WAYAMO FOUNDATION

AFRICA GROUP
FOR JUSTICE AND ACCOUNTABILITY

INTERNATIONAL SYMPOSIUM

International crimes, domestic justice –
accountability and capacity building in East Africa

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MARRIOTT HOTEL

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EXECUTIVE SUMMARY

Bringing together key stakeholders, renowned experts and leading practitioners, the Wayamo Foundation and the Africa Group for Justice and Accountability convened a public symposium in Kigali, Rwanda, on 21 November 2017, entitled ***"International Crimes, domestic justice – Accountability and capacity building in East Africa"****.*

The goal of this event, co-hosted by ***Rwandan Prosecutor General, Jean-Bosco Mutangana****, and* ***Commissioner General of Police, Emmanuel Gasana****, was to discuss the legacy and impact of regional and international courts on domestic systems; explore how to achieve justice and accountability for international crimes; analyse transnational organised crime, with a focus on witness protection and cyber crime; and study the role of networks and judicial co-operation.*

Over a three-day period from 20 to 22 November 2017, Kigali, Rwanda, played host to the latest in the Wayamo Foundation's series of East African international justice conferences aimed at exploring the current state of international criminal justice, its links with transnational organised crime, and national and regional efforts to deal with these crimes. The event was held thanks to the unstinting collaboration of the **Rwandan Ministry of Justice** and the financial support of the **German Federal Foreign Office**.

Of the East Africa Programme's four "*pillars*" (network meetings, symposia, capacity building training and media engagements), perhaps the most widely reported in the media was the well attended international public symposium on the theme of "*International crimes, domestic justice – Accountability and capacity building in East Africa*". In addition to co-hosts, **Prosecutor General Jean-Bosco Mutangana** and **Commissioner General of Police Emmanuel Gasana**, the symposium was formally opened by the **Hon. Evode Uwizeyimana**, Minister of State in the Minister of Justice of Rwanda and **Dr. Peter Woeste**, German Ambassador to the Republic of Rwanda.

The symposium brought together an eminent array of international and local experts on international criminal justice and transnational organised crime, non-governmental organisations, academics, practitioners, and members of civil society. Those taking part included: Burundi Judge and former President of the African Court on Human and Peoples' Rights, **Gerard Niyungeko**; Nigerians **Adeniran Akingbolahan**, Rule of Law Advisor, and **Charles Adeogun-Phillips**, Litigation Practitioner; **Mike Chibita**, Director of Public Prosecutions, and **Sarah Kihika Kasande**, International Centre for Transitional Justice, from Uganda; **Tora**

Holst, Former Chief Public Prosecutor of the Swedish Specialised International Crimes Unit; Kenyans **Victor Mule**, Prosecutor and Head of International Co-operation, Extradition and Mutual Legal Assistance Division and **Stella Ndirangu**, International Commission of Jurists; and ICC technical experts **William Rosato** and **Gerhard van Rooyen**. Some of the critical topics discussed were: the impact of international, regional and domestic justice systems; achieving justice through International Crime Divisions and universal jurisdiction; witness protection; linkages between transnational organised crime and core international crimes; and judicial networks.

While **Ambassador Woeste** made the point that there were times when national sovereignty and pride had to make way for trust and co-operation, **Professor Tiyanjana Maluwa** countered the view that Africa always trailed, by remarking that, "*Sometimes, where Africa leads the rest of the world follows!*"

> ***Sometimes, where Africa leads the rest of the world follows!***
>
> *Professor Tiyanjana Maluwa*

OPENING SESSION

Welcoming remarks

MASTER OF CEREMONIES

JOSEPH ROBERTS-MENSAH

Africa Director, Wayamo Foundation

BETTINA AMBACH

Director, Wayamo Foundation, Berlin

Bettina Ambach (BA) firstly expressed her gratitude to the event's co-hosts, Prosecutor General Jean-Bosco Mutangana and Commissioner General of Police Emmanuel Gasana, and to the German Federal Foreign Ministry in the person of German Ambassador Dr. Peter Woeste, for the country's generous support. She went on to welcome all present to the Symposium on "*International crimes, domestic justice – Accountability and capacity building in East Africa*". This would be the third instalment of a programme that had begun in Arusha, with events for prosecutors and investigators and for judges. Following this first ever visit to Kigali, the programme's venue would be moving on to Kampala and Nairobi in the new year.

As part of the overall East African "*package*", the previous day had seen the holding of the second High-level Network Meeting of Directors of Criminal Investigations (DCIs) and Directors of Public Prosecutions (DPPs), aimed at setting up a pilot project. The proposed network initially included Kenya, Tanzania, Uganda and Rwanda but more countries might eventually be invited to join. On a personal level, she welcomed: Ugandan DPP, Mike Chibita; Rwandan Inspector General of Police, Emmanuel Gasana; and Jean-Bosco Mutangana, in his dual capacity as Prosecutor General of Rwanda and newly elected President of the East African Association of Prosecutors (EAAP).

The day's symposium -the second part of the "*package*"- would be discussing linkages between transnational organised crime (TOC) and core international crimes, and domestic and regional justice, bearing in mind that accountability could be achieved on several levels.

Continuing her welcomes, **BA** greeted the representatives of the International Criminal Court (ICC), stressing that it was extremely important that all the different levels worked together in the spirit of complementarity. Similarly, she greeted Professor Tiyanjana Maluwa from the Africa Group for Justice and Accountability (AGJA), and explained that his fellow AGJA member, Mohamed Othman Chande, had unfortunately been unable to come. Kenyan DPP, Keriako Tobiko, had likewise been unable to travel out of the country and had sent Victor Mule in his place.

The third component and pivotal component of the 2-year East Africa project was capacity building, with a training session to be held the following day for senior prosecutors and investigators. In this connection, she extended a warm welcome to Former Chief Public Prosecutor of the Swedish Specialised International Crimes Unit, Tora Holst, who would be sharing her experiences both with the symposium and workshop participants. The overall aim was to foster synergies.

The fourth and last event in Kigali would take the form of an engagement with the media on their role in justice issues. It would be attended by representatives from the four project countries as well as South Sudan.

DR. PETER WOESTE

German Ambassador to the Republic of Rwanda

Dr. Peter Woeste (PW) conjured up a picture of policemen chasing a thief near a border running through the centre of a village somewhere in Africa. In his scenario, the thief jumps to other side of the dirt road and is safe from pursuit for the simple reason that, by crossing the border, his pursuers lose their jurisdiction. Furthermore, in a country like Rwanda, borders are never far away.

If one were only speaking of petty crime, one might be able to live with such "*inefficiencies*". Yet, this is not the case. Transnational organised crime is the real topic: a situation where criminals are globalised and police and public prosecution authorities remain provincial is simply untenable. Moreover, Rwanda is still struggling to get hold of fleeing genocidaires who managed to take advantage of just such a situation.

Although he would leave it to the symposium panellists -the "*experts*"- to tackle many of these issues, he wished to look at the bigger picture. There were ways to overcome the problem, e.g., bilateral agreements governing the right of pursuit, or courts having jurisdiction beyond the limits of sovereignty. Indeed, sovereignty was the crux of the matter, in that one of the most important pillars of sovereignty is a state's jurisdiction over its citizens.
This interpretation of sovereignty derived from 1648, the year in which Europe's devastating Thirty Years' War finally came to an end, with countless atrocities and millions of fatalities. The guiding principle running

through the peace treaties at the time was that of sovereignty, whereby each state jealously protected its territory. The whole issue of "*responsibility to protect*" clashes head-on with this traditional interpretation of sovereignty and, by extension, jurisdiction. It just so happened, that the tussle between these two principles had played out in Rwanda, where the international community had signally failed to intervene when the genocide was taking place. Perhaps, partly as a result, Rwanda was regrettably one of the few African countries that decided not to join the ICC.

Other forms of co-operation existed, however. These included Interpol and, in the case of Europe, Europol and the European courts. "*It all depends on how much sovereignty a state is willing to give away: in other words it is often about pride and trust*". Criminals must not be allowed to take advantage of pride. **PW** thus hoped that the next two days would help build trust and co-operation among neighbours.

JEAN BOSCO MUTANGANA

Prosecutor General, Rwanda

Jean Bosco Mutangana (JBM) greeted dignitaries and delegates from Rwanda and abroad, and noted the symbolism of such an event taking place on the site of the genocide. Not only was there a need to fight impunity, but new approaches (including regional ones) were called for to fight TOC and international crimes. "*We share views on the global nature of these crimes*". Countries had a duty to ensure citizens' right to security, especially from these types of cross-border crimes. There was therefore a need to build a network for this express purpose.

Continuous training should never cease, particularly in the case of these crimes, e.g., cyber crimes and TOC, which posed such a threat. "*We must pursue them relentlessly, even though convictions are hard to get. In this regard, co-operation is key*". It was not only logical but also necessary to "*team up*" in order to fight these crimes. The idea of the symposium was to further this partnership, and Rwanda, as president of the EAAP, would make an even stronger effort.

He thanked the organisers and funders -Wayamo and the German Federal government- and wished everyone present a successful symposium.

HON. EVODE UWIZEYIMANA

Minister of State in the Minister of Justice of Rwanda

Evode Uwizeyimana (EV) expressed his pleasure at being at the opening session of this East African international justice conference aimed at exploring the current state of international criminal justice, its links with transnational organised crime, and national and regional efforts to deal with these crimes. The symposium had been preceded by a high-level network meeting of DPPs and DCIs from Kenya, Tanzania, Uganda and Rwanda, aimed at strengthening the rule of law, by ensuring effective investigation and prosecution of complex crimes and intensifying inter-agency collaboration at the regional level.

The symposium brought together international and local experts on international criminal justice and TOC, NGOs, academics, practitioners and members of civil society, to discuss and explore the current state of international criminal justice, its links with transnational organised crime, and national and regional efforts to deal with such crimes. He thanked the organisers for having chosen Rwanda to host the event. Indeed, the symposium came at the right time because the world was changing radically and rapidly, due, among other things, to globalisation, urbanisation policies and the need to fight international crimes and TOC.

Moreover, the people of Rwanda and its justice sector stakeholders were extremely ready to co-operate in all efforts and initiatives aimed at preventing and eradicating such crimes. Governments and public institutions could not attempt to succeed without engaging and educating the public, prosecutors, investigators, and the media. In this latter respect, journalists from several East African countries would be able to build their knowledge of critical justice-related issues, while developing their reporting skills and having the opportunity to interview some of the guest speakers.

There was a need to be as united as possible, in order to confront the threats and challenges posed in the field of international, transnational and organised crime.

PANEL I

Contributing, not competing — assessing the impact of international, regional and domestic justice systems

MODERATOR

MARK KERSTEN

Munk School of Global Affairs, University of Toronto, Research Director, Wayamo Foundation

*Before giving free rein to his "tremendous panel", **Mark Kersten (MK)** observed that the title, "Contributing, not competing — assessing the impact of international, regional and domestic justice systems", was particularly timely, in view of the "growing market place of justice systems", which implied competition and "a lot of turf wars". The former situation where parties had to attempt to pursue international crime wherever possible had given way to a new situation where there was a diversity of mechanisms, ranging from the ICC to hybrid tribunals and a growing number of domestically based international criminal divisions. Even in an extreme case such as Syria, concerted efforts were being made to collect evidence for possible use at some future date.*

How then was one to ensure that these diverse systems worked together? One possible way of achieving this was the example afforded by the Central African Republic (CAR), where the ICC and the Special Criminal Court shared jurisdiction. Nonetheless one could not be complacent! "Much remained to be done to ensure that complementarity becomes a reality".

GERARD NIYUNGEKO

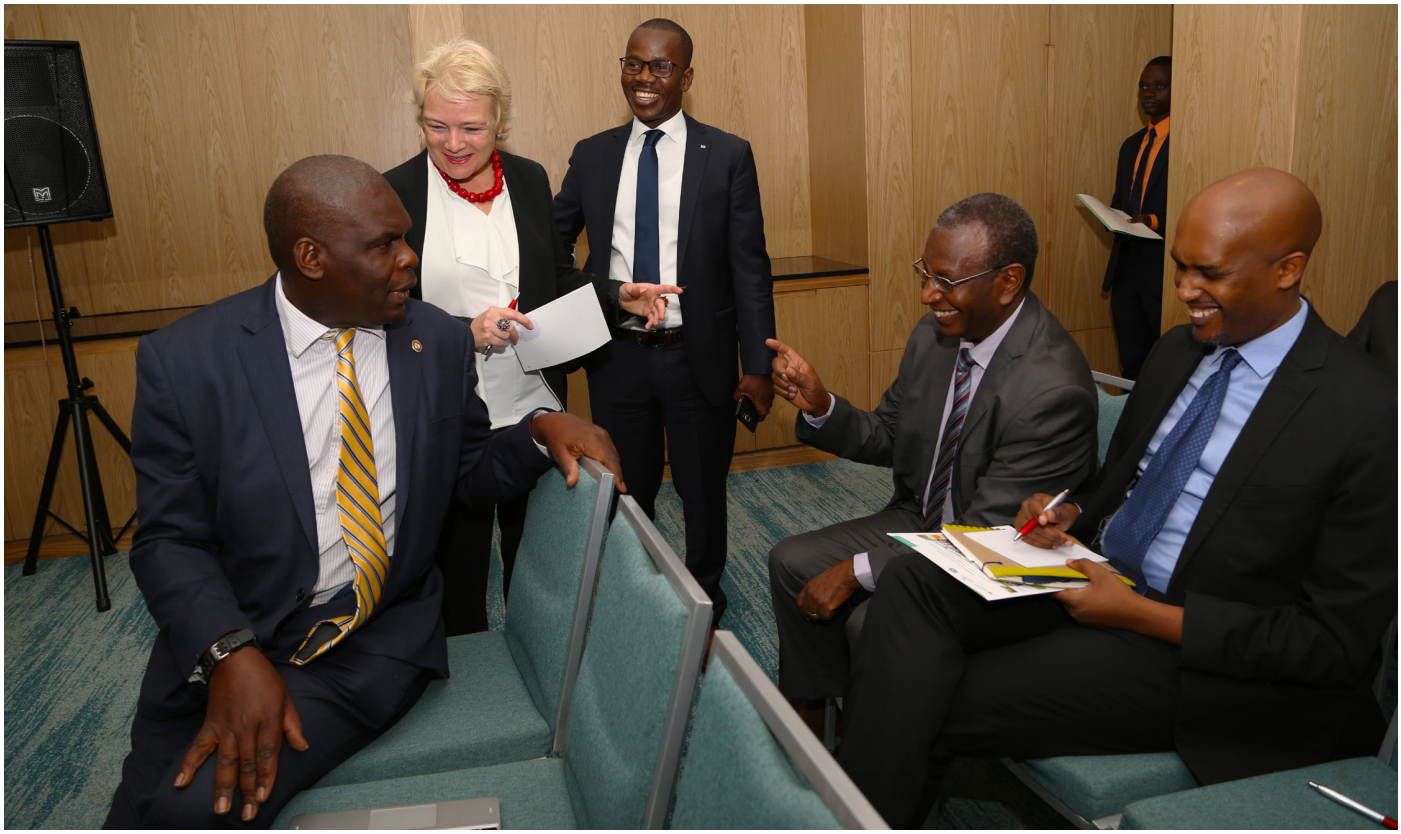
Judge and former President of the African Court on Human and Peoples' Rights

The first speaker, **Gerard Niyungeko (GN)**, set out to outline "*The legacy and impact of the African Court on Human and Peoples' Rights (ACHPR) on domestic systems*". Despite not being a criminal court, the ACHPR might nevertheless have had, and indeed have, an impact on criminal justice systems. He addressed the topic under four heads, i.e., legacy, direct impact, limits to impact, and future impact of African Court with jurisdiction over criminal matters.

1. Legacy of the Court through its jurisprudence on substantive rights

The ACHPR had made an important contribution to jurisprudence in terms of rights, some of which had an impact on domestic criminal systems. **GN** now proceeded to highlight the principal rights, citing some of the pertinent cases involved:

- the right to participate freely in government;
- the right to be heard by a competent and independent tribunal (here the case had involved the assassination of a journalist in Burkina Faso);
- the right to a fair trial (including the right to be defended, right to free legal assistance, etc.);
- the right of freedom of expression;
- the right to have elections conducted by an independent body;
- the right to liberty and security of the person; and,
- the right of indigenous communities to their traditional land and associated religious/cultural rights.



2. Direct impact of the decisions of the Court on domestic systems

GN listed some of the major impacts as being:

(i) change of national constitutions and laws;
(ii) reopening of investigations to prosecute and try alleged criminal perpetrators;
(iii) termination of criminal proceedings if marred by irregularities;
(iv) annulment or reduction of penal or civil sanctions;
(v) deletion of entries on police records;
(vi) grant of free legal assistance in criminal matters and expediting domestic judicial proceedings; and,
(vii) prohibition of certain measures, such as retrial.

3. Limits to the impact of the African Court's jurisprudence on domestic systems

On running through what he perceived as the four main limits, it should be noted that **GN** laid particular stress on the second (access to the Court). These limits were:

- the lack of universal ratification of the protocol establishing the Court. Of the 55 Member States of the African Union (AU), only 30 had ratified the Protocol establishing the Court;
- the problem of access to the Court by individuals. Only 8 States had fulfilled the requirement of a special declaration recognising the Court's jurisdiction to deal with cases brought by individuals and NGOs;
- the issue of non- or slow compliance with the Court's decisions. Even though the Court's decisions are binding on the parties, lack of compliance by states would inevitably limit the Court's potential impact;
- the lack of knowledge of the Court by potential users.

4. Possible future impact of the African Court with jurisdiction extended to criminal matters

Problematic issues in this regard were the fact that the Malabo Protocol had not been ratified, and that, even if it were to be ratified, the financial impact and burden would be enormous. Thirdly there was the thorny matter of the immunity regime governing sitting heads of state and high officials.

"*In all*", said **GN**, the impact of the ACHPR had been "*very modest to date*".

JEAN BOSCO MUTANGANA

Prosecutor General, Rwanda

Jean Bosco Mutangana's (JBM) chosen topic was "*Contributing, not competing — the legacy and impact of regional and international courts in domestic systems*". He evaluated the legacy of international and regional courts, with specific focus on the International Criminal Tribunal for Rwanda (ICTR) in terms of its achievements and shortcomings in prosecuting the international crimes of genocide, crimes against humanity and war crimes. Challenges relating to post-genocide justice at the domestic level were "*enormous*" in terms of the sheer numbers of suspects and detainees, with the prosecution of genocide suspects being the main area of "*competition*" between international mechanisms and domestic courts.

To illustrate the contribution made by the ICTR's jurisprudence to bringing justice to Rwanda, JBM singled out "*five high-profile groundbreaking cases*", namely, those of: Akayesu, definition of genocide and elements of crimes; former Prime Minister Kambanda, no impunity for heads of government; Nahimana et al., distinction between hate speech and freedom of expression; Former Minister of Defence, Col. Bagosora, command responsibility; and lastly, Ntagerura et al, case acquittal demonstrating the impartiality and independence of the Tribunal. ICTR judgements had served to clarify important aspects and principles of international law, with the most significant example of this arguably being the characterisation of rape as a possible means of committing genocide. A chart summarising the legacy, impact and analysis of each of the above cases is shown in the adjacent table.

The ICTR's focus on leadership is eloquently borne out by the fact that the accused included a former prime minister, fourteen ministers, seven prefects, twelve mayors, leading media personalities and several high-ranking military personnel, thereby sending a strong signal to Africa and the world that there will be no impunity for serious crimes. Moreover, the ICTR is a

Case	Legacy	Impact	Analysis
Jean Paul Akayesu	Affirmation of rape and other forms of sexual violence as constituent acts of genocide.	This finding was widely adopted in the subsequent jurisprudence of the Tribunal and domestic systems.	It may be regarded as well established case law today.
Jean Kambanda	This judgment is significant because it reaffirmed the principle that no individual enjoys immunity for such crimes on account of his/her official position.	Replacement of a culture of impunity with accountability, and established the certainty that impunity for such crimes was no longer tolerable	There was profound condemnation of the overwhelming scale of atrocities committed in Rwanda.
Nahimana, Barayagwiza and Ngeze	This famous case addressed the borderline between the right guaranteed under international law to freedom of expression and incitement to serious international crimes.	The ICTR set a test for distinguishing statements protected by virtue of freedom of expression from incitement to genocide, which is not protected by freedom of expression.	Hate speech is not protected speech under international law.
Colonel Bagosora Ntagerura et al.	The relevance of this case is that it confirms the notion of 'command responsibility', particularly of superiors who often hide away from the scene of the crime. Impartiality and independence of the Tribunal.	Command responsibility is entrusted, not solely to persons with a military background, but civilians too can be accused and convicted of superior responsibility, as evidenced in the case of Nyiramasuhuko, a female civilian who held a high post in the government. Ntagerura and Bagambiki were acquitted on all counts in the indictments, mainly genocide, complicity in genocide, and crimes against humanity.	The fact that the acts were committed by subordinates does not relieve the commander of criminal responsibility if he knew or had reason to know that his subordinates were about to commit such acts, or did not punish the perpetrators thereof. Even if the trial resulted in an acquittal, the case law still remains relevant because it established considerable facts regarding the genocide, and creates a significant historical record.

Table 1: Five high-profile groundbreaking cases (Jean Bosco Mutangana, 2017)

repository of comprehensive archives on the Rwandan conflict and its consequences, making its jurisprudence a significant component of the country's history.

Using a chart to compare the glaring discrepancies between the respective budgets, time taken and numbers tried by the ICTR, Rwandan domestic courts and Gacaca courts, JBM nonetheless went to pains to stress that the ICTR's legacy should be evaluated, not in terms of "*numbers tried*" but rather in terms of the important lessons learnt. ICTR trials had provided the most comprehensive account of the machinery of genocide and had shed light on the anatomy of the crime. In addition, the tribunal is credited for having tried most of the masterminds behind the genocide.

JBM argued that collaboration between the different mechanisms –both international and national- was the realistic way for Rwanda to establish reconciliation, accountability and justice. Not only was there a steady flow of witnesses, but when the ICTR required information, it generally used the good offices of the Rwandan prosecution authorities. Moreover, apart from international and domestic trials in Rwanda, third states had also prosecuted genocide cases on the basis of universal jurisdiction.

Needless to say, there had been challenges: there were times when the approaches appeared to compete and overlap, lacking a coherent, organised structure that would have linked the processes and allowed for genuine complementarity. Indeed the ICTR and Rwandan courts had often competed for defendants, e.g., Bagosora and Karamira. Moreover, there had been prima facie differences in structure, laws, procedure, and sentencing among the three systems, yielding inequalities in the treatment of defendants.

By way of a final recommendation, **JBM** stressed the need for a comprehensive legal framework as the starting point towards a harmonised, co-ordinated relationship. He repeated that all three approaches employed in Rwanda had been indispensable in establishing reconciliation, accountability and justice, and it could thus be said that, in essence, "*the triangular system*" –ICTR, domestic courts and Gacaca processes- had been complementary.

TIYANJANA MALUWA

H. Laddie Montague Chair in Law, Pennsylvania State University School of Law, and member of the Africa Group for Justice and Accountability

Standing in for his absent AGJA colleague, Mohamed Othman Chande, **Tiyanjana Maluwa (TM)** announced that, as some aspects had already been covered by his fellow panellists, he would address two specific issues, namely, complementarity and competition in the context of the Malabo Protocol.

If the Protocol came into force, it would result in the establishment of a criminal division of the African Court of Justice and Human Rights, in other words an African Criminal Court. The Protocol had generally met with a negative reception, since it was seen as a reaction against the ICC by African states. However, said **TM**, "*the truth is somewhat different*"; history showed that in fact the initiative dated back to the 70s. Accordingly, it was not just "*a bad-tempered reaction*". What had given "*immediate impetus to the adoption of the Malabo Protocol*" was the al Bashir indictment.

The Protocol does not provide for complementarity between the African Court and the ICC, for the simple reason that not all AU members are members of the ICC, and so there could not have been a reference in the Malabo Protocol to a court established by another treaty under circumstances in which not all the signatories to the Protocol were also signatories to the other treaty. Nonetheless, Article 46L (3) does provide that the African Court is entitled "*to seek the co-operation or assistance*" of regional courts and international courts. This would seem to allow for collaboration with other international courts. "*Holistically speaking, the Malabo Protocol does therefore allow for some kind of complementarity*".

TM went on to make four general points:

(i) international criminal courts and tribunals have raised global awareness of the need to recognise

international criminal law, with the result that notions of sovereignty dating back to 1648 can no longer serve as a defence;

(ii) these international criminal courts and tribunals have increased respect for international humanitarian law, by acting as a catalyst for national implementing legislation and thus ultimately enabling domestic sanctions to be applied to international crimes;

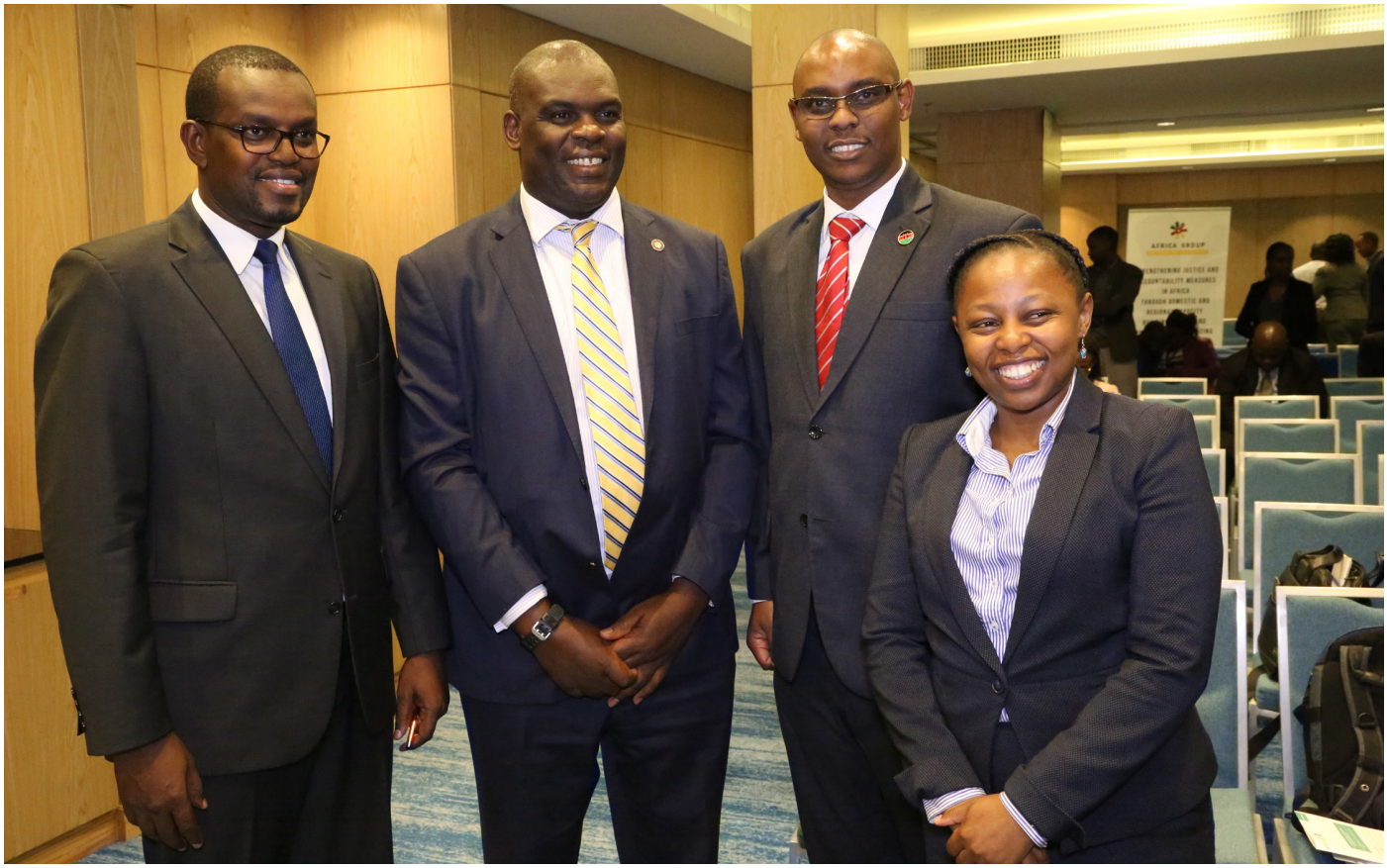
(iii) international criminal courts and tribunals have fostered compliance with international humanitarian law. This has become "*a factor across the board*", meaning that victims are forever aware that certain acts are punishable by international criminal tribunals, though whether this is a deterrent is debatable; and lastly,

(iv) in terms of contributions, in a substantive sense these tribunals have contributed to the content of international humanitarian law, e.g., the case of Akayesu was the first to define rape as a weapon of genocide. "*In terms of procedure too, the courts have been borrowing from each other*".

STELLA NDIRANGU

Head of the International Justice Programme, International Commission of Jurists, Kenya

Stella Ndirangu (SN) opted to talk about the impact of ICC cases on the Kenyan situation in terms of contributing rather than competing. To trace the way in which Kenya had become involved in international justice, she went back to the year 2008, when an initial attempt to mediate by AU Chairman, John Kufuor, had been replaced by an initiative involving an African Union Panel of Eminent African Personalities led by former United Nations Secretary-General, Kofi Annan. Annan met with the warring factions and, after 41 days of intense negotiations, brokered a power-sharing agreement. Provision was made for the creation of a



mechanism to establish what had gone wrong: this mechanism, known as the Waki Commission, conducted an inquiry into the post-election violence and, in its report, instructed the government to set up a special tribunal to prosecute those responsible for the worst crimes. As a safeguard against its recommendations being ignored, a list of the key suspects was given to Annan with instructions to pass it on to the ICC if no action was taken. These were the contents of the sealed envelope that Kofi Annan eventually handed over to the ICC. In brief, initial emphasis on domestic accountability had given way to efforts to secure an ICC intervention.

Although the Commission's recommendations had been implemented in a piecemeal manner, it had to be said that the ICC intervention had been a catalyst for many subsequent reforms, examples of which included:

- domestication of the Rome Statute by Kenya's 2008 International Crimes Act. This change in the law had first been put to use in a Sudan-related case to render ICC arrest warrants valid at a domestic level;
- victim participation, a novel, essentially civil-law feature to be introduced into a common law country such as Kenya;
- the new 2010 Constitution, which is itself linked to the reform process;
- some institutional reforms, such as the creation of specialised divisions in the DPP's office;
- better preparation in the lead-up to the most recent elections;
- reforms to witness protection, a programme that had been placed in the hands of an independent agency.

However, there had been very few domestic prosecutions of international crimes, and challenges still remained in the form of politicisation of legal processes, lack of political will, continuation of election violence and the ICC's failure to provide a good exit structure and address expectations.

q&a

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

Mark Kersten first asked each panellist a question, after which he opened the discussion to the floor.

Kenyan post-election violence

MK: It is now 2017. The post-election violence that led to ICC intervention happened a decade ago. What's the chance of the 2007/2008 crimes being prosecuted by any institution?; and what's the biggest obstacle to that happening?

SN: As regards the possibility of the evidence collected being reviewed and prosecutions brought, the outlook was "*positive*". After all, even the victims did not know who had committed the crimes. Actions had been filed to force the government to conduct investigations, in order to allow prosecutions to advance. The obstacle was "*political will to a large extent....It is easier to harness support for reform than for investigation*".

Need for the ICC

MK: You talked of the myth of the Malabo Protocol being a reaction to the ICC: do we really still need the ICC?; and if so, why?

TM: The answer to the question is "*Yes!*". African states and citizens saw the need for the ICC, precisely because this need predated the ICC, in that it went as far back as the early or mid-1970s. At the time when the ACHPR was set up, the issue of an international criminal court had been raised, but was not taken up for a number of reasons. "*The reality is that despite the noise, most African countries—probably the great majority—do want to be part of the international criminal justice system*".

Justice mechanisms

MK: Gacaca, ICTR, national courts: given what you know now, if you had a time machine and could travel back to the mid-1990s, what is the one thing that would have improved the mechanisms?

JBM: Looking back at the 1990s, one had take into account the prevailing legal landscape, which was not clear. When the Genocide Convention was adopted, Rwanda had not provided for the prosecution of the crime under its domestic laws. In 1994 the ICTR had been set up "*in a foreign country*", whereas, in his opinion, it should have been set up in Rwanda itself. Even so, "*a lot of good things had happened*" and the legacy was good. Of course there were challenges: "*Legislation should deal with the problem of competing claims between international and domestic jurisdictions, a problem that continues until today*".

Malabo Protocol

MK: What's the likelihood of the Malabo Protocol being adopted? What's the biggest hurdle? And if it was adopted, what would happen in terms of complementarity and co-operation in domestic and international institutions?

GN: The Malabo Protocol had been adopted: the problem was that it had not been ratified! It is a difficult question: no-one knows when it will finally be ratified by the requisite 15 AU members. The very lack of ratification is a sign that there is no political will for speedy ratification. This was in sharp contrast to the Constitutive Act of the AU which was ratified within the space of one year! Indeed, in the case of the Protocol, people had expected quite the opposite in view of the perceived desire to withdraw from the Rome Statute. If the Protocol were ratified, it should not raise major problems in terms of co-operation between the ICC and the proposed African Criminal Court. Overlapping jurisdiction was seen as showing the need for an agreement in the shape of a practical arrangement between the two courts. It was clear that any African Court would be complementary with respect to domestic systems (until now there had been three judicial dialogues on this very aspect).

Genocide, complementarity, and universal jurisdiction

JBM: Universal jurisdiction is the "*fourth pillar*" which contributes to the existing three pillars (Gacaca processes, domestic courts and international tribunals). Rwanda had established an international crimes unit and liaised with foreign jurisdictions coming to the country, operating on the principle of "*extradite or try*". He saw the prosecution of genocide by other states as "*very good!*".

ICC: a political tool to control Africa?

TM: "*The ICC is not a Western tool*". African countries had decided for their own sovereign reasons to sign the Rome Statute: indeed, the African region was the single biggest regional bloc of members. There was the argument that almost all the ICC situation countries were in Africa. This was perfectly true but it must to be stressed that most of these situations were referred to the Court by African States themselves; only two of these were not self-referrals. One has to be honest about these things. However, this was not to say that were no legitimate concerns about the ICC's failure to take up similar situations elsewhere. It is also true that African states have legitimate concerns about the role of the UN Security Council in the ICC criminal justice system. After all, some members of the UN Security Council are not even ICC members! The AGJA was trying to encourage dialogue to address these concerns.

Additional "raft of crimes" in the Malabo Protocol

TM: All the so-called "*additional*" crimes in the Protocol were crimes governed by various multilateral African (i.e. OAU or AU) treaties, meaning that there was a sound legal basis for their inclusion. While he had no way of knowing whether such crimes would eventually become universalised, what he could say by looking at history was that, "*Sometimes where Africa leads the rest of the world follows!*"

PANEL II

Charting the course ahead – achieving justice and accountability for international crimes

MODERATOR

ANGELA MUDUKUTI

International Criminal Justice Lawyer,
Wayamo Foundation

Pausing no longer than to remark on the need to work at both a domestic and international level, ***Angela Mudukuti (AM)*** *handed the floor to the first of the panellists.*

ADENIRAN AKINGBOLAHAN

Rule of Law Adviser to the Vice-President of the Federal Republic of Nigeria

When it came to the domestic investigation and prosecution of international crimes, **Adeniran Akingbolahan (AA)** said that the challenges and way forward were defined by the twin factors of willingness and ability. "*The factor of willingness transcended issues of ability*", and while willingness was essentially political will, it actually went beyond this and touched on broader issues, such as peace versus justice, and amnesty. As an illustration of the latter, **AA** mentioned the quandary posed by amnesty for Lord's Resistance Army (LRA) leader, Joseph Kony: while some felt that this would allow him to come into the open, others felt that it would not stop him from causing trouble.

While it was true to say that ability had "*many angles*", ratification of the Rome Statute and the adoption of implementing legislation offered a set of tools that domestic legislation might not provide, e.g., in terms of command responsibility, crimes against humanity, victims' reparations. In short, "*things that are welcome and should be explored*". In this connection, it had to be stressed that ratification without implementing legislation was a pointless exercise.

Challenges included issues of:
• capacity, i.e., when it comes to collecting evidence and conducting investigations. In the case of Boko Haram in northern Nigeria, these were challenging tasks for the military to perform;
• interagency co-operation. In many jurisdictions, investigation is traditionally undertaken by one body and prosecution by another. However, international criminal cases are highly complex and the way in which investigators and prosecutors work is crucial;
• sexual and gender-based violence. Although such issues are often excluded domestically, they nonetheless comprise a "*huge body of crimes*"; and,
• internal co-operation, particularly on the African continent. A simple example was the paucity of good communications, e.g., transport, flights. African countries were not well connected, let alone in areas of interest for criminal investigation and prosecution. In this regard, he was "*happy to see the development of the proposed network at a regional level*".

There had also been some successes, said **AA**.
- rather than focusing on the one withdrawal from the ICC to date (Burundi), it should be remembered that Africa had the highest number of ratifications of the Rome Statute;
- similarly, in 2010 alone, both Kenya and South Africa had passed implementing legislation and it was to be hoped that his trend would continue;
- in terms of domestic prosecutions, initiating these had proved to be "*a protracted process in Nigeria*" but some low-level prosecutions were finally under way. Other examples he could cite were the Gacaca processes in Rwanda and the trial of Hissène Habré in Senegal; and,
- there was increasing specialisation, with specialised international crime divisions in Uganda and Kenya

According to **AA**, the way forward lies in: more implementing legislation; greater collaboration with international bodies, e.g., as in the CAR between the Special Criminal Court and the ICC; increased capacity building (positive complementarity); more research into measures, the impact of efforts, and "*which model works best*"; and paying more attention to indices, such as the World Justice Project (WJP) Rule of Law Index, which would allow countries to address underlying problems.

CHARLES ADEOGUN-PHILLIPS

Litigation Practitioner and Former Lead International Prosecutor, ICTR, Lagos, Nigeria

Charles Adeogun-Phillips (CAP) began with a quote from the Preamble to the Rome Statute to the effect that "*the most serious crimes of concern to the international community as a whole must not go unpunished*". The primary responsibility for achieving this lay with states. However, since the ICC was very limited in its scope, date and application, this gave rise to the need for national jurisdictions to enhance their ability to prosecute international crimes. For this to happen it was necessary to domesticate the Rome Statute and to ensure that necessary resources and funding were in place. The combination of the technical resources and very high evidentiary standard raised the matter of finance, i.e., "*exhaustive investigation and examination do not come cheap!*"

Then there was the issue of structural and human resources: experienced prosecutors and judges had to be found and recruited. Something as simple as a courtroom had posed problems at the ICTR, where a shift system had to be introduced to overcome the lack of infrastructures, something which "*no-one had thought of!*" The fair trial rights of the accused was another challenge that had to be addressed, since it called for lawyers with the necessary expertise, and questioned the ability of national jurisdictions to meet the high standards demanded.

Local capacity had to be built or strengthened, particularly in the areas of witness protection, safe passage for witnesses who might themselves be liable to prosecution, and facilities for the most vulnerable witnesses. There was also a need for consistency among national systems. Moreover, "*justice had to be seen to be done*", something that involved the role of the media and the need for outreach programmes. In **CAP**'s experience, trials were held so far away that victims had no way of knowing about or following their progress.

There had been several AU-led attempts to extend the jurisdiction of the ACHPR to criminal matters. In an aside, **CAP** remarked that the African clamour for a criminal court was not -as was often asserted- due to the al Bashir case but in fact dated back to concern about the crime of apartheid as far back as the 1960s. He cited 3 points in support of the establishment of an African court:

(i) historical necessity, inasmuch as there were some crimes of no interest to the rest of the world;
(ii) legal treaty obligations; and,
(iii) the existence of crimes peculiar to Africa, over which the ICC had no jurisdiction, e.g., unconstitutional challenge to government.

Some of the main challenges to such a court included the existence of civil and criminal jurisdiction side by side, the complementarity principle, and the potential incompatibility between an African Regional Court and the ICC.

SARAH KIHIKA KASANDE

Head of Office – Uganda, International Centre for Transitional Justice

Under the heading, "*Prospects for the domestic prosecution of international crimes at the International Crimes Division of the High Court of Uganda*", **Sarah Kihika Kasande (SKK)** made the point that two Ugandan trials were concurrently under way: one -that of Dominic Ongwen- at the ICC, and the other -that of Thomas Kwoyelo- in the International Crimes Division (ICD) of the High Court. Uganda's ICD had been set up in 2008 in the wake of the Juba peace negotiations, as a transitional justice mechanism to address violations; it was also intended to give effect to the principle of complementarity, by virtue of which states have the primary obligation to investigate and prosecute international crimes. In 2011, a legal notice had expanded the ICD's designated jurisdiction from war crimes to genocide, crimes against humanity, terrorism, human trafficking and piracy.

The ICD had brought a number of benefits in the shape of:

(i) the deliberate integration of international practices, e.g., victim participation (previously victims had had no role in a common law system such as Uganda's). In the Kwoyelo case, the victims had actually managed to have the indictment amended to include charges of sexual crimes. The ICD had more or less incorporated the ICC regime, though there was some concern about its ability to meet these high standards at a local level. The hope was that these international standards would eventually trickle down and become applicable to other ordinary trials;

(ii) prosecution-led investigations;

(iii) a restorative component in the form of reparations for victims (as opposed to compensation for

damage), thereby addressing victims' dignity;
(iv) greater protection of the rights of the accused, e.g., obligation on the prosecution to disclose exculpatory evidence;
(v) heightened awareness of the need for witness protection measures; and,
(vi) greater specialisation of lawyers and judges.

The case of former LRA commander, Kwoyelo, "*speaks to the challenges*", in that it goes beyond domestication of the Rome Statute. His trial had initially been delayed by the existing amnesty regime. On appeal, the Supreme Court overturned the decision of the Constitutional court and held that the crimes with which Kwoyelo was charged were not eligible for amnesty. Yet, after all this time the case was still at the pre-trial stage! She listed some of these challenges as being:

- resources - the Court faced "*serious human resource constraints*" and was simply not adequately resourced. An enormous amount of resources was required for things such as evidence collection, outreach, witness protection, and psycho-social support and counselling for traumatised victims;
- capacity - the ICD had initially been staffed by trained judges but with time these had been transferred and replaced by a new bench, which now required training and capacity building;
- lack of a legal and institutional framework for victim and witness protection - protective measures had to be improvised, often using ad hoc structures. In some instances, these services could not be provided, due to a lack of facilities and/or funding;
- temporal gap in the law -Uganda had domesticated both the Geneva Conventions and the Rome Statute but most of the crimes committed by the LRA pre-dated the respective implementing Acts, with the result that the prohibition on retrospective application of the law placed crimes committed in the 1990s beyond the reach of these statutes;
- absence of political will and selective prosecution -the ICD found itself needing to justify its needs continuously, a problem further accentuated by the fact that it had been founded as the result of a political process. This lack of political will was exemplified by the failure to allocate sufficient resources to the Court; and,
- amnesty -under the Amnesty Act of 2012, many returnees were granted amnesty, thus removing them from the ICD's jurisdiction.

When it came to indicating the way forward, SKK laid stress on two areas in particular: firstly, capacity building ("*positive complementarity*" on the part of the ICC) to strengthen local capacity and prevent the ICD from becoming "*a white elephant*"; and secondly, mutual legal assistance (MLA) agreements in all their forms were required, to enhance the exchange of information, expedite extradition procedures, and facilitate the collection of evidence, tracking and interviewing of potential witnesses, recognition of arrest warrants, tracing of assets, and relocation of protected witnesses. At bottom, there was the problem of how to operationalise the Great Lakes Protocol.

q&a

Angela Mudukuti posed three questions of her own and then took further questions from the floor.

Domestication of Rome Statute

AM: How is one to encourage states to domesticate the Rome Statute?

AA: This was a "*tough one!*". Countries needed to see the practical application of the positive aspects. Advocacy was called for to get the citizenry to apply pressure. Once a country had ratified there was no point in not implementing the Statute. He had seen the practical benefits of domestication in northern Uganda, where peace had brought investment and activity where neither had existed before. In Nigeria too, the spectre of ICC intervention had been used by parties as a threat against their rivals, and the elections had gone off peacefully.

Future of hybrid courts

AM: In light of the ICTR experience, what is the future for ad hoc/hybrid courts?

CAP: In 2012, he had written an article objecting to comments by a UK barrister urging that Gaddafi be sent to The Hague for trial. Local knowledge was invaluable: indeed he had lost his first ICTR trial, due the fact that the real location of the crimes was different to the alleged location, a mistake incurred by not making use of people on the ground. Had that been a hybrid court, they would have had the benefit of local knowledge on the bench. "*The need to build capacity in the local population cannot be overemphasised*", which is why he had attacked the article's preference for a trial in The Hague rather than capacity building in Benghazi. A hybrid court might have been the answer in that particular case.

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

In this connection, **AA** noted that the rule against non-retroactivity had been waived in the Hissène Habré trial to allow a charge of crimes against humanity to be brought. Needless to say, this was an exceptional measure. Did he see the Hissène Habré trial as a model? Frankly he could not say, though perhaps each system had to adopt what it considered to be the best model for its own needs.

When this same subject was later raised by a member of the floor, **CAP** said that in the case of South Sudan, the problem was finding a forum for the proposed hybrid court. A host venue had to be found. **Tiyanjana Maluwa** interjected to explain that he had been one of the team of four who had drafted the instruments to establish the hybrid court, which was to be hosted by Tanzania. The United Nations and the AU wanted to see the court established as soon as possible. Discussions were in progress.

On a general note, **AA** was of the opinion that, "*the hybrid system also has its challenges. Research is needed to tell us where to go*".

Fair trial rights

AM: Is enough being done to ensure the fair trial rights of the accused?

CAP: Fair trial rights were possibly better protected at an international than at a national level. An illustration of this was provided by the Boko Haram trials being held in Nigeria, where "*rookie lawyers*" had been appointed to undertake the defence. Naturally, this was better than no representation at all, but all the same, he could not help feeling concerned.

Prolonged detention

AM: What of the rights of the accused, for instance in cases of prolonged detention?

SKK: Kwoyelo's long detention had possibly been due to legal processes, e.g., the amnesty issue. Soon it would be 10 years since his arrest, and part of this delay could be attributed to the capacity of his defence team. Other issues had been translation and disclosure of exculpatory evidence.

Balance between limited resources and capacity

SKK: Ideally there should be no such thing as a balance between resources and capacity "*because the rights of the accused are at stake!*" What the ICD had done in reality was to work with partners. This was very important but should in no way amount to a compromise.

Alternative forms of restorative justice

SKK: There had been a certain degree of romanticisation of traditional mechanisms, though it was true to say that they had been useful in reintegrating the returnees. Nonetheless, more had to be done to formalise the relationship between traditional and formal mechanisms.

PANEL III

Challenges in delivering justice: witness protection and linkages between international and transnational organised crimes

MODERATOR

ANGELA MUDUKUTI

International Criminal Justice Lawyer,
Wayamo Foundation

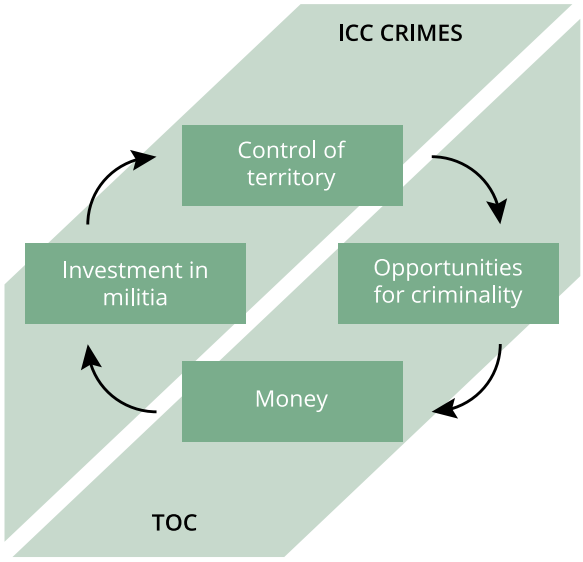
WILLIAM ROSATO

Office of the Prosecutor, International Criminal Court

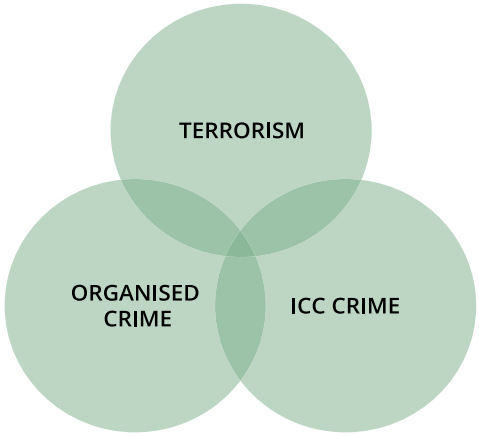
Drawing on his past experience as a police officer, ICC investigator **William Rosato (WR)** asked whether it really helped to have different concepts, such as drug squads, burglary squads and robbery squads. After all, the suspects were the same and the outcomes for the victims were the same. This applied equally to the division between international crimes and TOC, whether in terms of perpetrators or victims. According to the definition coined by the United Nations Office on Drugs and Crime, "*Transnational organised crime is crime co-ordinated across national borders, involving groups or networks of individuals working in more than one country to plan and execute illegal business ventures. In order to achieve their goals, these criminal groups use systematic violence and corruption*". In the case of Libya, for instance, the proceeds of such crimes had gone to fuel international ("*ICC*") crimes.

Like most criminals "*ICC criminals*" are not "*single issue specialists*". They operate globalised organised criminal networks and know one another long before coming within the ICC bracket. They take advantage of and act against a backdrop of international crime environments, characterised by disadvantaged, poorer countries and failed states having limited manufacturing capacity, poor communications, low educational and skill levels, limited law enforcement, and large potential profits. This makes for a low-risk, high-reward environment for crime. Inputs, including weapons, aviation, expertise and intelligence systems, need to be imported, and the resulting outputs then need to be exported. As a rule, such criminals have substantial means –be they in the form of cash, diamonds and/or gold- that they channel to safer banking regimes. These so-called inputs and outputs are provided and managed by

common networks which exchange inputs and outputs and expertise, with an impact that extends far beyond national boundaries.



Using the above chart **WR** explained how militia groups (such as those roaming Libya) use the proceeds of TOC (trafficking in drugs, oil and people) to finance their activities and, by extension, international crimes. "*If one wants to prevent ICC crimes, one has to cut the opportunity to make money*".



The above Venn diagram shows just how tightly terrorism, TOC and international crime are interrelated; to further underscore his point, **WR** showed a headline which read, "*ISIS and the Italian Mafia working together to bring oil into Europe*". Bearing this in mind, it is pointless to look at these crimes using a model which assumes that crimes are committed in separate categories: "*This*", said **WR**, "*is not an effective way of dealing with ICC criminality*".

A better approach is to ask the following questions:

(i) Who gains from ICC type crimes?, and What do they gain? Once this had been established, one had to follow the money.

(ii) How do they gain? People who invest in criminals do so with the intention of maximising the return on their money. In contrast, there are the profiteers who simply take advantage of a situation which presents itself.

(iii) Do we truly understand the motives of the main actors? According to WR, these were not particularly well understood.

(iv) Are we using the right techniques to investigate?, i.e., proactive versus reactive.

The latter, albeit unavoidable in many cases, was not always a good response. In this regard, one also had to ask whether prosecution was necessarily the correct course when disruption might afford a way of limiting harm and escalation. In this respect, **WR** sounded a warning note "*Instead of asking whether this is the best way of dealing with the problem, egos tend to get in the way!*"

GERHARD VAN ROOYEN

Senior Manager, Victims and Witnesses Section, Division of External Operations, Registry, International Criminal Court

Like his ICC colleague, **Gerhard van Rooyen (GVR)** also came from a law enforcement background. To disrupt organised crime and TOC, one of the best tools in the toolbox was a witness protection programme. Nevertheless, it also had to be said that witness protection was not the solution to everything. Why does one need to protect witnesses? "*Because*", said **GVR**, "*if you don't have witnesses, you don't have at trial!*" In short, witnesses are an irreplaceable source of information.

There is no such thing as "*regional crime*": all TOC is international. According to the 2011 World Bank Development Report, repeated violence threatens development: hence, strengthening legitimate

institutions and governance to ensure citizen security, justice and jobs is crucial to break cycles of violence. Moreover, international conventions (such as the UNTOC & UNCAC) and domestic law placed countries under an obligation to provide protective measures to witnesses in criminal matters.

Witness protection involved a range of methods and/or measures, in and out of court, and before, during and after testimony. A witness protection programme was a specific measure which should be seen as a last resort. Ideally, protection should be both physical and psychological, respect the witness' rights and protect him/her from unfair treatment, and be proportional to the threats and risks faced. Here, **GVR** warned that sometimes witness protection programmes became mere "*dumping grounds for witnesses*", when the real purpose of such programmes was to support the judicial process and enable effective prosecution by securing the testimony and evidence of threatened and intimidated witnesses. To achieve this, he recommended a bottom-up, step-by-step approach, which he illustrated using the pyramidal diagram shown below.

The ICC believes in a holistic approach to the protection of witnesses and victims, in that the responsibility to protect witnesses and victims lies with the Court as a whole (Article 68(1) of the Rome Statute). The Rules of Procedure and Evidence further stipulate that the Victims and Witnesses Unit, a neutral service provider, shall: provide witnesses who appear before the Court and others who are at risk on account of testimony with adequate protective and security measures, and formulate long- and short-term plans for their protection; recommend to the organs of the Court the adoption of protection measures; and assist witnesses when they are called to testify before the Court.

- Protection mechanisms at the ICC, can be presented in a pyramidal structure. This means that there is a correlation between the intrusiveness of the measure, its frequency and the risk that is applicable –more intrusive measures are less likely to be applied and are normally only for witnesses who are seriously at risk.
- Good practices and confidentiality – this is the foundation of any successful witness protection system, in that the good practices followed by the investigators during the investigation will in effect provide the widest scope of protection during a trial. This includes measures to keep the details of the investigation, the identity and contribution of witnesses confidential, and co-operating with local law enforcement on security arrangements.
- Procedural protective measures are implemented by decision of the Court on request (prosecution or defence). Examples are voice and facial distortion, use of pseudonyms, etc.
- Local operational protection measures, e.g., additional target-hardening or the provision of an emergency response system, i.e., 24/7 emergency contact for witnesses, which allows for extracting witnesses to a safe holding area, etc.
- Protection Program: last-resort measure. Ideally to be founded on a sound legal basis and set up and resourced to meet international best practices (Article 96 Registry Regulations). This programme provides the framework for the removal of the person at risk and his direct family to a safe location, e.g., permanent relocation of witness and family to another country. Strong emphasis is placed on keeping the investigations confidential for as long as possible, relying as little as possible on witnesses at risk and complementing this with judicial protective measures.

Whereas many scholars believed during the conception of International Justice Organisations that judicial protective measures during trial would provide an adequate level of protection for witnesses, practice has shown that protection is needed before, during and after trial.
Central to this ability to protect from the investigative phase to completion of trial and beyond is the identification and allocation of responsibility for protection within the criminal justice system to ensure that all the key partners know and accept their responsibility and duty of care.

Additional notes:
The above concepts are translated into the responsibility of the different actors within the ICC and can be applied to the actors within a national/domestic criminal justice system.

Within the ICC, the type of measure employed is usually determined by the VWS based on a threat and risk assessment, in consultation with the party (defence or prosecution) and the PAR. Implementation is effected either by the VWU or by the party under VWU supervision.

When it comes to protecting witnesses, a number of factors must be borne in mind.
The time factor (the need for a speedy trial) is critical, and includes the need to envisage and be prepared for procedural delays. Being a very specific measure with only one aim, a witness protection programme is extremely expensive and resource-intensive, requiring a highly skilled workforce and the necessary funding. Services can range from round-the-clock protection to international covert relocations, and developing countries may thus be less than ideally placed in terms of resources, processes and knowledge. Perhaps most important of all is the fact that a witness protection programme is life-changing, in that it alienates the witness, by breaking all manner of ties, social, physical and emotional. Hence, such programmes should only be used as a last resort in a range of interdependent protection methods, in cases of real crime priorities where the witness' life is genuinely at risk.

If no alternative witness can be found, then, to ensure a structured approach to the assessment of perceived threats/risks and the proportionality of the protection measures proposed, the following minimum admission criteria should be borne in mind:
- the seriousness of the offence;
- the nature and relevance of the witness' testimony;
- the nature of the apparent danger;
- the applicant's willingness to submit to protective measures (inasmuch as witness protection is a voluntary programme); and,
- the availability of alternative protection measures, i.e., using basic protective measures might well address a vulnerable witness' subjective perception of threat or intimidation.

"*You are going to create a monster!*", said **GVR**, and therefore a witness protection programme had to be neutral and objective, and to be successful had to be built on four pillars, the first of which was operational autonomy and capability. The other three were covert capacity, confidentiality, and accountability "*for every penny spent*". In the case of South Africa, it had taken time to overcome politicians' suspicions and convince them of the need for autonomy and covert capacity.

To sum up, protection of victims and witnesses is multi-dimensional, involving a variety of actors. It is a combination of tasks, mixing together skill sets intrinsic to the judiciary, crime investigation, and high-risk armed reaction and personal protection, with forensic staff, social workers and covert operatives all operating in a highly confidential environment. There are many similarities between protection at the international and domestic levels. Witness protection is crucial in successfully addressing TOC, human rights abuses, terrorism and large-scale corruption, all serious crimes involving powerful individuals and groups.

q&a

Angela Mudukuti began the Q&A session by putting a question to each panellist.

New tools

AM: In connection with the ICC, you mentioned the need for new tools: in an ideal world what would these new tools be?

WR: Reading the ICC statute from a common- or civil-law standpoint yields different interpretations of what investigators can or cannot do. Covert techniques pose a problem because they require the consent of the target state and in reality are only available in cases where such a state is "*friendly to the court*".

States' role in witness relocation

AM: Have you had any experience of states aiding with relocation?

GVR: The ICC has no territory of its own and thus depends on states coming forward to agree to relocation. In this respect, they had received "*great co-operation*" but with the single exception of Sweden, most of these agreements are confidential.

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

Exposing witnesses to risk of reprisal

Speaking from the floor, **Charles Adeogun-Phillips** said that witness protection was always very complex. One had to ask from whom the witness was being protected. What about the fair trial rights of the accused?; after all, the accused was the one who had something at stake. In this regard, disclosure would have to be made to the defence. How successful had **GVR**'s office been in defending witnesses from reprisals by "*proxies of the defendant*"? Furthermore, there was the matter of protection of witnesses during investigations. Risk of detection arose from the time investigators/prosecutors started talking to witnesses, e.g., in the case of the ICTR the use of UN rather than Rwandan vehicles on field trips had served to expose potential witnesses. How was one to deal with such problems?

WR: Investigations in the field were no different to, and could learn from, domestic experiences in parts of London such as the East End. "*We need to represent the people we're working for*", e.g., by using staff with a similar background and trying to blend in. The ICC should take note of this, though there would then be a problem going from a situation like Kenya to a completely different one like Georgia. Furthermore, a fair amount of activity already relied on communications technology, e.g., as the first meeting with a witness was so crucial, remote interviewing techniques were often used. Another tactic was to make appeals for witnesses to come forward or, alternatively, "*talk to everybody!*" and so blur any potential target.

GVR: Witness protection programmes needed to be governed by tough principles to enable people to be moved across borders. It was essential "*to break the link*". In the case of organised crime and TOC, concealing witnesses was rendered difficult by the existence of a gang situation where the members knew everyone. In such cases, one needed to have someone on the ground who was familiar with local customs.

Who should disrupt TOC before it becomes international crime?

WR: In reply to Mark Kersten's question, **WR** said that one had to ask what the easiest, cheapest, most effective way would be. Whichever agency that turned out to be -national or international- should then be selected to do the job.

Use of proceeds of forfeiture

WR: Seizing the proceeds of crime was difficult because in the case of the ICC, "*our suspects know a long time beforehand that we're coming*", and have ample opportunity to hide their illicit gains. However, where money can be seized, it goes into the Trust Fund for Victims. Here, **GVR** added that investigators were becoming better at finding the money.

Need for a national witness protection agency

GVR: Referring to the dual investigation and prosecution witness protection system in force in Rwanda, **GVR**'s recipe was simple, "*If it works for you, then it works!*"

How to end witness protection

GVR: One had to inform witnesses by talking about exiting the programme from the very outset. Witness protection is a voluntary system and so witnesses must know that "*they are there to testify and that afterwards they must get on with their lives*". He had even exited witnesses before they had testified.

PANEL IV

Working Together — networks and international judicial co-operation

MODERATOR

MARK KERSTEN

Munk School of Global Affairs, University of Toronto, Research Director, Wayamo Foundation

***Mark Kersten** noted that the common theme throughout the symposium had been that, while going it alone and asserting the sovereignty principle was possible, it was clear that in many instances it was better to work together, whether tackling TOC or witness protection. The previous day's network meeting had been "in the same direction and had shown that positive outcomes were possible".*

MIKE CHIBITA

Director of Public Prosecutions, Uganda

Mike Chibita (MC) The region had been marked by political turmoil and insecurity, e.g., genocide in Rwanda, the war of independence and its aftermath in South Sudan, disintegration in Somalia, and instability in the Democratic Republic of the Congo (DRC) and Burundi. This had created a steady supply of illegal weapons, which had in turn spurred crime and caused a steady flow of refugees, some of whom were criminals masquerading as refugees. The lack of identification made it difficult to identify criminals who were on the most wanted list. Porous borders meant that traffickers and criminals could make use of unofficial routes and move from country to country undetected, something that was further facilitated by the existence of family members on both sides of the border, e.g., one individual had 10 passports in his name, while another claimed to be South Sudanese or Ugandan according to which best suited his purposes.

This fragility was accentuated by a general lack of resources and capacity, with the resulting impunity making it easy for witnesses and others to be threatened and intimidated. Indeed, his own Assistant Director of Public Prosecution, Joan Kagezi, had been assassinated. At times, "*the intricacies of bordering countries such as South Sudan and the DRC*" made it feel like a "*dead end*".

A very good example of successful co-operation had been the Kampala bombing of 2010, which had left 75 people of different nationalities dead and entailed the need to obtain witnesses and perpetrators from other countries. This would never have been possible without co-operation. There were always complaints about MLA but there was no capacity to change it or solve the long delays. As a result, they had resorted to informal co-operation: "*getting to the FBI via official channels would never have succeeded*", said **MC**.

TORA HOLST

Former Chief Public Prosecutor of the Swedish Specialised International Crimes Unit, Member of the European Network for investigation and prosecution of genocide, crimes against humanity and war crimes

Tora Holst (TH) briefly introduced herself and explained that, as a prosecutor she had been working in Rwanda on genocide investigations. Expressing the greatest appreciation for the help received, she explained how this had led to two successful convictions and two life sentences for Swedish citizens.

In recognition of the fact that it is essential to combat impunity, the European Network for investigation and prosecution of genocide, crimes against humanity and war crimes (EU Genocide Network) had been established on the initiative of the Netherlands and Denmark in 2002 and 2003, and set up by the Council of the European Union, with Decisions 2002/494/JHA and 2003/335/JHA providing the legal basis. Since the first meeting in 2004, the number of states regularly participating had gradually risen from 15 to approximately 30 in recent years. A series of European conventions provided for judicial co-operation between EU Member States in the fight against impunity. Apart from conventions on extradition, mutual assistance in criminal matters and MLA, the European Arrest Warrant, based on the principle of mutual recognition of a list of 32 crimes (including the ICC core crimes) had proved particularly important.

Where permitted, network states are "*obliged to investigate, prosecute or extradite (according to international law), regardless of where the crimes have been committed, and irrespective of the nationality of the perpetrator or the victim*", provided that there is extraterritorial (universal) jurisdiction, a nexus (presence of perpetrator, residence), sufficient gravity, and the offence is not statute barred.

VICTOR MULE

Prosecutor - Head of International Co-operation, Extradition, and Mutual Legal Assistance Division and acting Head of International Organised Crimes Division, Kenya

The Network's stated goals are:
- to facilitate co-operation and assistance between the member states, law enforcement agencies and judicial authorities;
- to exchange best practices, experiences and methods;
- to exchange information on criminal investigation and prosecutions; and,
- to show the importance of setting up national specialist units for these types of core international crimes which are difficult to investigate and prosecute

Meetings are held twice a year over two days, with both open and closed sessions, at which countries make a short presentation of their ongoing cases. "*These meetings are very useful for exchange of information*", stated **TH**.

Sweden had formed its specialised war crimes unit in 2008 with just one person. A Human Rights Watch report on the use of such units showed that they were both useful and successful.

Based on practitioners' experiences and knowledge, the Network's strategy reflected lessons learnt and best practices of prosecutors, investigators and other experts, as well as the discussions of its meetings. In addition, the Network had issued a globally relevant compendium of the specifics of international crimes, which **TH** recommended to her listeners as "*well worth considering*".

In addition to the many invaluable lessons learnt from the ICTR, NGOs and the like, the overriding lesson was "not to make the same mistakes".

Commenting on the importance of networking, **Victor Mule (VM)** observed that the simplest way was exchanging business cards with colleagues! When faced with bureaucracy and MLA-related delays, the importance of having the telephone numbers of one's counterparts could not be overstated. As an example, he cited an ivory-poaching case involving Uganda, Kenya and Rwanda, in which the perpetrator was known to be intending to flee to the USA; in a triangular situation of this type, going through the official channels would have just taken too long. Thanks to informal co-operation, however, the necessary information had been exchanged in a timely fashion.

VM briefly listed some of the numerous benefits and advantages of networking, saying that:
- it strengthens international co-operation in criminal matters, by focusing on preventing and
- combating all forms of serious crimes, such as drug trafficking, terrorism, etc.;
- it facilitates and provides relevant legal and practical information on extradition and MLA procedures amongst member states and resolves difficulties arising from the implementation/execution of requests, e.g., delays, court battles;
- through its national contact/focal points, it promotes international co-operation through dispatch and implementation/execution of requests for international co-operation;
- it stimulates, improves and expedites co-ordination of investigations and prosecutions among member states;
- it helps fight impunity by offering a practical tool to ensure harmonised measures to promote international co-operation;
- it acts as a forum for a database of cases/requests and for sharing information on challenges, achievements or difficulties and other issues of

general interest on matters relating to MLA and extradition; and,
- it creates mutual trust and builds confidence in matters of MLA and extradition and promotes flexibility in the execution of requests.

The ideal network would thus have a legal basis in the form of a constitutive instrument (e.g., a Memorandum of Understanding or the like), a list of contact persons, a comprehensive database, a secure electronic communication system, and be characterised by mutual trust, informality and flexibility in the execution of requests. Other invaluable assets would be: a glossary to help in the translation of Letters Rogatory; standard forms; a list of laws; and a tool containing technical files on legal, procedural and practical information on the frequently requested investigative measures, e.g. searches, seizures, witness statements, etc.

The establishment of a network would be a major step towards a practical structured international co-operation mechanism in the region, said **VM**, leaving his own e-mail address and telephone number on the screen by way of a potential networking contact!

q&a

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

Mark Kersten began by putting the same question to all three panellists.

One surprising benefit of networking

MK: We think of big benefits, sharing information and extradition but I wonder if each of you could give an example where a network produced a surprising benefit?

VM: There were some witnesses in Italy who did not wish to go to Kenya to testify. Kenya had no framework for a video link but Italy complied with the request and the prosecution obtained a conviction.

TH: As she had mentioned, the Swedish team had benefited greatly from French investigators' advice to use local Rwandan drivers rather than their own people. Perhaps the most surprising benefit, however, was that gained by following Finnish advice to start the case in Kigali, so that the hearings would be perceived as safe and non-threatening.

MC: In one case where 2 years had gone by without having received any help or even a formal acknowledgement of receipt of a request for evidence, he had attended an asset recovery meeting in Europe where the participants had talked about their professional frustrations and, in particular, the fact that it seemed to be a world where small countries always helped big countries but not vice-versa. As a result, he had finally received acknowledgement of his 2-year-old e-mail and actually managed to get hold of the person!

Entry point for civil society

MC: Civil society organisations could help by looking on themselves as partners rather than opponents. If the common goal is to end immunity, "*then we are all on the same side*".

VM: Sometimes it was useful for civil society to be joined as a party to the action.

EU Genocide Network: open versus closed sessions

TH: Open sessions were for discussing questions of principal interest, whereas closed sessions could only be attended by practitioners for the purpose of discussing actual cases.

EU Genocide Network: support for Rwanda

TH: Europe was doing something about the remaining genocidaires at liberty. Network members put pressure on their colleagues, e.g., the Swedish had informed the French that they had the necessary evidence and so the French could therefore proceed.

Piracy

VM: Piracy is an offence against the law of all nations and thus subject to universal jurisdiction. If the offence occurs within 12 nautical miles of the coast it is armed robbery: beyond that limit -i.e., if it occurs on the "*high seas*"- it becomes piracy. In the case referred to by the questioner, the Kenyan prosecution had argued the latter successfully and obtained a conviction for piracy.

CLOSING REMARKS

JEAN BOSCO MUTANGANA

Prosecutor General, Rwanda

JBM thanked the panellists and participants alike, and said that very pertinent issues of international criminal justice had been discussed. After introducing his team of prosecutors, including the head of the Genocide Tracking Unit who had been designated to act as the contact person for the Rwandan section of the proposed network, **JBM** announced that five of his staff members would be attending the following day's training workshop, along with colleagues from Uganda, Tanzania and Kenya, whom he warmly welcomed. Lastly he expressed his gratitude to BA and the members of her Wayamo team.

BETTINA AMBACH

Director, Wayamo Foundation, Berlin

BA was most grateful to her hosts for the high-level representation at the symposium. She wished to emphasise just three points, namely:

(i) the expressed commitment to the new network. The previous day's meeting had been "very positive", and there was even the possibility of extending the network to more countries in the region;

(ii) the way forward lay in stressing domestic capacity to address international crimes but this needed to be done by working with different levels (national, regional and international); and,

(iii) the undeniable importance of the linkages between international crimes and TOC, and the fact that the ICC was disposed to pursue Strategic Goal no.9.

On this note, the 2017 Kigali symposium drew to a close.

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