INTERNATIONAL JUSTICE SYMPOSIUM

Beyond Narrow Interests - Justice And Accountability In East Africa

ARUSHA, TANZANIA | TUESDAY 27 NOVEMBER 2018

Funded by: Federal Foreign Office

The investigation and prosecution of complex, transnational and international crimes continues to be regularly undermined by parochial political interests and a narrow focus on crimes and perpetrators within national borders. What can be done to overcome myopic interests and insular approaches in order to further accountability for international and transnational organised crime? To address this question, the ***Wayamo Foundation*** *and* ***Africa Group for Justice and Accountability*** *hosted a one-day symposium on 27 November 2018 in Arusha, Tanzania.*

TABLE OF CONTENTS

EXECUTIVE SUMMARY

To hold the sixth round of its *"Fighting Impunity in East Africa"* project, the Wayamo Foundation returned to where it had all begun...Arusha, Tanzania.

Here, in the shadow of Mt. Meru, an intensive, week-long series of events was organised within the framework of an initiative funded by the German Foreign Ministry, co-hosted by the Africa Group for Justice and Accountability (AGJA), and fittingly entitled *"Beyond narrow interests – justice and accountability in East Africa"*.

As always, one of the project's four *"pillars"* was an international symposium. The fact that parochial political interests and a narrow national focus continue to undermine the investigation and prosecution of complex, transnational and international crimes raises the question of what can be done to overcome such myopic interests and insular approaches in order to further accountability for international and transnational organised crime. It was this that formed the core idea and theme running through the symposium.

The day's proceedings were formally opened by a trio of dignitaries, made up of Tanzanian DPP, **Biswalo Mganga**, Rwandan Prosecutor-General, **Jean-Bosco Mutangana**, and Former Chief Justice of Tanzania and AGJA member, **Mohamed Chande Othman**.

This traditional start was followed by a free-flowing conversation between Wayamo moderator **Joseph Roberts-Mensah** and two special guests, Ugandan and Kenyan DPPs, **Mike Chibita** and **Noordin Haji** respectively, who talked frankly and forthrightly – at times surprisingly so – about *"The trials and tribulations of prosecuting in Uganda and Kenya"*.

Other topics covered by the three panels during the morning and afternoon sessions were *"Combating transnational organised crime and terrorism"*, *"Distributing justice: international, regional and domestic justice mechanisms"* and *"Judicial co-operation and the links between international criminal justice and transnational organised crime"*. The panellists were drawn from Africa and around the world, and included: Nigerian prosecutor, **Chika Nnanna**; Kenyan Deputy DPP, **Dorcas Oduor**: Ugandans, **Jane Okuo Kajuga**, Senior Assistant DPP, and **Nicholas Opiyo**, human rights lawyer; former Ambassadors, **Tuvako Manongi** and **Stephen Rapp**; the President of the East African Court of Justice, **Emmanuel Ugirashebuja**; the ICC's **Philipp Ambach** and **William Rosato**; **Matevž Pezdirc** from Eurojust in The Hague; and roving UNODC (United Nations Office on Drugs and Crime) Regional Advisor for Anti-Money Laundering and Counter-Terrorist Financing in Central Africa, **Gary Hyde**.

Combating transnational organised crime and terrorism

PAGE 16

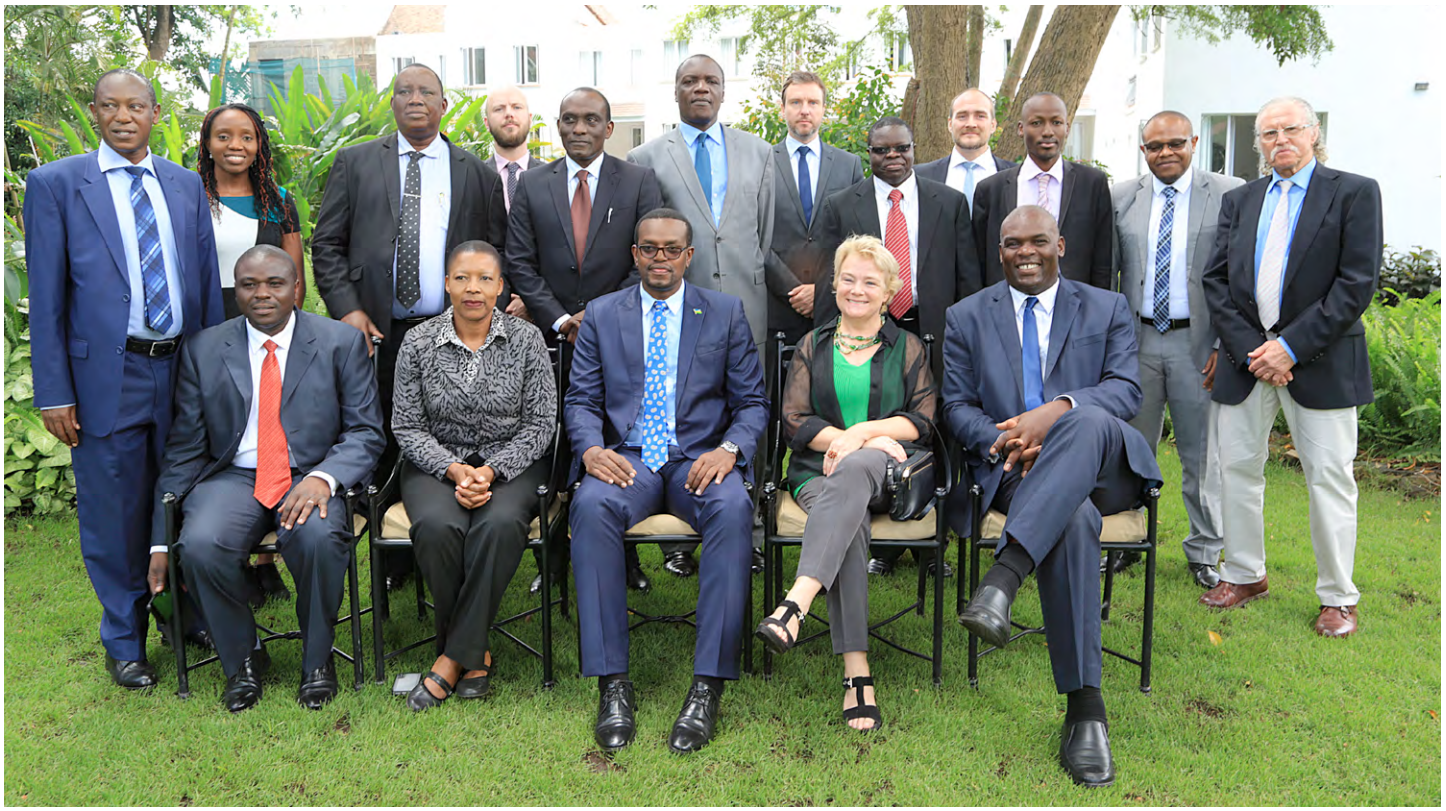
Distributing justice: international, regional and domestic justice mechanisms

PAGE 24

Judicial co-operation and the links between international criminal justice and transnational organised crime

PAGE 32

WELCOMING REMARKS



BETTINA AMBACH

Director, Wayamo Foundation, Berlin

Bettina Ambach (BA) opened the day's proceedings by welcoming a series of distinguished guests, including the President of the East African Court of Justice, the Directors of Public Prosecutions from the four network countries – Kenya, Rwanda, Tanzania and Uganda – and representatives from the International Criminal Court (ICC), the European Genocide Network, and the United Nations Office on Drugs and Crime (UNODC).

The central idea running through the symposium and the week as a whole, she explained, was how to overcome narrow interests when combating transnational organised crime (TOC) and international crime (IC). With the financial help of the German Foreign Ministry, Wayamo and the Africa Group for Justice and Accountability (AGJA) had decided to tackle this challenge by holding an event made up of the following four components:

- the previous day's **4th High-level Meeting of Directors of Criminal Investigations and Directors of Public Prosecutions** which culminated in the creation of the Network of Directors of Public Prosecutions and Criminal Investigations in the East African Region;
- a public component in the form of a **symposium** to bring academia, university students and civil society into the debate;

- a capacity building component in the form of a **training workshop**, *"a very strong component of Wayamo's work"*; and,
- a **media engagement**, to which journalists from the region and South Africa had been invited.

The hope was that, as a whole, the initiative would serve to strengthen the efforts of prosecutors and investigators in the fight against TOC and IC. Before handing over to the next speaker, **BA** stressed that the symposium was intended to be an *"interactive forum"*.

BISWALO MGANGA

Director, National Prosecution Services, Tanzania

After thanking Wayamo for holding the latest in a series of international justice symposiums aimed at strengthening collaboration amongst investigators and prosecutor in East Africa, **Biswalo Mganga (BM)** went on to say that one of the topics to be discussed was combating TOC and terrorism.

An incident that had occurred the previous day in Somalia was an example and an *"alert to all"*. Terrorism is a crime against the state, and against security and stability as a whole: it violates the right to live free from fear, enshrined in the Preamble to the Universal Declaration of Human Rights. Worse, it is anti-democratic, since it seeks to overthrow the democratically elected government. **Some terrorists operate under a political or religious banner to fool people into thinking that they are fighting for political rights or religious issues.**

Equally important issues when seeking to address the current challenges are judicial co-operation and the link between international criminal justice and

TOC. Criminals co-ordinate, co-operate and exchange information on how to commit these crimes, and how to evade justice by circumventing the law, sometimes by pleading legal technicalities with the aid of members of the legal profession. **Whereas criminals co-operate on how to transfer and share the proceeds of crime, this same pattern of co-operation and co-ordination is often not seen in the criminal justice system.** ***"We continue to work in isolation within our offices in the same country or from other jurisdictions"***.

The East African Association of Prosecutors (EAAP) had come up with collective ways of dealing with these challenges. Guided by the EAAP Constitution and Strategic Plan, member states are required to co-operate whenever they are faced with complex international crimes.

"It is", said **BM**, *"my sincere hope that this Network will help to reduce, if not eliminate, these challenges and make East African states a safe and crime-free zone for rapid economic growth"*.

JEAN-BOSCO MUTANGANA

Prosecutor General, Rwanda

Jean-Bosco Mutangana (JBM) expressed pleasure at being in Arusha again, the city which had hosted the international tribunal that had tried key and mid-level perpetrators of the Rwandan genocide. He was grateful to the Wayamo Foundation, in the person of *"our good partner Bettina, who has been working with countries in East Africa and beyond to strengthen the rule of law*

> *"Prosecutors, investigators and law enforcement agencies in the region have to work together to fight these crimes in recognition of the fact that to combat them effectively, there needs to be a regional approach in additional to global approaches"*

by supporting effective investigation and prosecution of international and transnational crimes as well as reinforcing skills and capabilities of regional prosecutors under the EAAP umbrella".

The EAAP's mandate entailed facilitating regional co-operation, detection, investigation and prosecution of crimes, and providing mutual legal assistance (MLA) for extradition purposes. ***"Prosecutors, investigators and law enforcement agencies in the region have to work together to fight these crimes in recognition of the fact that to combat them effectively, there needs to be a regional approach in additional to global approaches"***. Indeed, inter-agency collaboration had been discussed at length during the previous day's network meeting.

IC and TOC are planned, organised and carried out transnationally. Their global and ever-changing nature means that law enforcement agents and practitioners from different countries need to build a strong network and fill gaps regionally in a collective effort to fight such crimes. Continuous training in the investigation and prosecution of international and other serious crimes should never cease, particularly with respect to new aspects of TOC, such as cybercrime and human trafficking, which have come to constitute a grave threat. Not only do investigators and prosecutors know full well how difficult it is to gather sufficient evidence and secure a conviction, but their work does not make them popular. Even so, **JBM** regarded it as necessary to engage in *"this battle and increase our commitment to working for the common good"*.

The new Network would work in concert with the EAAP and ensure continuity.

MOHAMED CHANDE OTHMAN

Former Chief Justice of Tanzania and AGJA member

Mohamed Chande Othman (MCO) hailed the symposium as an enriching occasion for critical appraisal, mounting challenges, and charting future realistic and deliverable strategies for justice and accountability. He then proceeded to invite the public to validate or dismiss what he was about to say, and then advanced the following five propositions or observations.

- It is important to agree that the **real issue is about fighting impunity**, seeking accountability for crimes and re-establishing the rule of law. In setting up international tribunals, ranging from the International Criminal Tribunals for the Former Yugoslavia and Rwanda (ICTY and ICTR) to the Special Court for Sierra Leone and the International Residual Mechanism for Criminal Tribunals, various UN Security Council resolutions have reiterated the determination to put an end to serious International Humanitarian Law (IHL) violations and create a credible system of justice and accountability to end impunity, sentiments echoed by the wording of the Preamble to the Rome Statute of the ICC. Likewise, many international treaties – including the UN Conventions on Transnational Organised Crimes, Illicit Traffic in Narcotic Drugs and Psychotropic Substances, and Corruption – are built on combating impunity.
- East African countries should lend their support to the fight against impunity for serious IHL violations and TOC. **MCO** saw this *"as an urgent duty and not a choice … an obligation, not an exercise of a discretion."* The former UN Legal Counsel, Patricia O'Brien, had perhaps expressed this best when she said, ***"In this new age of accountability nobody is above the law including, in particular, Heads of State. Leaders will eventually be held accountable for their actions"***. Indeed, over the span of 25 years more than ten Heads of State have been brought to account, including former Khmer Rouge leader Nuon Chea (*"Brother Number Two"*), Hissène Habré, Charles Taylor, and the late Slobodan Milošević.

- There is current consensus that **ICC States Parties have the primary duty to investigate and prosecute core international crimes committed on their territories or by their nationals**. This is the principle of complementarity whereby the Court is deemed to be a court of last resort, and forms part of the orderly organisation of world community. It is not a demonstration of national monopoly. With TOC too, the burden lies on state law enforcement agencies, and on the Directorates of Public Prosecutions and Criminal Investigations (DPPs and DCIs) in particular.
- All the above is conditional on the capacity and professionalism of national law enforcement and justice mechanisms. The aim must be to build and sustain robust and more mature national law enforcement institutions and justice mechanisms. Credit is due to some East African states, such as Kenya, Tanzania and Uganda, for their efforts to establish Specialised Divisions of the High Court with jurisdiction to try persons accused of serious IHL violations and TOC.
  However, much more remains to be done in new areas, such as cybercrime, the dark net, banking and financial transactions and flows, and digital forensics: in short, it is *"a continuous learning process"*.
- Fourth, effective address of serious IHL violations and TOC requires a triple-sided approach – national, regional and international – which in turn means close co-ordination and co-operation. More needs to be spelt out in terms of mutual legal assistance, arrest and transfer or extradition. The newly established East African DPP and DCI network will go a long way towards fighting impunity.
- Fifth and finally, one of the challenges to containing and suppressing TOC is that there has been *"lukewarm success"* to date in holding those most responsible to account. More visible apprehension of suspects is needed to inspire public confidence. Tanzania is a leading transit corridor for about 12,000 illegal immigrants, mostly heading towards South Africa and Mozambique. The only way to catch the kingpins is through co-operation among the countries of origin, transit, destination.

Reiterating his appreciation to Wayamo, AGJA and the German Foreign Ministry for holding and sponsoring the symposium, **MCO** concluded by saying, ***"Although this could be said to be the re-birth of the new age of accountability, it is not yet the golden age of accountability because much more remains to be done"***.

CONVERSATION

International Criminal Justice – The Road Ahead

A CONVERSATION WITH

MIKE CHIBITA

Director of Public Prosecutions, Uganda

NOORDIN HAJI

Director of Public Prosecutions, Kenya

MODERATOR

JOSEPH ROBERTS-MENSAH

Africa Director, Wayamo Foundation

Joseph Roberts-Mensah (JRM): *In your opening remarks, could you both comment briefly on the title we have given to this conversation, "The trials and tribulations of prosecuting in Uganda and Kenya". Are there "trials and tribulations" in your work?*

Noordin Haji (NH): They cannot be properly viewed as *"trials and tribulations"*. The real challenge lies in the need for clarity in the country's laws and regulations.

Mike Chibita (MC): observed that, personally speaking, his challenge had been coming to prosecution from the Bench, with the differences between the two making the task of prosecution seem like a real trial and tribulation!

- Whereas a judge has to supervise just a few people, a DPP is responsible for over 600 members of staff, each of whom represents *"a potential tribulation"*. In addition, judges hear evidence and then write up their rulings in the quiet seclusion of their chambers, while a DPP has to make decisions under the glare of public scrutiny and criticism.
- *"The media rarely speak to a judge about anything but could live in the DPP's office given the chance!"*
- When it comes to expectations, a DPP is expected by his staff to find money to provide for their needs and by his government *"to eradicate crime and get a 100% conviction rate on a shoe string"*.
- Finally, a DPP loses all his privacy because, as the criminals and their agents *"want him dead"*, he is placed under 24-hour security surveillance.

Those are but a few of the trials and tribulations of a DPP but *"it's a small price to pay"*.

NH: Like MC who had come to the prosecution from the shelter of the Bench, he had found himself elevated to the very public post of DPP from the closeted world of Intelligence. The challenge as he saw it, lay in trying *"to push the envelope as much as possible in a Kenyan constitutional context"*, with corruption figuring high among the country's problems, and jurisprudence and interpretation of the law being the other major challenges.

JRM: *What would you say is the single biggest challenge?*

When pressed by **JRM** to mention what they saw as the single biggest challenge facing the quest for justice and accountability in the wider East African context, **NH** said that the issue of integrity was central to ensuring the rule of law, while **MC** pointed out that, since East African countries accounted for a sizeable proportion of the world's wildlife space, the problem of poaching and international trafficking was of real and immediate concern.

JRM: *There have been instances in both DPP's countries which had given rise to the call of "Never again". How can one ensure "never again" in the context of the post-election violence that marked the 2007/2008 Kenyan elections and the Lord´s Resistance Army crimes in Uganda?*

NH: Once again, integrity and accountability and the rule of law are the issues. Without these, the types of incidents referred to are likely to re-occur.

MC: Idi Amin and the atrocities committed by the Lord's Resistance Army (LRA) are part of the reason why the International Crimes Division (ICD) of the High Court was set up in collaboration with the ICC and other stakeholders. Thomas Kwoyelo is currently on trial at the ICD, but when it comes to the rule of law, both the prosecution and the counsel for the defence are on the same side.

JRM: *How do you balance the need to achieve justice for LRA crimes with the rights of the accused and the international protest at the handling of the Kwoyelo case?*

MC: As compared to the victims, suspects and accused persons have many rights, including the right to bail and a speedy trial. In contrast, victims have almost no rights, unless prosecutors *"go out of their way"* to ensure that these are upheld. *"The only thing that the state wants is the victims' testimony!"* Hence, there is a need to balance these rights. For example, Kwoyelo's victims and their families also have rights.

*Following-up on his guests' responses, **JRM** now introduced the subject of standards, specifically suspension of rights as in Guantánamo, and asked whether there were occasions when rights must necessarily be lopsided.*

NH: *"Guantánamo didn't work, and a blanket suspension of rights normally doesn't work"*. However, if there is a judicial sentence, this could justify why an individual's rights have been suspended …but the standard for suspension must be very high.

MC: Legal systems usually provide for this. *"When you are suspected of being guilty of committing an offence, you forfeit certain rights"*.

JRM: *In fighting transnational organised crime and international crimes, is cross-border co-operation and collaboration at its optimum?*

NH: In East Africa more is needed to emulate the European Union, where there are no boundaries. More work needs to be done.

MC: Agreeing in essence with his Kenyan colleague, **MC** made the point that the countries in the region had come a long way, citing, by way of example, the co-operation which Uganda had received from Kenya, Tanzania, the USA and the UK in the July 2010 Kampala bombing. Even so, *"we are not yet there"*.

*When **JRM** interjected to ask whether the problem might lie in having different institutions and laws,* **MC** gave an instance of a Ugandan magistrate's refusal of Tanzanian extradition application being overturned by the High Court. At one level, this might be no more than a failure to appreciate the gravity of a wildlife offence; at

another, there might also be an underlying problem of the exercise of sovereignty and independence.

***JRM**: Would you say that there is still a role for the ICC to play in keeping countries honest and focused on ensuring justice and accountability for international and transnational crimes?*

NH: The ICC still has a very positive role to play. This is not just a matter that affects East Africa: it affects all states.

MC: *"What would the alternative be? We're still better off with the arrangement than without it!"*

JRM: About becoming public figures: is there too much expectation from the general public/citizens? Is there a need to educate the public?

MC: There are always great expectations, to the effect that, as DPP, you have enough power to prosecute all crimes. Even prosecuting 70% of crimes is ambitious, since many crimes go undetected. Not only do the public and the media labour under the misapprehension that the DPP receives his instructions from the President as regards whom to or not to prosecute, but there is also an impression that, instead of prosecuting the *"big fish"*, he concentrates on the small fry. There is no appreciation of what the real challenges are, when it comes to prosecuting the *"big fish"*. The truth of the matter is that Uganda now has a policy of using plea bargaining in offences involving US$3,000 or less, in an effort to persuade petty offenders to enter a guilty plea, restore stolen proceeds and avoid a prison sentence, thereby freeing resources to target the criminal masterminds. There is a real need to educate the public in this respect.

> *"Somebody needs to fight for the victims!"*
>
> **Mike Chibita**

NH: When the *"big fish"* are caught, the public expects a 100% conviction rate. Furthermore, the public doesn't appreciate why investigations take so long. Expectations are just too high. There is also the issue of bail. The Kenyan Constitution is clear: bail is a right. But this has to be weighed against the protection of citizens. In the case of counter-terrorism, detention takes place under very strict conditions with the onus always being on the state.

***JRM**: Would you say enough is done in the aftermath of violence or conflict within your borders to support victims? Do you have a role?*

MC: Of course we have a role: it is possibly the only institution of government that can fight for victims. The prosecution's role is one of advocacy and help: *"Somebody needs to fight for the victims!"*

NH: After the post-election violence, a fund was set up for the victims. The DPP's office has tried to address issues and works closely with the Law Society of Kenya in this respect. In addition, there is a witness protection agency, whose mission is to help victims who are under threat by providing them with safe houses and funds. Much more could be done, however.

***JRM**: In your experience could your work in any way benefit from improved gender balance?*

NH: Gender balance is being addressed in Kenya and *"great strides have been made"*. Women account for three quarters of the staff in the DPP's Office, and they are extremely diligent, and bring a very important element to the way cases are handled.

MC: More than 50% of prosecutors are now female. The ODPP has produced some of the most formidable prosecutors the country has seen. The late Joan Kagezi was the first head of the ICD and was replaced by now Justice Susan Okalany, who was named 2017 IAP Prosecutor of the Year. *"We have Jane Okuo Kajuga as Public Relations Officer and Head of International Co-operation, Samali Wakooli as Head of Gender, Children and Sexual Offences, Betty Khisa as Principal Assistant DPP, and Alice Komuhangi Khaukha as head of Anti Corruption Department…I could go on and on!"*

***JRM**: Would you consider that parochial political interests, a myopic and narrow focus on crimes and perpetrators within national borders can ever truly be overcome?*

NH: *"Politics are always complicating everything you do. With more responsible politicians, hopefully we'll be able to overcome the narrow focus. As DPPs from East Africa, we have reached out to work efficiently for our people and adopt a more holistic approach in how we address cross-border cases."*

MC recalled that, as a judge, he had been faced with a case where the property of an absentee landlord had been overrun by squatters. When the bank sought the eviction order to which it was technically entitled, he felt bound to consider the interests of the people who had settled on the land and, as a result, decided not to issue the order. *"We as DPPs cannot pretend to be operating in a vacuum and must therefore be aware of existing political realities"*. It is necessary to work within a social, economic and political reality and remain mindful of the fact that a minimum of political stability is required for the rule of law to function.

PANEL I

Combating transnational organised crime and terrorism

MODERATOR

MOHAMED CHANDE OTHMAN

Former Chief Justice of Tanzania and AGJA member

Noting that combating transnational organised crime and terrorism was evidently a problem close both to East Africa and to the members of the panel involved in fighting terrorism, MCO briefly introduced the panellists and explained that each speaker would have 10 minutes to make his/her initial address.

DORCAS ODUOR

Secretary and Deputy Director of Public Prosecutions and Head of Economic International and Emerging Crimes at the Office of the Director of Public Prosecutions, Kenya

Dorcas Oduor (DO). *"Transnational organised crime poses a significant and growing threat to national and international security, with dire implications for public safety, public health, democratic institutions, and economic stability across the globe. Not only are criminal networks expanding, but they also are diversifying their activities, resulting in the convergence of threats that were once distinct and today have explosive and destabilising effects."* In this respect, said **DO**, developing countries in which the rule of law is weak are particularly vulnerable.

The prosecution's job is to implement the law. It follows then that, if the law is not there, prosecutions cannot be brought. While in some countries there is a need for substantive and procedural law, in others which do have the necessary legislation, the laws can be unresponsive and/or incompatible with future instruments. In essence, what this amounts to is that there is no uniformity across the region, and this is one of the factors which hinder cross-border co-operation.

Furthermore, within the different regional jurisdictions, there is a need for parties who can implement the laws, something which, in turn, calls for knowledge and capacity. If investigations are limited in some way, this makes it difficult for the prosecution to have enhanced evidence. Hence, education, training, infrastructures and tools are called for.

Even where all these elements are present, there may be problems due to a lack of inter-agency collaboration. Fortunately, inter-agency collaboration is now a reality in Kenya.

Not only are international and regional co-operation necessary, but domestic laws are also needed to enable evidence obtained through such cross-border collaboration to be used. Judicial systems sometimes lag behind the pace of technological advances, with an extreme instance of this being the continued use of handwritten note-taking in the Kenyan courts!

Other aspects which require attention are:

(i) issues of admissibility, since these can hinder co-operation;
(ii) the use of asset seizure and confiscation as a tool;
(iii) awareness-raising to sensitise the population to the magnitude of the problem; and,
(iv) the need for good governance to ensure equality before the law, and reassure prosecutors and investigators that they are not working in a vacuum.

CHIKA NNANNA

Prosecutor, Complex Case Group (CCG), Department of Public

Chika Nnanna (CN) explained that the first major terrorist attack in Nigeria took place in Abuja on 1st October 2010, Nigeria's Independence Day. This was followed by further attacks on key targets by members of Boko Haram led by Abubakar Shekau.

While the government sought ways to deal with the problem, massive arrests were made, especially in the north-east of the country, by the military and members of the Civilian Joint Task Force. As a result, about 1600 suspects were moved to a military facility

in Kainji, highlighting the urgent need to develop a comprehensive strategy for processing persons suspected of being involved in terrorist activities.

Due to the absence of the necessary institutional and legislative infrastructure, the 2011 Terrorism (Prevention) Act (TPA) was passed in a hurry. As a result, a further statute, the Terrorism (Prevention) (Amendment) Act, 2013 (TPAA), had to be passed, and now these two enactments stand side-by-side.

In 2017, the Government decided to step up proceedings, and gave the order to begin prosecutions. Interrogations were conducted by the Joint Investigation Centre (JIC) and case files were sent to prosecutors without the necessary supporting evidence, largely due to the fact that evidence is difficult to collect in conflict situations. Accordingly, the prosecutors decided that, in those cases where there was no or insufficient evidence, they would recommend that the detainees be released.

The first Kainji Special Trials were held in October 2017 at the Wawa Military Cantonment because many suspects who had originally been detained elsewhere were transferred there after a series of prison breaks and attacks on detention facilities. The trials, which were held *"in accordance with the rule of law"*, resulted in 50 persons being convicted and 203 being discharged for lack of concrete evidence. In February 2018, the second round of trials *"came with a lot of improvements"*, with the National Human Rights Commission being invited to observe and report on human rights issues. A total of 203 persons were convicted and 582 were discharged, *"which"*, said **CN** *"shows that we were not hell-bent on obtaining convictions!"* The third instalment in July 2018 also brought improvements, one example of which was the fact that JIC personnel were called as witnesses: 113 detainees were convicted and, because the prosecution was armed with the necessary case files, far fewer persons were discharged for want of evidence. One problem encountered was the presence of minors, since under-age subjects have to be tried by a family court.

Nigeria is currently preparing to embark on a *"mopping-up phase"* in the form of a 4th round of trials to be held in Maiduguri. Many suspects (including women and children) are being detained at the Giwa Barracks there, and the task of profiling these detainees is under way.

The common offences with which suspects are being charged under the TPAA are membership of a terrorist group and/or proscribed organisation, concealment of information, giving support to terrorist groups, and acts of terrorism.

CN ticked off some of the main challenges faced, as being:

- conflict between suspects'/defendants' constitutional rights and national security;
- combined role of the military as combatants and collectors of evidence;
- over-reliance on confessions as well as non-compliance with relevant provisions of the Administration of Criminal Justice Act, 2015 in the recording of confessional statements;
- inadequate forensic examination facilities (especially in cases of sexual and gender-based violence);
- absence of a comprehensive database of offenders;
- delays in trials caused by, among other things, a lack of interpreters; and,
- inter-agency rivalry between security and law enforcement agencies.

Nonetheless, **CN** was quick to point out that, *"not everything has been bad"*, in that the experience gained has yielded a series of good practices, examples of which include:

(i) early engagement/short deployment of Complex Casework Group prosecutors during investigations to advise JIC staff on the best ways to collect evidence, and ensure that investigations are conducted in compliance with procedural and human rights laws and norms (aided by UNODC and EU);

(ii) Federal High Court (Criminal Trials) Practice Direction 2013 establishing a system of case management to provide for fair trials, and impartial and expeditious administration of criminal cases arising out of terrorism, kidnapping, trafficking in persons, rape and the like;

(iii) a Bill to harmonise the country's two major counter-terrorism acts; and,

(iv) in passing sentences, the courts consider time spent in detention.

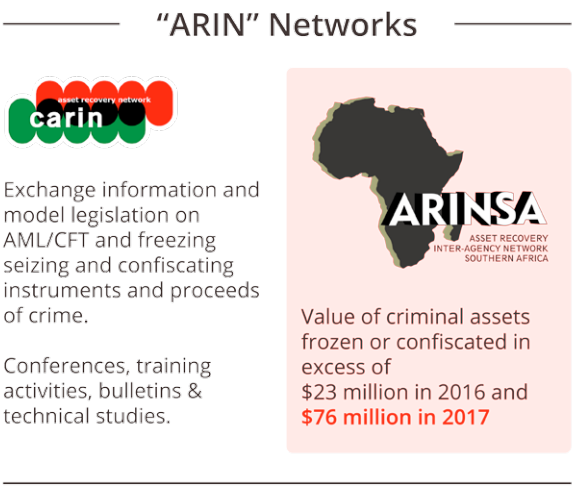
GARY HYDE

Regional Advisor for Anti-Money Laundering and Counter-Terrorist Financing in Central Africa, United Nations Office on Drugs and Crime

In a presentation entitled *"Going after the Money! The importance of financial investigations as part of every wildlife or natural resource case"*, **Gary Hyde (GH)** used a picture of the Congo basin to stress the threat posed by environmental crimes in general, and in this specific instance, by illicit logging and mining and the resulting illegal financial flows. Not only are the conditions in such mines *"inhuman"*, but the way they are operated means that toxic substances, such as mercury and cyanide, are allowed to flow into and pollute local rivers and water-catchment areas.

The real objective of criminals is predictably to acquire status and all the usual trappings of success. Their assets tend to be in the form of large amounts of cash, which must be stored in some way, thus giving rise to the ensuing -and very real- problem of security, humidity and rodents. It is here that their need for some kind of money laundering comes in. What is therefore required is an *"assets-based approach"*, aimed at seizing the proceeds of crime, which are not limited to cash but also include the *"instruments of crime"*, i.e., vehicles, equipment, warehouses and the like.

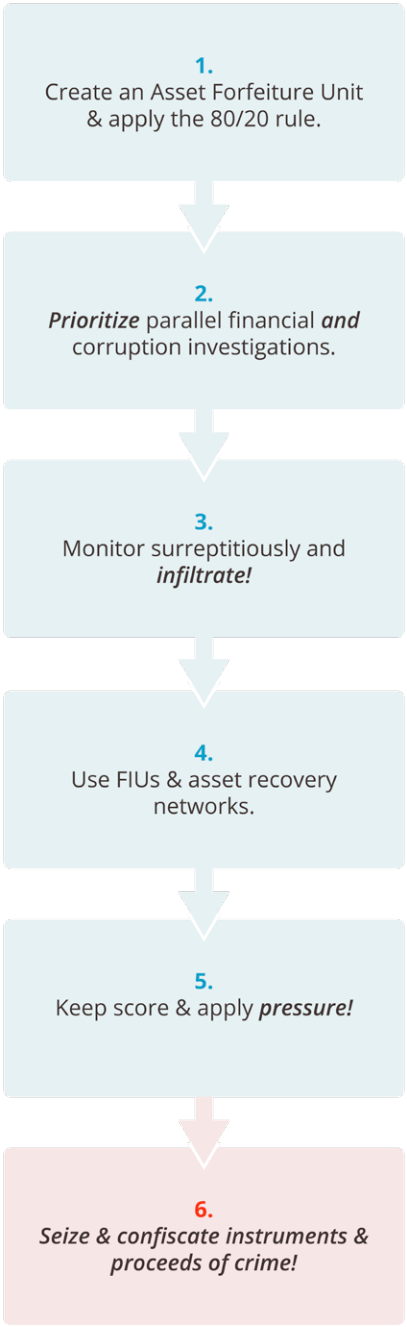
It is necessary to build a financial *"business model"* of the criminals' operation by asking simple questions, such as who moves/uses/stores what, when, why, where and how? **As shown in the illustration below, asset recovery inter-agency (ARIN) networks are a "great tool" for hunting down and freezing, seizing and confiscating criminals' assets, and thereby attacking them "where it hurts most". Apart from the invaluable job they do of exchanging information, the advantage of such networks is that they can also impart training and provide model legislation on anti-money laundering and combating the financing of terrorism (AML/CFT).**



According to **GH**, one of the most important functions they perform is possibly that of keeping the type of *"scoreboard"* circled in red. In this case, the value of criminal assets frozen or confiscated was in excess of US$23 million in 2016 and US$76 million in 2017. In the case of terrorism and armed rebel groups, **GH** observed that 80%-90% of the information on Al Qaeda had come from financial investigation. *"Clean money gets turned into dirty money: terrorists groups have huge overheads, which create opportunities for us!"*

The *"elephant in the room"* when addressing crime is corruption, which is omnipresent. By creating the concept of *"illicit enrichment"*, the United Nations Convention against Corruption (UNCAC) provides an extremely useful tool for combating corruption.

Taking his lead from Albert Einstein, who was widely credited with saying, *"The definition of insanity is doing the same thing over and over again, but expecting different results"*, **GH** recommended the formation of Asset Forfeiture Units and application of the so-called 80/20 rule in order to disrupt the criminal networks.



In order to make countries a hostile environment for criminals, it is necessary to get involved with organisations such as ARINSA and exert constant pressure on these gangs. *"Continuity is vital!"*

q&a

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

Before opening the discussion to the floor, **MCO** summed up some of the salient points raised and/or questions posed by the three panellists.

- In the region, do we have what it takes to investigate and prosecute transnational organised crime and international crime?
- Do we have the necessary framework?, e.g., the problem of conflicting legislation in Nigeria.
- The question of unpreparedness of investigators vis-à-vis new crimes, e.g., the problem, again in Nigeria, of the combination of *"no confession and no evidence leading to no conviction"*.
- The problem of high numbers of suspects being detained/incarcerated. How specialised are the institutions?
- The need for a finance and asset-based approach, with financial investigation units in the Treasury and Central Bank.

***Floor**: Most criminals use computers as a tool. Investigators -and prosecutors- need a lot of know-how to obtain evidence. How can cybercrime be handled in East Africa?*

GH: While not personally equipped to address cybercrime, GH strongly suggested liaising with Interpol, which *"has a great programme"*.

DO: Technology has moved beyond the law, e.g., M-Pesa, the mobile phone-based money transfer service, is even being used from prison to move money! *"We have to rely on the international community to come up with laws and seek solutions."*

***Floor**: A money laundering/asset-based approach requires the issue of an asset freezing order. Hence substantive and procedural laws are needed because any delay leads to the assets being moved. How is one to get around this and ensure that court orders are speedily issued?*

GH: An extremely effective solution is to have a provision in the law to allow for substitute assets to be seized in lieu of the original.

DO: Cases have to be prepared well beforehand to ensure that all the necessary evidence is available.

***Floor**: Dealing with terrorism has been piecemeal, due in part to the fact that there is no agreed definition of "terrorism". Is there a way of moving forward or a way of prosecuting it under another name?*

DO: There is no answer as yet, but then again criminal laws are not scientific. There is some advantage to not having a definition because having one would definitively close the door to alternatives, such as using case law. In Kenya, prosecution-led investigations in terrorism have led to a 95% conviction rate

***Floor**: In the case of the legislation-related difficulties being faced in Nigeria, would domestication of the Rome Statute be useful in prosecuting Boko Haram?*

CN: Experience has shown that implementation of the Rome Statute would indeed help because, when it comes to international crimes, Nigerian prosecutors are forced to use the Penal Code in order to seek a similar offence on which a charge can be brought.

***Floor**: Mutual legal assistance poses a lot of challenges due to a lack of uniformity and/or contradiction between the laws of different countries. What is to be done?*

DO: Where MLA laws are not available or are contradictory, this is an impediment. Other modes of co-operation can be sought, and sometimes Internet instruments can be used to get around contradictions.

***Floor**: As regards the phenomenon of Islamic insurgency in northern Mozambique, there are suggested linkages with Tanzania, Kenya and beyond. Is this an issue of concern?*

Noordin Haji intervening from the floor: It is well known that there are connections between Mozambique, Somalia, Kenya and East Africa. There is a need to look at the money flows. Having suffered a lot at the hands of Al-Shabaab, Kenya is not only adopting *"a more holistic approach to terrorism"*, which entails looking at prevention, it has also built a great deal of capacity in the area of terrorist financing and money laundering.

"The definition of insanity is doing the same thing over and over again, but expecting different results"

Albert Einstein

PANEL II

Distributing justice: international, regional and domestic justice mechanisms

MODERATOR

ANGELA MUDUKUTI

International Criminal Justice Lawyer, Wayamo Foundation

Angela Mudukuti (AM) opened the afternoon session by introducing the members of her "eminent panel" and asking her first panellist to take the floor.

TUVAKO MANONGI

Former Permanent Representative of Tanzania to the United Nations, United Republic of Tanzania

The future of international criminal law is predicated on the premise that transnational crime is a business – and *"business is good!"*. It has grown and expanded along with the world economy, and demanded attention from nation states. Over 50 activities are estimated to fall under the umbrella of TOC, including money laundering, corruption, terrorism, trafficking, etc. Such activities undermine states' abilities to provide their citizens with basic services in the context of peace, security and development. Indeed, United Nations Sustainable Development Goal 16 (SDG 16) is all about pursuing TOC.

The future of international criminal law in East Africa and in Africa as a whole will therefore continue to face challenges, which, though possibly more pronounced in the region, are nonetheless a global phenomenon, and can only be confronted by greater efforts targeted at minimising criminal activities.

International criminal law continues to evolve, and in this context, there has been a degree of convergence with the goals of international humanitarian and human rights law. This convergence has proved to be a difficult area for Africa, no more so than in the relationship between Africa and the ICC.

In the aftermath of the Rwandan genocide, the ICC came into being with the largest support from Africa. Its jurisdiction over the most serious crimes (genocide, crimes against humanity, war crimes and latterly, the crime of aggression) was a response to the humanitarian tragedies that had brought so much misery and affliction, particularly to Africa. Yet,

despite serving as an inspiration in the fight against impunity and injustice, the Court has had a tumultuous relationship with Africa.

Tuvako Manongi (TM) expressed the view that *"this contentious relationship is unnecessary for two primary reasons"*:

(i) the primary foundation of the African Union's Agenda 2063 is based on an aspiration to promote a universal culture of good governance, democratic values, gender equality, respect for human rights, justice and the rule of law; and,

(ii) African Heads of State declared 2016 to be the African Year of Human Rights.

The ICC's mission is one that enhances and strengthens this agenda, preventing the commission of international crimes with impunity: it does not undermine it. Not only is the Court's jurisdiction deliberately designed to be complementary, with its jurisdiction only being triggered when a state is *"unable or unwilling"* to prosecute, but the rationale for accountability is equally clear, with no immunity for anyone regardless of his/her official capacity. However, it is the waiver of immunity contained in Article 27 of the Rome Statute which has become the main bone of contention in Africa, and the African Union has resolved to seek an advisory opinion from the International Court of Justice (ICJ). What this amounts to, said **TM**, is that Africa is seeking a restatement of the customary principle of international law which affords immunity to sovereigns and those working in their official capacities! This, he observed, is in sharp contrast to a country's primary duty, namely, to protect the rights of its citizens.

It is not enough to have rules and regulations: states must ensure that these are enforced. Hence, regardless of how current issues between Africa and the Court are resolved, countries must improve their domestic legal and judicial systems so that they can deliver justice in full, fair, effective and timely manner. What appears to prompt compliance is often the threat or fear of national enforcement: in other words, where individuals believe in enforcement there will be fewer actors in the criminal sphere. In Tanzania, for example, the perception that corrupt practices will be dealt with has driven down incidents of corruption in public transactions.

While suspects need to be brought before the law, holding them for an indeterminable length of time poses significant human rights issues. **A proper balance must be struck between accountability and impunity.**

NICHOLAS OPIYO

Human Rights lawyer and founder of the Human Rights organisation, Chapter Four Uganda

Nicholas Opiyo (NO) explained that he had taken part in the Juba peace process, with the designated role of advising Uganda on accountability issues.

Although the peace agreement was never signed, the Ugandan Government nonetheless honoured its commitment under the Accountability and Reconciliation item on the agenda and established a War Crimes Court in 2008, albeit by administrative instrument rather than an act of parliament. Created as a division of the High Court, it was later renamed the International Crimes Division. Its lack of rules of evidence and specific jurisdiction led to judges without any special expertise trying international cases as though they were just any other criminal case. Eventually the 2010 ICC Act was passed, granting the Court jurisdiction to try all crimes covered by the Rome Statute.

This then is the background to the challenges posed by the Kwoyelo trial -a trial, according to NO, of Uganda's institutions and its commitment/competence to try international crimes. In March 2009, Thomas Kwoyelo was shot, wounded and captured in the DRC and then flown to Uganda where he was admitted to a military hospital. Subsequently he was removed from hospital

and detained in a safe house on the outskirts of Kampala, where he was denied access to family, lawyers or any visitors, and allegedly subjected to torture and cruel degrading treatment over a period of three months.

He was charged before a Kampala Magistrate's Court with crimes under the country's penal code, as well as grave breaches of the Fourth Geneva Convention, including wilful killing of civilians, taking of hostages, extensive destruction of property, causing serious injury to body or health, and inhuman treatment.

Kwoyelo applied for amnesty under the country's Amnesty Act. His application was denied and he was subsequently charged before the then War Crimes Court. He challenged this in the Constitutional Court, which ruled that he was entitled to a grant of amnesty and that his trial be stopped forthwith. When this ruling was ignored, the High Court ordered the DPP and the Amnesty Commission to grant Kwoyelo a certificate of amnesty. Following a further two applications which were dismissed by the Constitutional Court, Kwoyelo then appealed to the Supreme Court, which declared him ineligible for a grant of amnesty and ordered that he be put on trial.

NO discerned at least three adverse effects flowing from the lack of proper procedural rules:

(i) the lack of rules of procedure had hindered the trial process (pre-trial proceedings were plagued with objections about irregularities);

(ii) the lack of rules governing victim participation had meant that victims were not required to show a nexus between their victimhood and Kwoyelo's actions; and,

(iii) the lack of rules governing witness protection and disclosure had delayed the start of proceedings.

In addition, there had even been uncertainty as to the precise charges to be brought, with Kwoyelo first being charged under the Penal Code, then under Common Article 3 of the Geneva Conventions, and lastly under customary international law.

Hence, the question that arises is whether the trial meets the standards of a fair trial and due process. Though not convinced that this is indeed so, **NO** nonetheless conceded that it is important that the ICD is in place and that progress is being made.

STEPHEN RAPP

Former Ambassador-at-Large for War Crimes Issues, Office of Global Criminal Justice, Department of State, United States of America

Stephen Rapp (SR). Beginning on a personal note, **SR** commented that before becoming a roving ambassador he had been a prosecutor in Arusha and at the hybrid Special Court for Sierra Leone, where he appeared in the case against Charles Taylor and others.

Experience and observation have shown that there is a relationship between these international crimes and the types of transnational crimes that are prosecuted at a national level. While domestic prosecution is sometimes difficult, it is nonetheless preferable because it brings justice closer to the victims. Even so, the ICC is needed as a court of last resort, where there is a lack of capacity and/or political will. This is particularly true of post-conflict situations and/or situations posing issues of legality, such as cases where the Rome Statute has not been domesticated and retroactive legislation cannot be brought in to cover international crimes. In the Central African Republic (CAR), a mixed court could provide a solution to such capacity- and political-will-related issues. Sometimes hybridisation is needed in order to deal with countries' legal regimes. *"In view of the challenges of prosecuting international/atrocity crimes, especially in ethnic conflicts, it is important to send signals that there will be accountability!"*

By way of a partial solution, **SR** offered three possible *"antidotes"*:

- **Resort to a lesser charge, e.g., the *"Al Capone approach"***: when FBI agents found it impossible to obtain enough evidence to prosecute Al Capone for his gangland activities, they settled for prosecuting him for – and famously succeeded in having him convicted of – the relatively minor crime of tax evasion. **SR** suggested that this approach might well be adopted where proof of major international crimes is unobtainable: in such cases, prosecutors, who would otherwise feel frustrated at the prospect of perpetrators enjoying impunity, might find ways of successfully indicting them, albeit on a lesser charge.
- **Resort to an alternative charge, e.g., false statements**: in the USA, prosecutions cannot be brought for war crimes/genocide committed abroad. In view of this legal barrier, US prosecutors have resorted to seeking – and obtaining – convictions on the basis of false statements made on entry

forms and immigration cards. Using these tactics, fifteen witnesses were flown in from Liberia to testify against Mohammed Jabateh (*"Jungle Jabbah"*), and a further 20 witnesses were likewise brought over to testify against Charles Taylor's former Minister of Defence. As a result, both individuals are currently serving long prison terms.

- **Resort to stratagems, e.g., *"sting operations"***: to illustrate the point, **SR** cited the case of Russian arms dealer, Viktor Bout, the man who supplied weapons to Charles Taylor. To evade his pursuers Bout returned to his native Russia where he found a safe haven, and where, according to **SR**, the enforced idleness resulted in his becoming *"bored out of his mind"*. Acting on information that the Revolutionary Armed Forces of Colombia (FARC) were eager to acquire stinger missiles for use against U.S. forces in Colombia, Viktor Bout went (or was lured) to Bangkok, where he was arrested on terrorism charges by the Thai Police, working in collaboration with the American authorities. He was extradited, tried, and convicted by a Manhattan federal court, and is now serving a 25-year sentence.

The lesson to be drawn from this, concluded **SR**, is that *"using other tools can be a way of ending impunity"*.

EMMANUEL UGIRASHEBUJA

President of the East African Court of Justice

Emmanuel Ugirashebuja (EU) briefly summarised some of the developments at and challenges facing the East African Court of Justice (EACJ).

Jurisprudential developments

- On the matter of the EACJ's jurisdiction over human rights, in the case of Democratic Party of Uganda vs. Attorney-General the Appellate Division ruled that the Foundational Treaty grants the Court jurisdiction to review the African Charter of Human Rights within the context of the Treaty Establishing the East African Community;
- In the Magezi v. the Attorney General of Uganda the Appellate Division held that the EACJ can look into allegations that a Member State has committed a breach of its own laws, since this is the only way to ascertain whether or not it has violated the Rule of Law;
- the EACJ can hear challenges from a Member State regarding any of the latter's institutions, including its courts; and,
- the EACJ can award compensation because the Court is bound to apply the principles of international law see the Hon. Margaret Zziwa v. the Secretary General of the East African Community Case.

Challenges

- The lack of permanency of its judges (though this item is on the agenda of the Ministerial Meeting); and,
- the Court's susceptibility to attacks by the media, which are at times politically motivated. It has therefore been agreed "that there is a need for a public relations department to keep the record straight", since one of the key elements is citizens' confidence in the Court.

Lastly, **EU** expressed his appreciation to Wayamo for bringing together judges, prosecutors and investigators *"because the Rule of Law is like a chain and a chain is only as strong as its weakest link!"*

Before inviting questions from the floor, moderator Angela Mudukuti acknowledged the presence of Samuel Algozin from the Mechanism for International Criminal Tribunals (MICT), and invited him to say a few words about the institution.

Samuel Algozin (SA) explained that the MICT has branches in The Hague and in Arusha. It was set up by the UN Security Council to continue and assure the jurisdiction, rights and obligations of the ICTY and ICTR. During its 21-year life span, the ICTR had done *"a noble job"* in respect of the 1994 genocide and provided a forum for free and fair trials. When the ICTR closed, the Security Council realised that residual matters had to be addressed.

Hence, ***"the Mechanism has a limited but important mandate"***, namely that of:

- completing the judicial work of the ICTR, including appeals and reviews;
- addressing contempt proceedings stemming from ICTR cases;
- tracking and prosecuting the remaining fugitives. At present there are eight: if captured, three will be tried in Arusha and five in Rwanda;
- assisting national jurisdictions to investigate and prosecute cases domestically by, for example, sharing information on the MICT database with domestic authorities;
- supervising the enforcement of sentences. As the United Nations does not have its own prisons, co-operation with Member States is required (e.g., Mali, Benin, Senegal); and,
- protecting victims and witnesses.

The MICT has enjoyed a very good collaborative relationship with Tanzania and other countries in the region.

q&a

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

***Floor**:*

- *From the victims' point of view, surely justice is not seen to be done when persons are convicted of crimes other than those pursued? Shouldn't the major crimes be targeted instead?*
- *In cases where people are caught and deported but not prosecuted on their home territory, isn't there a risk that the deporting state's goal is to wash its hands of the problem rather than to catch the perpetrator?*

SR: Clearly victims want to be vindicated. Even so, while people like the Yazidis in Iraq understandably want to see their assailants convicted of genocide, this should in no way be a pretext for the holding of kangaroo courts. Accordingly, the rule of thumb is, *"if you can't get the best, go for the good!"* The trial in the USA had engaged all the victims even though it was about lies told to the

immigration authorities. It is better to prosecute than to release and send the suspects back home, unless there is a definite assurance that there is going to be a trial.

***Floor**: Why was Kwoyelo chosen for prosecution rather than some other captive?*

NO: Admitting that this was a difficult question, NO said he had come to believe in two things. Firstly, there was the matter of the timing of Kwoyelo's capture after the collapse of the peace process, when the Government was *"annoyed"*. Both the Government and the court were "desperate to show that there was a domestic mechanism for trying international crimes and that *"the investment had not been wasted"*. Kwoyelo was basically *"a guinea pig"*. Secondly, Kwoyelo had entered into a deal to surrender and then reneged on it. *"He's a difficult character, who does not want amnesty because he sees it as an admission of defeat."*

***Floor**: Arresting suspects before all the evidence is in place has to be weighed against the prospect of long detention periods, with an ensuing possible reduction in sentence and/or the right to bring an action for wrongful imprisonment.*

SR: Long detentions need to be regularly reviewed. While not desirable, in cases where there is a real risk of flight, detention is only logical.

***Floor**: Might the ICC set-up actually be an impediment to fighting impunity in East Africa?*

TM: Although the concern about the ICC set-up being an impediment may be legitimate, it should be noted that most cases have in fact been referred by the States Parties themselves. On the other hand, it also has to be said that there are equally legitimate concerns about UN Security Council referrals, in that some of the Security Council members are not States Parties and would not allow their own citizens to be tried by the ICC.

***Floor**: What, if anything, has the MICT done about trying to locate the fugitives lately rumoured to be in Kenya and Zimbabwe?*

SA: Pursuit of fugitives is ongoing, as shown by the arrest of another fugitive, Ladislas Ntaganzwa, in the DRC in 2015.

***Floor**: Some outsiders saw Uganda as an example of positive complementarity and thought that it was going to be a model for other states. Could you comment on this?*

NO: *"It looks good from afar…but it's far from good!"* Trying international crimes in Uganda is *"a commendable initiative and a step in the right direction: however, it is a step fraught with irregularities"*. Kwoyelo's rights were violated (e.g., no access to counsel, long detention). Firstly, there is a need for a permanent court; secondly, rules of procedure and standards of disclosure must be clear from the outset; and thirdly, the court must be seen as an independent court capable of trying all international crimes in Uganda, i.e., including those known to have been committed by the armed forces. There must be trust in the ability of the system to try both sides.

***Floor**: With reference to the Burundi case, isn't the EACJ interfering with the country's sovereign courts?*

EU: A country's sovereignty versus the EACJ, though an interesting debate, is a flawed way of looking at sovereignty. The treaty provisions give the Court its mandate. A court is an organ of state like any other. Hence there is no loss of sovereignty: the domestication of the treaty makes the Court an integral part of the Member State's justice system.

***Floor**:* Regarding the immunity question to be referred to the ICJ, would a negative or a positive response suffice to lessen tension between the AU and the ICC?

TM: *"Whatever the ICJ's decision, the issue is not going to go away! Greater engagement with the AU is called for, in order to address concerns and dispel fears. The ICC needs a confidence-building mechanism."*

> *"Using other tools can be a way of ending impunity: if you can't get the best, go for good!"*
>
> **Stephen Rapp**

PANEL III

Judicial co-operation and the links between international criminal justice and transnational organised crime

MODERATOR

MARK KERSTEN

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

WILLIAM ROSATO

Investigator, Office of the Prosecutor, International Criminal Court

William Rosato (WR) chose to speak about *"Means, motive, opportunity in ICC crimes"*.

Taking Libya as an example of a country where both types of crimes – core international (or *"ICC"* crimes) and transnational organised crimes – are being committed, **WR** observed that situations of this nature often lead to *"chicken and egg"* discussions about the links between the two, i.e., do the actors on the ground control territory to generate money or do they generate money to control territory? His retort was, *"Does it matter?"*. Everybody thinks someone else is doing something and dealing with the problem but criminals are experts in exploiting such gaps. In short, ***"We talk but they act!"*** Another country presenting a very complex geopolitical situation is the CAR, with Russia, regional powers, foreign business interests and organised crime groups all moving in. Since there are many resource opportunities, rival groups are intent on partitioning the country, with their different agendas overlapping with religion and ethnicity.

When it comes to conducting investigations, as a general rule one should seek to understand the context and look for the simplest, most direct explanation. Drawing on his own experience as a policeman, **WR** recalled the Hackney Borough case, where a man reported an assault in the following words, *"I don't know who it was. He just came up to me and punched me in the face for no reason."* At first sight this seemed so improbable that the police thought he was lying. The time-honoured approach to this -and all crimes- is to look for the means, motive and opportunity. With the means and opportunity being self-evident in this case, all that remains is to ask why people punch each other in the face. The classic motives are set out in the diagram below.

Motive

To find out who has a motive for committing a crime, investigators have traditionally applied the Latin adage, *"cui bono?"*, i.e., whom does it profit? Too often, investigations tend to focus on who, what, where and when, while neglecting why (the motive) and how (the means). Analysing motive in the case of international and transnational organised crimes, one is confronted by a clear distinction between the direct perpetrator and the orchestrator. While the former has an overt motive with an unclear outcome and limited benefits, the latter has a covert motive with a clear outcome and extensive benefits. Investigators and prosecutors should therefore ask themselves why it is that orchestrators are so much richer than direct perpetrators, whose motive they are prosecuting, and, perhaps most significantly, whether they are simply following the orchestrator's narrative.

Means

The means needed to commit such crimes are basically 4+1, i.e., money, people, weapons and expertise, plus public relations to provide the necessary cover story behind which the perpetrators can hide. These means are invariably provided by investors, profiteers and/or a transnational network of other criminal orchestrators and facilitators. **WR** showed how a cursory glance at the identities of the people who worked for both Charles Taylor and Gaddafi would immediately reveal the common links.

The UNODC definition of transnational organised crime is *"organised 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"*. *"How"*, asked **WR**, *"does this differ from ICC crimes?"*

The overriding aim should be to target and prevent harm. Prosecution is one way of achieving this but the problem is that prosecutors only want to prosecute, ***"If you have a hammer then everything starts to look like a nail!"***

MATEVŽ PEZDIRC

European Network for investigation and prosecution of genocide, crimes against humanity and war crimes, Eurojust, The Hague, The Netherlands

Matevž Pezdirc (MP) began by explaining that, through the medium of Eurojust and the European Genocide Network, 32 national jurisdictions were involved in conversations on, among other things, the use of open-source information and the links between international and transnational organised crimes. *"There is"*, he stressed, *"no such thing as special compartmentalised criminals"*. Criminals are "generalists", and this is precisely why it is necessary to look for the links: *"core international crimes are just the tip of the iceberg!"* There is an underlying criminality ranging from wildlife offences across to trafficking, terrorism, illegal exploitation of natural resources and arms dealing. Additionally, prosecutorial charges can include counter terrorism offences and war crimes. He offered an example where a German national has joined ISIS in Syria and had been convicted upon his return on two counts, namely, membership of a terrorist group and the war crime of inhumane and degrading treatment of a dead person under Common Article 3 of Geneva Conventions.

When looking at the circle of criminals, there is tendency to focus on the direct perpetrator to the exclusion of the facilitator(s).To illustrate his point, **MP** mentioned a case heard in The Netherlands in which a Dutch national was successfully prosecuted for aiding and abetting a war crime due to selling chemicals to Saddam Hussein using them for gas attacks end of 80s.

In view of the above, **MP** saw the following as necessary:

- an integrated approach;
- a common database;
- co-operation between immigration, law enforcement and prosecution authorities at a national and

international level;
- financial investigations and asset recovery;
- appropriate legislation which envisages the criminal responsibility of legal persons (businesses and corporations); and,
- cooperation between African and European states to ensure linkage of countries where crimes have been committed and countries where high-tech equipment and reliable banking services are available.

JANE OKUO KAJUGA

Head of the Department of International Co-operation, Senior Assistant DPP, Office of the Director of Public Prosecutions, Uganda

Picking up where Matevz Pezdirc had left off, **Jane Okuo Kajuga (JOK)** said that international and transnational organised crimes could not be effectively prosecuted without judicial co-operation.

In East Africa, judicial co-operation is a key factor, and many countries in the region have entered into international, regional and bilateral arrangements to this end (of course, where there are no formal agreements, states can always render assistance on the basis of reciprocity). While most East African countries are signatories to the United Nations Convention on Transnational Organised Crime (UNTOC), sight should not be lost of the fact that regular crimes have also developed a cross-border element. In this connection, mention should be made of the East African Community Treaty and the Judicial Co-operation Protocol of the Great Lakes Region 2006.

Drawing on her experience in Uganda, **JOK** reported that in the last year more extradition than MLA requests had been received and made within the region. This *"disconnect"* was something to be addressed, and might signal the need for investigators and prosecutors to receive further MLA training.

While MLA can help states to take evidence, serve judicial documents, examine objects or sites of interest, execute searches, seizures and the like, and provide information and other evidentiary items, it currently faces a series of major challenges. **JOK** proceeded to run through some of the main ones. These include:

- an information/knowledge gap, where prosecutors and magistrates are not sufficiently informed and have a poor grasp of regional laws governing MLA and extradition. Sometimes prosecutors are not even aware of the relevant treaties and/or conventions;
- the proper way to draft an MLA request that meets the standards of the requested state. *"Many MLA requests are muddled and do not meet the legal requirements"*;
- the party to whom an MLA request should be addressed, e.g., Tanzania had recently changed its procedure. Even the correct way to package and transmit the request can pose a problem;
- a whole host of legal issues, including outdated laws, a lack of MLA legislation, non-domestication of international/regional instruments, and different legal regimes (common versus civil law systems);
- dual criminality, with different definitions of offences and standards for transfer of convicted prisoners;
- the complexity of official channels for transmission of the request, with documents sometimes going astray;
- deadlines;
- changes in contact persons, with no updated/designated database to show these;
- premature arrests which serve to alert suspects in cases of extradition.

There is therefore a need for:

(i) a **database** for all bilateral agreements, laws and cases, plus information on where the laws can be found; and,

(ii) **training** for investigators, prosecutors and judicial officers.

PHILIPP AMBACH

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

Philipp Ambach (PA) announced that he intended to discuss the legal distinction between core crimes under international law and transnational organised crime, and then "pick up" on some potential practical considerations.

(i) Core crimes under international law encompass war crimes, crimes against humanity, genocide and the crime of aggression. For the most part they derive from armed conflict between states, and some of the conduct sanctioned by the crimes marks possibly the oldest conflict-related crimes there are. The core crimes have become the subject of international conventions invoking individual criminal responsibility to protect universally recognised values such as peace and security. Indeed, the Rome Statute preamble defines these as the "most serious crimes of concern to the international community as a whole". As such, they may override national sovereignty, with states having a duty to prosecute or surrender those suspected of committing them.

(ii) Transnational crimes are, as regards the underlying conduct, crimes found in national law and the respective national criminal courts; yet, these crimes have a border-crossing element, making them 'transnational'. The border-crossing element can refer to goods or persons (drug trafficking; smuggling of goods; human trafficking), or (financial) transactions (cyberspace), or even criminal networks operating across countries. They are predominantly committed by private individuals acting for monetary gain, without state intervention (while the commission of international crimes traditionally often contained elements of state policy or involvement in the commission of crimes). "Transnational organised crime is perpetrated for monetary gain and does not target human beings; international crimes do".

Transnational organised crime ('TOC') involves organised criminal networks profiting from the sale of illegal goods or any other border-crossing criminal activity creating monetary gain wherever there is a demand. Despite conceptual differences, there is a certain amount of overlap between the elements of TOC and core international crimes, and where transnational (organised) crimes attain the necessary amount of gravity and fulfil some additional elements, some of the criminal conduct may potentially be elevated to the status of, say, a crime against humanity. A possible instance of this would be human trafficking in a case where there is evidence to show that it had taken place as part of "a widespread or systematic attack against a civilian population".

Similarly, a crime against the environment (termed by some as "ecocide") might, in certain circumstances, qualify as a war crime under the Rome Statute of the International Criminal Court, provided that it generated widespread, long-term and severe damage, was connected to an international armed conflict, formed part of the belligerent activity, and aimed at bringing about a concrete and direct military advantage. PA stressed here that the threshold of military necessity (and what goes beyond such necessity and therefore becomes illegal) under IHL is "extremely high".

Conversely, elements of TOC are found in many international crimes but are hard to prove because investigators of international criminal courts and tribunals may not necessarily follow all investigative leads that point towards criminal networks operating under the guise of an armed conflict. The two types of crimes may come together for instance in situations where armed force is being used to gain or maintain power/resources/territory, and local resources are exploited to finance the conflict. In other words, transnational crimes fuel such wars, e.g., arms and arms traffickers are paid with the proceeds of illegal exploitation of natural resources[1]. The link between TOC and international crimes makes it advisable for international crimes to be incorporated into subject-matter jurisdiction of any specialised national units dealing with transnational (organised) crime(s) in order to be able to capture the full range of criminality in a given case.

According to PA, the following are needed:

- regional conventions to create common definitions of transnational crimes and relevant requirements to prove these crimes in court (regarding both actus reus (objective elements of crimes) /mens rea

1 *See Philipp Ambach, International criminal responsibility of transnational corporate actors doing business in zones of armed conflict, in: Freya Baetens (ed.), Investment Law within International Law: Integrationist Perspectives, Cambridge 2013, pp. 51 et seq.*

(Subjective elements of crimes));
- regional MLA and enforcement co-operation regimes and procedures to enable and expedite evidence-collection; and,
- domestication of the Rome Statute to enable national jurisdictions "to call the crimes by the same name" wherever transnational crimes may indeed be part of a wider complex of crimes committed as an attack against the civilian population or indeed as part of an armed conflict.

q&a

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

***Floor**: Are there some concrete examples of cases in which the ICC has been involved, where the two types of crimes were mixed and there was a "TOC iceberg" which the national authorities could prosecute?*

WR: The current system is request-based, i.e. *"If you don't ask, you don't get!"*. The only area where this does not exist is terrorism. The ICC is now involved in proactive sharing of information but that in turn relies on the extent of its investigation knowledge: in the CAR, for instance, there is a database which can be accessed by the national authorities. In the past, some ICC information has led to sanctions being imposed on traffickers and migrant smugglers.

***Floor**: In cases where there is no bilateral treaty, as between Nigeria and The Netherlands, and the courts refuse to grant extradition, Nigerian prosecutors have sometimes tried to use the UNTOC. How has Uganda manoeuvred in order to get around this type of obstacle?*

JOK: Extradition procedure is a lot more complicated than MLA: in the words of one judge, *"It depends on how proactive your courts are"*. Instead of the need for bilateral agreements, it is sometimes more a matter of reciprocity. In the case of extradition, it may be necessary to develop a body of jurisprudence.

***Floor**: With reference to the "chicken and egg" debate, what is the relationship between the two types of crimes? Are there situations where the commission of TOC could be an early warning sign of impending international crimes?*

PA: TOC can definitely be a potential early indicator. TOC encroaches on a weak system, and by destabilising it further can inflame situations and lead to conflict and international crimes. But it can also work the other way round: armed groups need weapons and ammunition. This brings in external partners who are not involved but see an opportunity; conflict zones have weak controls and thus provide a safe haven for organised crime to exploit the situation – thus perpetuating the lack of stability and armed violence.

MP: In the heat of conflict, existing organised crime groups will most likely transform themselves into militia; and vice-versa in post-conflict situations, where such groups become an impediment to the peace and transition process. How is this possible?... because they are unemployed and have the necessary networks in place. Appropriate legislation is needed in every country, without it national authorities cannot investigate and prosecute war crimes and consequently undermine efforts of other countries that are respecting their international obligations and prosecute perpetrators of atrocity crimes.

> *"If you have a hammer then everything starts to look like a nail!"*
>
> **William Rosato**

***Floor**: There is a lot of room for improvement in international judicial co-operation, e.g., in the case of the 2010 Kampala bombing, the existence of the death penalty in Uganda impeded co-operation, despite the fact that the death penalty had not been applied for 10 years. As DPP Mike Chibita had said, there seems to be more concern for defendants than for victims! Poor response to extradition requests means that criminals stay free.*

PA: The previous day's network meeting between regional DPPs and DCIs is what is required in order to close impunity gaps due to differing legal definitions and other formal hurdles to proper and seamless prosecution of transnational crimes. *"I'd go for regional agreements like this!"*

JOK: *"There's hope; we're increasing our capacity"*.
MP: Judges should be involved in the capacity building process.

CLOSING REMARKS

BETTINA AMBACH

Director, Wayamo Foundation, Berlin

Bettina Ambach (BA) brought the day to a close by thanking all concerned and noting that the last panel had "brought us back to where we started, namely, the need for networking at a regional and at an international level".

WAYAMO FOUNDATION

AFRICA GROUP
FOR JUSTICE AND ACCOUNTABILITY

- CONTACT -

BETTINA AMBACH

DIRECTOR, WAYAMO FOUNDATION

RIETZESTRASSE 21, 10409 BERLIN (GERMANY)
TEL. +49 30 92145545

INFO@WAYAMO.COM
WWW.WAYAMO.COM

Funded by: Federal Foreign Office