruling that no-one may consent to being murdered, even if such consent is genuine.

It can be argued that the values underlying trafficking are as fundamental as those underlying murder or grievous injury, i.e. – autonomy, freedom and dignity. As such, consent to their violation should not matter.

The topic of victim consent is particularly important in trafficking cases and often constitutes the linchpin of a case. This is because many trafficking cases are characterised by seeming victim consent. Sometimes victims explicitly state that they agreed to the exploitation because it was their best alternative. Some even express love or friendship for the trafficker and tell authorities that he was their best friend. Sometimes, their behaviour too may lead us to conclude that they consented to the exploitation, and for example, not fleeing when they have the opportunity to do so; returning to an abusive situation; not seeking help at the first opportunity. The question arises – how to address this question. Is such consent relevant. If not, why not?

According to the United Nations Protocol, the consent of a victim to the intended exploitation is irrelevant in trafficking cases if the following foul means have been used: *"the threat or use of force or other forms of coercion, of abduction, of fraud, of deception, of the abuse of power or of a position of vulnerability or of the giving or receiving of payments or benefits to achieve the consent of a person having control over another person..."*.

The Ghana Human Trafficking Act lists all of these 'means' as part of its provision on the elements of the crime, but does not include an explicit statement that an adult victim's consent is irrelevant, though Section 1(4) does include such an explicit statement concerning child victims.

A UNODC [United Nations Office on Drugs and Crime] Issue Paper concludes that consent is always a *"live issue"*, no matter what national legislation or case law say. This is at least partially because it is a value-laden topic, heavily influenced by the approach of legislators, prosecutors and judges as to the meaning of autonomy and individual freedom. Does the value of autonomy mean we should respect an individual's choice, even if it is a bad choice? Or does it mean that we should strive to understand that choice on a deeper level as a function of the individual's vulnerabilities and the trafficker's methods of control? The answer will depend on the practitioner's own values.

PSYCHOLOGICAL MEANS: EROSION OF AUTONOMY, DIGNITY AND FREEDOM

Traffickers'[3] methods of control are not limited to physical means but also include subtle psychological means. In fact, the business model of the modern trafficker is the use of subtle means. One experienced practitioner explained that psychological means are not as resource intensive as physical means and tend to work even better. Typical examples occur in what are termed *"lover boy cases"*, where the perpetrator initially presents himself as a romantic partner and then subsequently abuses the victim.

3 R v Urizar, File No. 505-1-084654-090, L-017.10, Court of Québec, District of Longueuil, Criminal Division (J.C.Q.), (2010-08-13), August 13, 2010, and Urizar v. R., No.500-10-004763-106, Court of Appeal, Quebec, January 16,2013. The trial court case is available in the UNODC Human Trafficking Case Law Database (UNODC Case No. CAN005).

RG pointed to the Canadian Urizar case, as an example. The perpetrator presented himself as the romantic partner of a teenage girl in conflict with her family. While he started out treating her well, he later required her to give him all the money she earned and forced her to do striptease work. When asked why she had not submitted a complaint against her abuser after one of a number of escape attempts, she stated that she loved him and was torn between the love she felt for him and the abuse he subjected her to.

Traffickers can also be family members, as was seen in the infamous Mabuza case[4] in South Africa, where a sister trafficked her own sister and an aunt trafficked child nieces. Likewise, in the Fakudze case[5] – again in South Africa – a stepdaughter was trafficked by her stepfather for sexual exploitation. Cases of trafficking by family members are particularly liable to erode the identity of the victim who may continue to love the perpetrator even in the face of abuse. He may feel that such abuse shows he is unworthy of being loved and thus unworthy of any better treatment.

Traffickers – romantic, familial or otherwise – use methods geared to eroding the autonomy, dignity and freedom of their victims, inducing feelings of worthlessness, and gradually taking control.
One tactic is to start by being kind to the victim and giving him or her presents and praise, then move on to abusive behaviour gradually[6]. Another tactic is inducing feelings of worthlessness. Traffickers deny victims proper clothing[7], tell them they are not worth anything,

4 S. v. Mabuza and Chauke, Case No. SHG 9/13 in Regional Court for the Regional Division of Mpumalanga at Graskop and Mabuza v. State Case No A150/2016 in the High Court of South Africa, Gauteng Division, Pretoria – Conviction by first instance affirmed by court of appeals.

5 State v. MMF, Case 41/942/16 in the Regional Division for Kwazulu – Natal at Durban.

6 See Urizar case ibid and an Israeli case: Criminal Cases 6749, 6774-08-11 in Jerusalem District Court, State of Israel v. D.A. and A.M. issued on 10 September 2013, affirmed in Supreme Court in Criminal Appeals 8027,8104/13 John Doe et al v. State of Israel, 27/05/2018.

7 See for example United States v. Varsha Mahender Sabhnani 599 F.3d 215 (2d Cir. 2010), the United States of America. The case is available in the UNODC Human Trafficking Case Law Database (UNODC Case No. USA033). In this case one victim was forced to wear tattered clothing which did not even cover her private parts. See also United States v. Kaufman 546 F.3d 1242 (10th Cir. 2008), available in the UNODC Human Trafficking Case Law Database (UNODC Case No. USA014), where mentally ill persons were punished by taking away their clothes.

cut off their hair[8], force them to have sexual relations with one another[9], force them to commit crimes[10], deny them leisure time, thus debilitating them and not allowing them time to think and plan[11].

Dr. Judith Herman, author of *"Trauma and Recovery"*, explains that a typical pattern of using victims to commit crimes may be motivated, not only by the aim of preventing them from complaining to police or for economic gain, but also because committing such actions may cause them to feel worthless and deserving of bad treatment, and thus deprive them of the will to change their situation.

8 See the United Kingdom case of R v Connors and Others, [2013] EWCA Crim 324, Court of Appeal, Criminal Division, 26 March 2013, the United Kingdom of Great Britain and Northern Ireland. The case is available in the UNODC Human Trafficking Case Law Database (UNODC Case No. GBR016). Here, homeless victims' heads were shaved.

9 See United States v. Kaufman ibid. See also U.S. v. Pipkins 378 F.3d 1281(2004).

10 An example is a United Kingdom case where young Vietnamese men were forced to grow cannabis. See L & 0rs v. R in the court of appeal (Criminal Division) [2013] EWCA Crim 991.

11 See UNODC Case Digest on Evidential Issues in Trafficking in Persons Cases, section 3.2.6.7 on lack of leisure time as a subtle restriction of freedom. This document is available at https://www.unodc.org/documents/human-trafficking/2017/Case_Digest_Evidential_Issues_in_Trafficking.pdf

PHILIPP AMBACH

Chief of the Victims Participation and Reparations Section in the Registry of the International Criminal Court

Looking at the topic from a *"more legal"* stance, **PA** wondered whether *"modern slavery and human trafficking"* were the same thing or indeed (slightly) different concepts. He added that, strictly speaking, one would have to add a third term, that of *"enslavement"* as it is used in the statutes of international criminal courts and tribunals. The relationships of the three terms to one another are important to define when tackling criminal conduct from a legal perspective.

Human trafficking is one of the main features of conflict-ridden societies, particularly in less stable regions with weak rule-of-law systems, where organised criminals take advantage of the situation to operate across borders for private gain. In scenarios where post-conflict societies are re-building with still fragile justice sectors, this can in turn destabilise the whole region. For instance, it is estimated that some 200,000 individuals are held in servitude in Mali, a situation that was further exacerbated by the outbreak of hostilities in 2012.

In essence, what one is seeing very frequently is a problem of infrastructure and absence of rule of law at the national level being exploited by transnational organised criminals.

HUMAN TRAFFICKING AS AN INTERNATIONAL CRIME

What is the difference between human trafficking under national laws, the UN Convention against Transnational Organised Crime (UNTOC), and international criminal law? Certain crimes are deemed to attain a level which requires them to be prosecuted universally: these are the four so-called *"core crimes"*, i.e., crimes against humanity, war crimes, genocide and aggression. Human trafficking has found its way into the set of core crimes under the – broader – concept of 'enslavement' as a crime against humanity in the statutes of the International Criminal Tribunals established by the UN Security Council as well as the ICC.

How then does one put this in context? International criminal law will look at human trafficking precisely because it's a phenomenon that is often connected with armed conflict. Like all other types of trafficking, it acts as a major enabler for armed groups, which use the proceeds from illicit trafficking activities to buy weapons and thereby perpetuate their armed operations and power bases.

The frequent occurrence of crimes containing the element of ownership of a person in modern armed conflicts led to *"enslavement"* being included as a crime against humanity under Article 5(c) of the Statute of the International Criminal Tribunal for the former Yugoslavia (ICTY). The Appeals Chamber accepted the definition of enslavement as *"the exercise of any or all of the powers attaching to the right of ownership over a person" (Kunarac case)*. It should be noted that this definition is broader than that traditionally applied in the past for traditional chattel slavery (and encompassed in the 1926 Slavery Convention); rather, the objective elements of the crime are fulfilled where there is some destruction of the juridical personality. The duration of the enslavement is not an element of the crime, no minimal duration must be proved. Instead, the question turns on *"control"*, which could even extend to someone being transported as a trafficking victim (and not just as a slave labourer).

CONSENT

Remarking in passing that the consent of the victim would be *"almost a macabre thing to argue"*, **PA** explained that the ICTY Appeals Chamber had ruled that lack of consent does not have to be proved as an element of the crime. It would thus be for the Defence to establish the existence of valid consent. This distinction is of *"crucial importance from a practical point of view."*

ICC

To some extent, the definition of enslavement contained in Article 7(c) of the Rome Statute is a *"copy"* of that used by the ICTY, but adding some important clarifiers particularly in its 'Elements of Crimes', such as that: *"Enslavement' (...) includes the exercise of such power in the course of trafficking in persons, in particular women and children"*. While it contains language akin to the crime of slavery, i.e., *"right of ownership"*, it makes no mention of duration, thus following the UN ad hoc Tribunals' path of the definition of the crime.

Furthermore, there is judicial precedent at the ICC to show that sexual slavery may well fall within the definition of *"enslavement"*, particularly regarding practices such as forced marriage, *"comfort stations"*, and any forms of domestic servitude or other forced labour involving sexual activity, including rape, by the captors (*Katanga and Ngudjolo case*).
These same concepts of enslavement and sexual slavery are likewise to be found in the Statute of the Special Court for Sierra Leone.

THRESHOLD FOR AN INTERNATIONAL CRIME: THE "CHAPEAU ELEMENT"

Not any form of human trafficking will be of a quality and gravity making it an 'international core crime' and thus generating all States' duty to prosecute or extradite such crimes. In order to prove the commission of human trafficking as an international crime, and more specifically a crime against humanity, a special additional requirement of proof needs to be satisfied: it needs to be established in evidence that the conduct (ie the human trafficking) was committed as part of *"a widespread or systematic attack directed against a civilian population"*. The same applies to the mens rea required for a crime against humanity, i.e., the perpetrator must have known the conduct was or intended it to be part of widespread or systematic attack directed against a civilian population. Without such an attack against the civilian population and the perpetrator's knowledge, human trafficking is considered as criminal conduct in terms of national criminal law, or as defined in UNTOC-it will not be subject to prosecution by an international criminal tribunal as an international crime. This demonstrates in turn that a sustainable and comprehensive fight against human trafficking cannot be won through international tribunals alone: national and regional agencies have a major role to play in law enforcement where human trafficking is being committed by organised transnational criminal actors for private gain, and absent any notable attack against the civilian population.

To illustrate his point, **PA** brought up the example of Libya. ICC Prosecutor, Fatou Bensouda is on record as saying that Libya is *"a marketplace for the trafficking of human beings"*, yet, rather than bringing charges for such crimes, to date, she has instead underlined that the ICC needs to co-operate with national actors to combat this international phenomenon over which the ICC may often have no jurisdiction where the 'chapeau elements' for international crimes cannot be proven. **PA** noted that a multi-layered and multi-party strategy is required to tackle the web of crimes that thrive in the context of migration through Libya. National, regional and international investigation and prosecution authorities need to cooperate, exchange information and assist each other. Therefore, if the main issue is combating transnational organised crime, then national/regional mechanisms must be involved, in an integrated and inter-connected fashion.

It was at this point that Moderator, Mark Kersten opened the discussion to the floor.

q&a

A brief sampling of comments on some points of interest from the floor.

ROOT CAUSES

Floor: The root causes of human trafficking include poverty, lack of education, immigration policy, fractured families and the lack of good jobs. Are we considering looking into these areas to see what governments are doing to minimise human trafficking?

Floor: On the subject of root causes, our own governments are guilty of mismanagement, with Members of Parliament going around in big cars with bodyguards. *"We need to wake up and do something about it. We don't need money from the United Nations: it takes something from government to release children from debt bondage and act!"*

Floor: One of the root causes is poverty. At one extreme, families have a lot of children, with those considered *"lazy or troublesome"* often being trafficked; at the other extreme, the questioner knew of a case where a trafficker's family had actually accompanied him to court to plead and protest that he was the

breadwinner! To add to the problem, there was the possibility of retaliation against any family that denounced or reported trafficking.

RG: She had to agree that, in the case of child traffickers, sometimes the parents were innocent, and sometimes, as in the example cited, they were not!

Floor - (AGJA member, Femi Falana): When looking at the root causes, most discussion centres on manifestations of criminality when the real root cause is the failure to have a new economic order which takes cognisance of poverty in developing countries and the reasons for it, namely, money laundering, capital flight and corruption, which result in the proceeds ending up in the banks of Western countries. Without a change in the economic order, we cannot really stop these crimes.
RG: Conceding the point, she accepted the prevailing hypocrisy of the international economic system vis-à-vis Africa.

PA: Criminal law is blind to questions (often geo-political ones) of economic order. It serves to sanction criminal conduct, regardless of where and by whom it is committed. Seamless and powerful law enforcement and the pursuit of the rule of law can go a long way in combatting transnational organised crime, including corruption, committed anywhere in the world. If successfully fought at the root, the proceeds of crime will not make their way into any of the 'Western banks' referred to.

Floor (AGJA member, Zainab Bangura): Personal experience had shown that, even though people know that there is a risk of dying, they are prepared to put themselves in the hands of traffickers. Those who migrate are the *"strong ones!"*; for them *"slavery is a means!"* Furthermore, in many cases people fall for traffickers' propositions through ignorance.

One of the challenges is the backsliding of democracy, which raises the question, *"How do we hold on to what we have?"* People receive political but not economic freedom. Are the World Bank and IMF really helping or do they push countries to the brink of bankruptcy? How is it that foreign banks do not ask questions when politicians move large sums of money around?

RG: The UN Protocol pays lip service to attacking the root causes. The so-called 4 *"Ps"* paradigm – *"Prevention, Protection, Prosecution and Partnerships"* – is the fundamental framework used to combat contemporary forms of slavery. Of the four, prevention goes to the root causes.

RESPONSIBILITY OF END-USERS

Floor (AGJA member, Fatiha Serour): There is a demand that encourages human trafficking. Do we really internalise the causes? Who is really responsible? Each of us has a responsibility and is accountable.

RG: There can be no doubt that users do have responsibility. The Ghanaian Act includes a section designed to criminalise users, though this raises the problem of how to prove that the user knew that the person in question was a victim of trafficking.

VULNERABILITY

Floor (AGJA member, Fatiha Serour): A deep-seated approach to the emotional element is called for.

RG: While the legal definition of trafficking includes an *"act"*, *"means"* and *"purpose of exploitation"*, vulnerability is key in any trafficking case. As one Israeli prosecutor had observed, *"Traffickers are like deer hunters. They have a talent for ferreting out vulnerabilities that other people cannot see."*

PROSECUTION AS A DETERRENT EFFECT

MK: If human trafficking is seen as a market phenomenon, is prosecuting these crimes particularly valuable in terms of a deterrent effect?

RG: Do prosecutions help? The short answer is *"yes!"* An example of this was provided by Israel in the early 2000s, when it was the destination of young girls being trafficked from the USSR for prostitution purposes. There was a failure of social networks. The victims were held in *"horrendous conditions"* and the situation was characterised by debt bondage and suicide. Nonetheless, NGOs and law enforcement agencies managed to stamp it out. Indeed, certain traffickers found Israel too dangerous and started transporting their victims to Cyprus instead. Prosecution, while not the sole answer, is nevertheless important.

Secondly, without training, the police cannot deal with this crime. Specialised training and specialised units are required. It is important to change *"the climate"* in the police and prosecution, and to this end, a different *"reward system"* may be called for.

VICTIM SUPPORT

MK: When it comes to the dependency of victim and trafficker, is there sufficient support for victims if and after they come forward?

RG: In some cases, victims have been given support, as in Swaziland and Israel. In South Africa too, there is a mechanism for protecting children from traffickers through the use of intermediaries.

PA: The ICC and many modern hybrid internationalised criminal courts provide strong features of victim participation. This includes trafficking victims. If any of these cases were to come before these courts, relevant victim protection programmes could provide counselling, security and support. However, in many cases (particularly in the national context of developing states), reparations are hard to secure.

LIBERIA

Floor (Adama Dempster): Girls are taken from Liberia to Lebanon where, under the pretext of working, *"they end up as something different"*. Thanks to corruption, however, the traffickers were able to leave the country. Similarly, there have been cases of offers to take girls to the USA where they become sex slaves.

RG: This shows how countries should come together to talk about patterns.

LIBYA

MK: Libya is the scene of a great deal of systemic human trafficking, with those responsible committing many other types of abuses in addition to trafficking.

Floor (AGJA member, Fatiha Serour): In Libya, human trafficking has become almost institutionalised. Three points should be borne in mind:

I. the fact that it is a situation of conflict should not be a reason or excuse for inaction;
II. the Libyan leadership does not address the issue; and
III. the responsibility and accountability of the international community. There has been very little media coverage. One has to ask whether there is a question of double standards in view of the fact that *"European countries are worried about having to receive these people"*.

PA: ICC arrest warrants in the Libya situation target a lot of crimes that may link to human trafficking. Therefore, traffickers may become criminally responsible even for international crimes if they only aided and abetted their commission. *"If human traffickers can be shown to have intended – or only accepted - to further crimes committed as part of an attack on a civilian population, then prosecution even of these actors may be possible."* However, if ordinary criminals are at work under the mere guise of the armed conflict, this is most often rather in the realm of transnational organised crime pursued for profit and personal gain.

CLOSING REMARKS

After asking the public to join him in thanking his two guests for their *"rich presentations"* and insightful analyses of the problem from their respective and very different perspectives, **Mark Kersten** made way for the final speaker.

DR. EDMUND FOLEY

Head of the Public Law Department.

Dr. Foley rose to say in conclusion that it had been a *"wonderful two days"* which had proved *"very revealing"*.

As a matter of fact, he was dealing with some of the offences raised in his own class. His faculty already had a course in ECOWAS [Economic Community of West African States] law, and he intended to keep up the relationship with Wayamo and the Kofi Annan International Peacekeeping Training Centre in order to broaden the course.

He felt that the next step should be the domestication of the relevant international instruments and noted that, in this context, there was *"a lot of talk about the Malabo Protocol"*. The time had come to deal with international crime through the national framework: *"No more resolutions. No more talk! We want more walk!"*

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