WAYAMO FOUNDATION

AFRICA GROUP FOR JUSTICE AND ACCOUNTABILITY

LAUNCH EVENT

PUBLIC SYMPOSIUM

Fighting Impunity in East Africa – Ensuring accountability for international and transnational organised crimes

With the financial support of: Federal Foreign Office

MOUNT MERU HOTEL
6 JUNE 2017 | ARUSHA, TANZANIA

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OPENING REMARKS

BETTINA AMBACH

Director of the Wayamo Foundation

Bettina Ambach (BA) first thanked the judiciary and Director of Public Prosecutions (DPP) of Tanzania for their warm welcome, former Chief Justice Mohamed Chande Othman for being present to help with the launch, and the German government for funding what was to be a 2-year project. Based on the principle of complementarity and a firm belief in the strength of domestic judicial systems to deal with both international crimes and transnational organised crime (TOC), the project envisaged regional capacity building for the four project countries. Additionally, the previous day had seen the first preparatory meeting with the DPPs from three of those countries (Uganda, Kenya and Tanzania) about setting up a network.

The project's third component consisted of public symposia and media engagement, and she therefore welcomed those journalists who had especially come from Kenya, Rwanda and Uganda. It was important to inform the public about crimes and the efforts being made to address them.

Not only was Arusha the ideal venue, in the light of its role as a judicial centre at a regional and national level, but the International Criminal Court (ICC) had also sent two representatives in recognition of the importance of co-operation between national and international levels. Indeed, stress would be laid on the linkages between international crimes and TOC.

The launch would be completed by a two-day training workshop, with more such events to be held in the near future way of, say, hybrid courts, the SCC in Bangui, etc. In this regard, Wayamo had embarked on an initiative to draw up development guidelines for hybrid courts.

HON. MOHAMED CHANDE OTHMAN

Former Chief Justice of Tanzania, Africa Group for Justice and Accountability (AGJA) member

Hon. Mohamed Chande Othman (MCO): Realising he would be "*speaking to the converted*", he intended to limit his remarks to just four points.

- **Firstly**, he welcomed the initiative which not only focused on accountability for international and transnational organised crimes, but was also anchored in capacity building of law enforcement agencies, Directors of Public Prosecutions and the media across East Africa. There was increased public demand for timely, effective and efficient investigations and prosecutions. This occasion provided a proper forum for an exchange of experiences, serious reflection, and knowledge-sharing about the investigation and prosecution of these types of crimes.

- **Secondly**, East Africa, like all other regions of the world, was witnessing the globalisation of crimes. The nexus between international and transnational organised crime allowed for "*cross-fertilisation*". The topics had thus been well chosen.

- **Thirdly**, the launch of this capacity-building initiative to combat impunity and ensure enhanced accountability for serious international humanitarian law violations and TOC should mark the beginning of a new kind of fast-track partnership between prosecutorial and law enforcement agencies. Capacity building was complex, "*multi-dimensional and multi-faceted*".

The weaker and more vulnerable a region's law prosecutorial enforcement agencies, the more fertile the ground for the growth and flourishing of such crimes

- **Lastly**, it was an open secret that East Africa was a target of TOC (including narcotics, money laundering, human trafficking, wildlife poaching, maritime piracy, bribery

GOAL OF THE SYMPOSIUM

The goal of the Public Symposium was to explore the current state of international criminal justice, its links with transnational organised crime in East Africa and the development of possible networks to enhance judicial co-operation and exchange of information.

The Symposium was followed by a special media component, during which journalists were able to further develop their reporting skills, and interview the guest speakers.

and corruption, among others). Indeed, it was a veritable "*minefield*" and "*a nightmare to local DPPs*". The scale and geographic scale of these crimes was enormous and so they could not be fought in isolation but had to be fought regionally and globally.

The task was beyond the capability of any one country. This initiative would make it possible to combat such crimes in a co-operative and concerted manner.

JUSTICE ISAAC LENAOLA

Justice of the Supreme Court of Kenya and Deputy Principal Judge at the East African Court of Justice

Justice Isaac Lenaola (IL): Confessing that he was "*excited*" at what was to be a 2-year programme resting on 4 pillars *[capacity building, network, stakeholder diplomacy, and public outreach]*, Justice Lenaola stressed the need for networking and engagement. The meeting in Arusha had "*immense implications*".

One example would serve to illustrate the point. Speaking as someone who had been involved in wildlife matters for 20 years, he explained that the previous year, as part of a panel dealing with the poaching of rhino horn and ivory from East Africa, he and his fellow panellists had been shown photographs of ivory pieces stockpiled on the Vietnamese border. The conclusion which they had unanimously drawn was that China and Vietnam were culpable. In one case, the arrest of a female suspect in Tanzania had led to the trafficking dispatch point being transferred to Mombasa and thence to Mozambique; in another, a gang on the other side of the world had reacted in much the same way, by moving its operations from Malaysia to a different crossing point. "*These guys are smart!*" Hence, cross-border co-operation was vital: there was a need to keep ahead of the criminals through the kind of networking proposed by Wayamo. This was something for participants -investigators and prosecutors alike- to carry away from the symposium, i.e., the need to work together and keep ahead of the traffickers.

FRITZ SCHUCHMANN

Legal Counsel of the Embassy of the Federal Republic of Germany

JUSTICE SAUDA MJASIRI

Court of Appeal of Tanzania

Fritz Schuchmann (FS): The Foreign Office of the Federal Republic of Germany was extremely pleased to support the project as part of its commitment to strengthen the rule of law in Africa.

Legal institutions and the rule of law, both nationally and internationally, could only be successful if embraced by the professionals involved and sustained by the social environments affected. International criminal law faced the challenge of developing and fostering generally accepted principles of accountability in the light of differing cultural, political and legal traditions. The complementarity of international and national criminal justice was therefore crucial when it came to fighting impunity.

It was to the credit of the Wayamo Foundation and the Africa Group for Justice and Accountability (AGJA) that experience and knowledge of criminal justice was to be shared and enhanced across borders in East Africa. The German Government was delighted to support these efforts and strongly believed that the project would strengthen the criminal law framework in Tanzania, Kenya, Uganda and Rwanda, and increase public awareness and appreciation of international criminal justice.

As someone with limited experience in prosecution, he could only vaguely imagine how tough the challenges in international criminal justice cases might be. The Wayamo Foundation and its experts would prepare professionals to tackle such challenges.

Democracy and the rule of law meant that no single person could put him/herself above the law, and a vibrant democracy had therefore to be able and willing to prosecute any breach. Only if transnational crimes were effectively prosecuted and such prosecutions were acknowledged by an informed civil society, could the rule of law be preserved in the long term.

On behalf of the Acting Chief Justice of Tanzania, she said that the judiciary was grateful to be invited to this important event. It both recognised and appreciated the work being done by the Wayamo Foundation and could not sufficiently underscore the importance of a project aimed at strengthening the rule of law and capacity to deal with complex transnational crimes.

It was indeed timely and vitally important to develop networks to enhance judicial co-operation and the exchange of information. Given the status of transnational organised crime, no country could afford to remain in isolation. Cross-border co-operation was evidently required.

The project rested on four pillars: capacity building for investigative, prosecutorial and judicial staff; the creation of a network of DPPs and Directors of Criminal Investigation (DCIs); sensitive stakeholder diplomacy; and public outreach and awareness. The four components were inter-related and had to be built together in order to have an impact. Capacity building needed to involve all stakeholders, so that they could work effectively.

The Judiciary in Tanzania was ready and willing to apply international criminal law. Indeed, under the former Chief Justice's stewardship, a number of training courses had been conducted on International Human Rights and International Humanitarian Law. Judges, magistrates and law enforcement officers needed to have a full understanding of the international criminal justice system. The judiciary had an important role to play in promoting the rule of law at the national and international level, in order to ensure equal access to justice for all. The battle could not be fought by one country.

Impunity could be addressed by: upholding the rule of law at the national and international level; ensuring equal access to justice for all; ensuring compliance with national legislation and policies on human rights by the judiciary and other law

enforcement institutions; adopting International human rights standards to ensure equal justice for all; and enhancing the level of accountability. The judiciary was independent but had to be accountable. Judiciaries had to create an environment where there was proper enforcement of the law, and where justice was meted out without fear or favour.

"*Let us all strive to uphold the rule of law in the interest of justice!*", urged the judge.

PANEL I

National and regional efforts to prosecute international and transnational crime

MODERATOR

HON. MOHAMED CHANDE OTHMAN

Former Chief Justice of Tanzania, Africa Group for Justice and Accountability (AGJA) member

SAMUEL AKORIMO

Head of Registry, UN Mechanism for International Criminal Tribunals, Arusha Branch

Samuel Akorimo (SA): He briefly explained the nature and purpose of the UN Mechanism for International Criminal Tribunals (MICT), and highlighted the opportunities and the importance of the proposed project within the wider context of ensuring accountability.

The MICT had been established by the UN Security Council to inherit and manage the remaining essential functions of two ad hoc tribunals, namely, the International Criminal Tribunals for the former Yugoslavia (ICTY) and Rwanda (ICTR). These included enforcing sentences, protecting witnesses and victims, managing the records, pursuing the arrest and prosecution of fugitives, and supporting national jurisdictions.

He wished to highlight the fact that great achievements had been made by the work of the two tribunals in terms of jurisprudence and best practices, and that this in turn had contributed to the fight against impunity. Furthermore, there had been groundbreaking developments in dealing with core international crimes and individual criminal responsibility, and establishing areas that were "*quite new*" in modes of criminal liability.

In this regard, at the MICT branch in Arusha, the ICTR records section alone occupied 2050 linear metres (i.e., just over 2

kilometres of boxed archives!), with the Mechanism being responsible for managing and making these readily accessible. In addition, audiovisual recordings of ICTR proceedings were also being made available to stakeholders for the purposes of the work that they did in fighting crime.

There was a commonality between international crimes and TOC. This was the "*complexity*" of both types of crimes which called for a certain expertise. He was impressed with and grateful to Wayamo for establishing the link because the Symposium's focus on it was very well considered in the framework of developing capacities in the East African region.

SELEMANI KINYUNYU

Legal Researcher for the African Court Research Initiative working in support of the Office of the Legal Counsel of the African Union

Selemani Kinyunyu (SK) Stating that he intended to focus on regional responses to and, specifically, the possible role of the future African Court in dealing with international and transnational crimes, **SK** noted that in 2014 the African Union (AU) Assembly had adopted a Protocol to vest the African Court on Human and Peoples' Rights (ACHPR) with jurisdiction over these crimes. While the Court would have a complementary mandate with the ICC over core crimes under international law, the future criminal configuration of the African Court would also give it jurisdiction over transnational organised crimes such as trafficking in drugs, persons and hazardous waste. In addition, the Court was to have jurisdiction over other international crimes, including piracy, terrorism, mercenarism, money laundering, corruption, illegal exploitation of natural resources, and unconstitutional changes of government, all of which could also be transnational or organised in nature.

He intended to examine just two of the reasons that had driven African states to adopt such an ambitious set of crimes.

- **Firstly**, there had always been a clear link between core international crimes and TOC, dating back to Trinidad and Tobago's request to the UN General Assembly in 1989 to create a court to deal with drug trafficking and other transnational criminal activities. The 1994 Draft Statute of the ICC reflected these concerns and proposed the inclusion of, "*...exceptionally serious crimes of international concern.*" The eventual decision to exclude other international and transnational crimes from the jurisdiction of the ICC had been due to legal and political expediency.

An understanding of the linkages between core international and transnational organised crimes existed, not only at a conceptual but also at a practical level, as illustrated by the situation, firstly in Mali, due to the destabilising effect of Tuareg militia and other jihadist groups which engaged in drug and arms-trafficking, and secondly in Kenya, due to the activities of the *Mungiki*, an organised criminal group that engaged in racketeering and extortion and also perpetrated mass killings in the wake of the disputed 2007 Kenyan elections.

- **Secondly**, TOC had a corrosive influence on the rule of law in fragile states, several of which were in Africa, where it had a destabilising effect and gave rise to core international crimes. The recent ICC Policy Paper on Case Selection and Prioritisation committed the Office of the Prosecutor (OTP) to co-operate with states in respect of conduct that constituted a serious crime under national law, e.g., illegal exploitation of natural resources, arms trafficking, human trafficking, terrorism, financial crimes, land grabbing, or the destruction of the environment.

The Protocol vesting the African Court with criminal jurisdiction was therefore a reflection of the specific needs of the African Continent in dealing with international and transnational crimes. To date, the Protocol had been signed by 9 states but no ratifications had been received.

In 2012, the AU had also adopted a Model Law on Universal Jurisdiction, which proposed continent-wide criminalisation of drug trafficking and piracy. Though not binding, the Model Law could nonetheless serve as a template for states wishing to adopt legislative measures to tackle international crimes and TOC.

Transnational organised criminal groups were continually evolving newer strategies, such as cyber-crime -and cyber terrorism in particular- currency counterfeiting, and trafficking of various kinds, ranging from wildlife to small arms, cultural property and human organs. Furthermore, other more low-tech but high-impact threats were likewise emerging, e.g., motor cycle gangs, mobile money fraud, identity theft, and conversion and placement of the illicit proceeds of crime in untraceable virtual currencies.

There was a need to keep pace with these current challenges and confront them.

BISWALO MGANGA

Director of Public Prosecutions, Attorney General's Chambers, Tanzania

Biswalo Mganga (BM): He concurred with all that had been said. While criminals knew no boundaries and could therefore move around with ease, he like any other private citizen required a visa and papers to travel from one country to another. With the proposed initiative to strengthen regional cooperation, however, he felt that he could "*move fast*".

Listing some of the most notorious TOC cases, **BM** mentioned that sentences handed down in Tanzania had ranged from 25-year prison terms to million-shilling fines, and that there had also been instances of extradition to Uganda and the USA. He advocated the use of forfeiture as a possible penalty to hit the criminals where it hurt them the most, "*we want to make sure that crime doesn't pay!*". The ultimate aim, he said, was to give criminals no base from which to hide and commit crimes in East Africa.

AMOS NGOLOBE

Deputy Director of Public Prosecutions, Kampala, Uganda

Amos Ngolobe (AN): Endorsing all that had been said by his colleagues, **AN** went on to explain that the Ugandan DPP had an International Crimes Division and, though short of prosecutors, had a mandate to prosecute international and transnational crimes. In addition, the judiciary was equipped with the International Crimes Division (ICD) of the High Court, which had been specifically established to handle these types of cases. Furthermore, as a signatory to the Rome Statute, Uganda was carrying out its obligations and had domesticated the Rome Statute.

Taking the Al Shabaab terrorist bombing in Kampala by way of example, **AN** said that the victims had included nationals of other countries, and the investigation had thus spread to Uganda's neighbours and abroad. The ensuing international co-operation had resulted in a case involving 82 witnesses, in which all 8 defendants had been convicted (5 to life, 2 to 50 years, and 1 to 6 years on remand). The Ugandan authorities had benefited from the help and co-operation of law enforcement agencies around the world. Indeed, their experience had shown that international co-operation was indispensable in these types of crimes.

Investigating and prosecuting such crimes was highly complex, time-consuming (e.g., the number of exhibits required) and dangerous, as highlighted by the assassination of prosecutor, Joan Kagezi in 2015.

Currently the ICD was hearing its first case, that of Thomas Kwoyelo, who was being charged with war crimes and crimes against humanity.

All this went to show the need to fight as a team: one country was too small to do it alone. He felt that they were all going to benefit greatly from the proposed initiative to establish a network of DPPs and CIDs.

NICHOLAS MUTUKU

Deputy Director of Public Prosecutions, Nairobi, Kenya

Nicholas Mutuku (NM): Appearing on behalf of Kenyan DPP, Keriako Tobiko, **NM** stated that he wanted to show the importance of the initiative by highlighting what Kenya had done in three aspects, namely, legislation, institutions and policy.

Legislation

Under Articles 2 (5) and (6) of the Constitution, the general rules of international law and any treaty or convention ratified by Kenya formed part of the country's national law. As a party to the Rome Statute, Kenya was co-operating with the ICC in the surrender of 3 suspects. It had ratified 14 out of 19 international conventions and protocols, including the United Nations Convenåtion against Transnational Organised Crime (UNTOC). The Rome Statute itself had been domesticated in the form of the 2008 International Crimes Act. Other statutes of relevance included the Prevention of Organised Crime Act, Prevention of Terrorism Act, Proceeds of Crime and Anti-Money laundering Act, Anti-corruption and Economic Crimes Act, Bribery Act, Wildlife (Conservation and Management) Act, and Merchant Shipping Act (to combat piracy). Cybercrime was a real problem and the relevant Bill was currently before Parliament.

Insofar as MLA was concerned, the Mutual Legal Assistance Act dispensed with the need for a treaty to render such assistance, and for its part the Extradition Act ensured that Kenya was not a safe haven for criminals.

Institutions

Under the Constitution, the ODPP was independent with specialised departments dealing, among other things, with international crimes. Similarly, the Police also had specialised units.

Policy

Policy initiatives included the wall erected between Somalia and Kenya. Challenges however existed in the form of limited resources, porous borders, political instability in neighbouring countries, leading to an influx of refugees and, on occasion, terrorist activities in refugee camps.

His department had faith in the 2-year Wayamo project and saw the network of DPPs and CIDs as being critical as regards the problem of delays, in that it would enable evidence to be obtained in real time.

q&a

Female genital mutilation and child marriage

NM said that his department was specifically addressing female genital mutilation (FGM) issues and that there was special training for such cases. According to **AN**, Uganda was fighting FGM both culturally and through the law, by passing legislation outlawing it. Although the Tanzanian Penal Code also made FGM an offence, this was not enough, opined **BM**: the community had to be "*sensitised*".

SK stated that child marriage could be challenged at a national, subregional and continental level and there was a case from Mali currently pending judgement. In the case of Tanzania, marriage of secondary schoolgoers was prohibited by law, said **BM**.

Fugitives from justice (specifically Félicien Kabuga)

NM strongly denied that Rwandan businessman, Félicien Kabuga, was residing or doing business in Kenya. Indeed, the Kenyan authorities had acted on a request from the ICTR to freeze his assets. **SA** added that Kabuga was one of the fugitives currently being targeted, and if anyone had information, he/she should kindly bring it to the attention of the Kenyan authorities or the MICT. The mechanism had a specialised facility for housing fugitives schoolgoers was prohibited by law, said **BM**.

Witness protection

SA noted that the MICT had expertise in this field, which he would be pleased to share with Tanzania and other countries.

Rwanda's withdrawal of individuals' and NGO's rights to directly file complaints against it with the ACPHR

SK explained that the origin of Rwanda's withdrawal could be traced to the so-called Stanley Safari case. Nevertheless, even though Rwanda had withdrawn, the Court still had the necessary jurisdiction to hear current cases and those filed within one year of withdrawal. Interestingly, Rwanda had officially stated that its withdrawal was "*for review*", and so there was still hope.

Specialised courts

SK felt that spread of specialised courts could lead to "*fragmentation*". Moreover, these often received resources that would otherwise have been allocated to other courts. For these reasons, he preferred to see the extension of jurisdiction across the judiciary.

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

Power to prosecute

In Uganda, the anti-corruption body was empowered to bring prosecutions, said **AN**. It was **BM**'s opinion that the possibility of a prosecutor also being the investigator opened the way to abuse of power, and though prosecutors would readily co-ordinate with investigators, by law it was the DPP that had the sole power to prosecute.

Unfinished business

Summing up, **MCO** said there was a demonstrated commitment to tackling international crimes and TOC. While there had undeniably been results, there was still "*unfinished business*" at both a national and regional level, e.g., withdrawals from the African Court, and gaps in witness protection and cross-border co-operation. Even so, there were co-operation efforts under way and these were one of the ways forward. The thinking was that the two types of crimes had to be approached in the knowledge that they were complex and could benefit from being tackled jointly. This had been an "*ice breaking*" start.

PANEL II

Is international criminal law of importance in Africa?

MODERATOR

MARK KERSTEN

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

ALLAN NGARI

Senior Researcher, Transnational Threats and International Crime Division, Institute for Security Studies, Pretoria

Allan Ngari (ANG) Remarking in passing that he found the launch of the initiative "*exciting*" and wished the project "*the very best*", **ANG** said that the answer to the question posed by the title was in the affirmative.

The Zambian survey was keenly pertinent, since the initial reaction of fear at the news that it was to be held had turned to one of "*pleasant surprise*" when the results became known, showing that many African citizens continued to view the ICC as relevant. It was only necessary to refer to the AU and its instruments to highlight the importance of international law on the continent and the fact that there was no space for immunity for such crimes. The background to all this was the 1994 Rwandan genocide and the feeling that such a thing should never be allowed to happen again in Africa.

The challenge lay in the implementation of norms, something that was proving "*elusive*", as illustrated by the case of al-Bashir, which turned on the AU sequencing peace and justice, on the grounds that al-Bashir was a key interlocutor in Darfur. Nonetheless, one had to ask whether peace had in fact followed on from his alleged role there.

The situation had become more complicated still when the Kenyan cases arose, and attacks on the Court had increased in intensity. On the other hand, the shift towards regional mechanisms had witnessed no progress in implementation of the Malabo Protocol.

Did victims perceive international criminal justice as important? The answer was "*a resounding yes*". Nonetheless, the wheels of justice were slow! Accordingly, it had to be said that the promise of international criminal justice outside of the ICC was still proving elusive.

ANGELA MUDUKUTI

International Criminal Justice Lawyer, Wayamo Foundation

Angela Mudukuti (AM) In answer to the question posed by the topic title, **AM** said that *"of course international criminal law is important"*. Indeed, *"its importance could not be overstated"*. However, International criminal law had to be viewed in a comprehensive manner encompassing domestic and international justice mechanisms. The ICC alone could not be tasked with the immense responsibility of delivering justice.

The ICC was a court of last resort and therefore domestic justice mechanisms had to play their part.

Domestication of the Rome Statute

To ensure domestic jurisdictions had the necessary capability and to give meaning to complementarity, in addition to having the necessary capacity, states had to have the necessary legislation in place. Whilst domestic jurisdictions could amend their laws to include core international crimes, domesticating the Rome Statute, something that South Africa had done in 2002, also provided options. It was important to look at some examples, taken from her time with the Southern Africa Litigation Centre (SALC), which brought the first case in terms of South Africa's ICC Act before the courts.

Zimbabwe torture case

AM started with the case of SALC v The National Director of Public Prosecutions, colloquially known as the *"Zimbabwe Torture Case"* which dealt with crimes against humanity perpetrated by Zimbabweans in Zimbabwe against Zimbabweans but to be investigated in South Africa given that many of the victims had fled to South Africa. In Zimbabwe, a non-ICC Member State and a nation unlikely to be the subject of a United Nations Security Council referral, prospects of justice were slim. However, the domestication of the Rome Statute in neighbouring South Africa provided an avenue for justice, as it included a measure of universal jurisdiction, which meant that South Africa had the necessary jurisdiction to investigate and prosecute core international crimes, regardless of where they were committed.

The title was clearly -and intentionally- provocative. Yet, the recent example of what had happened in Zambia made it apposite. When the Zambian government, arguing that it was taking its AU obligations seriously, had called for a public consultation on whether or not to withdraw from the ICC, over 90% of the population had voted in support of the ICC. This had shown that, contrary to widespread fears and scepticism, the plebiscite had not been a mere pretext for withdrawal.

Rephrasing the title slightly, MK asked, ***"So, is International Law of less, equal or more importance?"***

The SALC submitted a dossier of evidence to the South African National Prosecuting Authority and the South African Police but they declined to investigate. When this refusal was taken on judicial review, all 3 courts (the High Court, Supreme Court and Constitutional Court) ruled that the authorities had a duty to investigate. Without the necessary legislation in South Africa, this would never have happened and the victims would be left with nowhere to turn.

- **Al Bashir case**

AM moved on to discuss a second case, i.e., the June 2015 attempt to arrest al-Bashir. There were (and are) a number of complex international law arguments about head of state immunity but in South Africa at the domestic level, the domestication of the Rome Statute meant the position on the matter was clear. The South African High Court and Supreme Court of Appeal thus ruled that President al-Bashir should have been arrested for subsequent transfer to The Hague. The conclusion to be drawn was that, whatever one's position on immunity, enhancing domestic criminal law to include the Rome Statute allowed states to make a choice and take a stand on what have been regarded as "*unclear*" issues in international law.

While international law was not perfect, and domestic and international courts were not without flaws, domestication of the Rome Statute remained as a vital way to combat impunity.

ANTON STEYNBERG

Senior Trial Lawyer, Office of the Prosecutor, International Criminal Court

Anton Steynberg (AS) As the other panellists had largely answered the question of "*if*", he intended to address the issue of "*how*" international justice could best be pursued in East Africa.

The ICC had had "*bad press*" in Africa. In his estimation, much of the criticism was unfounded and based on misunderstandings, or even misrepresentations. Even so the ICC was not "*deaf to criticism*" and had been looking at ways to "*reset and recalibrate its relationship*" with African States Parties, at both a national and regional level.

The ICC should be seen as a partner -not a competitor- in the fight against international crimes and impunity. As a court of last resort, it wanted to see countries with primary responsibility take the lead in investigating and prosecuting international crimes. Indeed, the Court would only intervene when countries were unable or unwilling to do so. In addition, the OTP was already pursuing a policy of "*positive complementarity*", whereby, rather than becoming involved itself, it sought to encourage and assist States Parties to fulfil their statutory duty. The Court would support any initiative to fight international crimes, but required that bodies be established which were capable of performing the task.

More recently, the OTP had been pursuing two other initiatives, through which it hoped to enhance its relationship with States Parties.

- **The first was the so-called "*Strategic Goal No.9*"**.

It involved seeking strategic opportunities to engage in joint investigations with States Parties, e.g., Libya, where the OTP had been sharing information gathered during its investigations with the DPP in Libya and Italy, in order to help combat people-trafficking.

- **The second was the recruitment of Situation Specific Investigative Assistants from within situation countries**.

Aside from giving the OTP important local knowledge and perspective, once the investigation was at an end, these assistants would be able to share the skills and training received with their national authorities.

BRENDA J. HOLLIS

Prosecutor, Residual Special Court for Sierra Leone

Brenda J. Hollis (BH) One should not equate international criminal law with the ICC. International criminal law was not a judicial system but rather a body of law pertaining to a category of crimes whose scale, gravity and impact warranted a global response (the so-called core international crimes, i.e., war crimes, crimes against humanity and genocide) and the procedures for dealing with them. International courts were simply one way of addressing such crimes, and the ICC was a treaty-based court created for this express purpose.

If they had not done so already, African states needed to incorporate these crimes into their legal systems for the same reason that they had criminalised other conduct. Indeed, even more than with purely domestic crimes, these crimes transcend national borders, were of the utmost viciousness, were massive in scale and impact, and undermined -if not destroyed- the legitimacy and viability of the states in which they were committed. Countries might find themselves acting as safe havens for perpetrators, way points for organised crime (e.g., shipments of arms obtained by illicit means) or repositories of the proceeds of such crimes.

These crimes needed to be incorporated into national systems, within judicial systems and processes which were independent, impartial and devoted to ending impunity for criminal conduct. Only in this way could control over the handling of such crimes be retained. States that failed to do so could not complain if matters were taken from their control, considering the threat to peace, security and stability posed by these crimes.

States should embrace international criminal law since it could assist them in the fight against non-core international crimes such as terrorism and torture, which, along with organised crime should, in **BH**'s view be treated as international crimes, by virtue of their scope, gravity and impact on the viability of state and regional institutions. International courts had developed a tremendous amount of jurisprudence dealing with these crimes, which would help states avoid having to begin from "*ground zero*" in their handling of these crimes.

ERMIAS KASSAYE

Legal Researcher for the African Court Research Initiative working in support of the Office of the Legal Counsel of the African Union

Ermias Kassaye (EK) Explaining that he would be speaking about AU mechanisms, **EK** began with the Malabo Protocol adopted by the AU Assembly in June 2014. It was the "*premier mechanism to help Member States prosecute international crimes*", and extended the jurisdiction of the yet to be established African Court of Justice and Human Rights (ACJHR) to genocide, crimes against humanity, war crimes, the crime of unconstitutional change of government, piracy, terrorism, mercenarism, corruption, money laundering, trafficking in persons, trafficking in drugs, trafficking in hazardous wastes, illicit exploitation of natural resources, and the crime of aggression. To date, however, only 9 Member States had signed the Protocol.

EK indicated that another mechanism to be created by the AU was the Hybrid Court of South Sudan. Under the Peace Agreement, the AU was required to set up a court mandated to investigate and prosecute individuals bearing responsibility for human rights violations and other abuses committed during the armed conflict in South Sudan.

Thirdly, there was the Hissène Habré case, the first internationalised tribunal established by the AU. The case had taken 2 years, at the end of which Habré had been sentenced to life imprisonment. This had been achieved on a budget of US$9 million, as compared to the ICC, which had taken 12 years and US$1 billion to obtain just 2 convictions, which, said **EK**, showed that the Habré Tribunal had been able to deliver justice in more timely and efficient manner.

Mechanisms to deliver justice should first be implemented nationally and regionally, and only then internationally.

panel QUESTIONS

Before opening up the discussion to the floor, Mark Kersten asked each panellist a question

MK: **International criminal law is still important but are certain "*brands*" (e.g., hybrid courts, domestic mechanisms) becoming more important than the ICC brand? Are we seeing growing competition between brands?**

BH: She felt that what they were seeing globally was a search for mechanisms to respond to these crimes, which seemed "*to rise like a phoenix*". It was not a competition: each type of court had its benefits and its drawbacks. Sometimes it might be preferable to have a regional or international body dispense justice, to avoid the perception of victor's justice. Each situation would dictate the best option.
AM: Agreeing with **BH**, she felt that it was a question of impact rather than popularity. Criticisms of the ICC had led to a growing leaning towards domestic mechanisms. However, she challenged **EK**'s assertions about the relative speed advantage of the mechanism used for the Habré trial, pointing out that it had taken 25 years! While acknowledging the delay, **EK** insisted that it was nevertheless an achievement and a model "*to take away*".
AS: Prosecutions against powerful people at any level would run into the same problems as those experienced by the ICC. His solution would be to work together for justice of one "*brand*", namely, *"justice for the victims"*.

MK: **The announcement of the Zambian referendum on the ICC had led to a lot of fear: had this initial reaction shown a certain element of insecurity?**

ANG: Rather than insecurity, the reaction to the news had been one of "*deep concern*". The negotiation of treaties such as the Rome Statute showed good will: what had happened subsequently had been a politicisation of the process, something that should not be allowed to happen and had accounted for the concern, "*If you put yourself in the position of the victims, you'd have to ask who would fight for you?*"

MK: **It had been interesting to hear about joint investigations with local jurisdictions. Was this a reaction showing a change in the ICC towards acting as a co-ordinating body or development court?**
AS: In an ideal world, this would leave the ICC with little else to do but it was a bit premature to say that it was "*morphing into*" a co-ordination body.

MK: **The head of state immunity issue: how would this affect hybrid courts such as that projected for South Sudan? Would head of state immunity result in exclusion from African courts and leave the ICC as the sole body able to try such people?**

EK: There was no apparent head-of-state exclusion in the case of South Sudan but the sequencing of peace and justice would have to be considered and the situation would have to be viewed from a wider perspective.
AS: It was clear that this had never been seen as acceptable to the ICC. If states were unwilling/unable to address this nationally and/or regionally, the ICC would look into the possibility of prosecuting.
BH: She emphasised that there was no such immunity in an international court for an international crime.

Mark Kersten then asked the panellists to mention one thing that would help international law resonate

AM: It was important to look at the bigger picture. Once people understood how international crimes in neighbouring countries could affect them, they would begin to appreciate the need for international criminal law.
BH: International criminal law dealt with violations of fundamental human rights, and in many cases local populations tended to place more trust in international courts than their own institutions.
ANG: International criminal law at a national level, if domesticated, could capacitate people to investigate and prosecute crimes and ensure payment of reparations to victims.
EK: Agreeing with this, he said that one had to think of the victims at the end of the day.

q&a

Two interventions from the floor

Samuel Akorimo confessed that he had initially been critical of the question posed in the panel's title because of the tremendous work on international criminal law taking place in Africa, e.g., Sierra Leone, the Habré trial. African states had facilitated the work of the ICTR to the extent of enforcing sentences. The ICTR archives showed "*ground-breaking achievements*", such as the advances made in the crime of genocide. On the other hand, ICC justice was a relatively recent development and it was this that probably made the question relevant. He praised the link drawn by Wayamo between TOC and international crimes, and felt it would "*lend momentum to international criminal law*". He concluded by saying that, on balance, the question was relevant but "*Let's remember African states' contribution!*"

For her part, **Bettina Ambach** drew attention to the relevance of certain crimes to certain countries. In South Sudan, the hybrid court plus the ICC (among others) were conducting their own investigations. So who, she asked, would be protecting the witnesses from harassment? In the case of Kenya those accused by the ICC had been elected to office. In the light of this, should there be a debate about democracy versus justice?

Democracy versus justice

AM: Being a democratically elected leader did not absolve anyone of accountability or liability.
AS: Agreeing, he said that he saw no competition or conflict between democracy and justice.
ANG: Democracy went hand-in-hand with the rule of law, which demanded a fair trial.

Witness protection

ANG: Kenya was the only country in the region with this capability. Witness protection was a key element: it had to be said that in Kenya many witnesses had recanted and this was real concern. On the other hand, it also had to be said that no-one knew about the successes.
AS: There should be no competition over witnesses. Under the Rome Statute, the ICC had a responsibility to protect its own witnesses.

Did international criminal law have a deterrent effect, e.g., could it prevent another Rwandan-type genocide?

ANG: It did have a deterrent effect, he said, citing an anecdote of some nuns who had used the threat of the ICC to deter a group of rebels.
BH: One had to distinguish between specific and general deterrence, and in the latter case the rule was, "*the more certainty that criminal conduct would be dealt with, the less likely the crime*".
AS: The very existence of the ICC had a deterrent effect. Indeed, he would like to think that its intervention in Kenya's post-election violence had had some kind of lasting effect. Similarly, domestication of the Rome Statute would have a deterrent effect per se, in that it gave local jurisdictions the capacity to prosecute.

Relevance of international training

ANG: Not only was this justified by the preventive aspect and the links between TOC and international crimes, but the move towards a more universal jurisdiction for international crimes actually called for this type of training.
BH: Training for international crimes was much the same as for organised crime, which had a greater impact globally than the core international crimes!
AS: International training was additionally relevant as it would assist domestic prosecutors to prosecute foreign nationals accused of international crimes who might be present in their countries.

PANEL III

Crime beyond borders - tackling transnational organised crime

MODERATOR

BETTINA AMBACH

Director, Wayamo Foundation

CANDICE WELSCH

Chief, Implementation Support Section, Corruption and Economic Crime Branch, United Nations Office on Drugs and Crime (UNODC)

Candice Welsch (CW) Essentially organized criminals would engage in anything that made money, with the traditional forms including drug-, human- and firearms-trafficking, extortion, migrant smuggling and money laundering, and the (re-)emerging forms including trafficking in natural resources, counterfeit goods and cultural property, as well as piracy and cybercrime.

CW explained that TOC could act as a source of funding for terrorist, insurgency and armed groups, who used it to finance and facilitate their activities. TOC flourished in areas where the rule of law was fragile and it could weaken state institutions, fuel instability and corruption.

The scale of TOC overwhelmed domestic law enforcement capability, with a global US dollar value estimated to be in the billions, e.g., drugs 320 billion, counterfeiting 250 billion, firearms 320 million, natural resources 3.5 billion (forestry, oil, diamonds etc), wildlife 19 billion, and cybercrime 1 billion.

An analysis of organised crime in East Africa showed that it was a product of trans-continental illicit markets and an underlying weakness in the rule of law, a situation that was in turn exacerbated by corruption. TOC groups took advantage of vulnerability, and used corruption to facilitate crime (through transit, shipping, etc.), and so the UNODC was also addressing this aspect.

CW now took some of the main types of TOC in turn.

- **Heroin and opiates** had been trafficked from Afghanistan, Iran and Pakistan to and through East Africa since the 1980s but seizures suggested that volumes were increasing (US$160 million p.a.), causing health and other problems. The remainder appeared to be transiting to Europe and other destinations, showing that the region's ports were vulnerable.

- **Human-trafficking:** East Africa was not as threatened as other regions, e.g., about 3% of victims detected in Europe were East African citizens. However, there was also trafficking at an intra- and transregional level: about 13/% of the victims detected in North Africa and the Middle East between 2012 and 2014 had come from Sub-Saharan Africa, mainly East Africa, and specifically the Horn of Africa.

- **Wildlife and ivory: CW** showed how African elephant populations had decreased over time, with the rate of poaching reaching worrying levels in recent years. Huge numbers of lesser-known species were likewise being poached and trafficked.

Ivory seizures clearly highlighted the main areas of interest as being China, Malaysia, Vietnam, Tanzania and Kenya,

and underscored the impossibility of any one country trying to combat the trade singlehandedly, especially when it was important to be able to prosecute major players and organisers of the illegal trade and not merely the low-level perpetrators.

- **Homicide rates:** these would inevitably rise with the presence of TOC, as was graphically shown by events in South America.

Listing the challenges as weak investigative and prosecutorial capacity, lack of international co-operation, lack of prioritisation, corruption, underequipped staff and outdated/ inadequate laws, **CW** said that this went to show that an effective response to TOC had to be:

- global, integrated and co-ordinated;
- strategic, including policy and operations in combating TOC;
- comprehensive, i.e., covering all aspects of the "*value chain*"; and,
- address corruption as a facilitator.

A legislative capacity and framework was essential in order to be able to tackle new crimes.

In brief, to respond to TOC it was necessary to work together and "*go after the organisers*", who were increasingly mobile and agile. That was why networking between investigative and prosecutorial authorities was so important.

SHIRANI DE FONTGALLAND

International Law Expert and former Prosecutor

Shirani de Fontgalland (SDF) began by posing the following question, "*Are we talking of new types of crimes or rather about how old crimes are enabled through having a new transnational dimension?*"

Article 3 of the UNTOC defined "*transnational crime*" [as an offence committed in more than one state, or committed in one state but with a substantial part of its preparation, planning, direction or control taking place in another, or

committed in one state but involving an organised criminal group that engaged in criminal activities in more than one state, or lastly, committed in one state but having substantial effects in another]. In his foreword to the Convention, Kofi Annan had put it very well: "*With the signing of the United Nations Convention against Transnational Organised Crime in Palermo, Italy, in December 2000, the international community demonstrated the political will to answer a global challenge with a global response. If crime crosses borders, so must law enforcement. If the rule of law is undermined not only in one country, but in many, then those who defend it cannot limit themselves to purely national means. If the enemies of progress and human rights seek to exploit the openness and opportunities of globalisation for their purposes, then we must exploit those very same factors to defend human rights and defeat the forces of crime, corruption and trafficking in human beings*".

A significant factor in this discussion on tackling transnational organized crime, is the rapid development of information communication technology (ICT). In contrast to the prosecution of international crimes under the Rome Statute, it was the criminal justice systems of domestic jurisdictions that were responsible for prosecuting these crimes. The requisite strategy was to ensure co-ordination among relevant agencies and in particular, prosecution and investigation in order to prevent, detect, investigate and prosecute effectively. Regional co-operation came in where the transnational element arose, and this called for adequate legislation as well as reciprocity and trust in engagement with other jurisdictions. There was a clear need for a criminal justice response to counter such crimes and this included the observance of human rights.

In the case of terrorism, she reiterated that countries had to ensure that they did not provide a safe haven. There was a close nexus between terrorism and organised crime gangs, money laundering, etc. Traditional investigation and prosecution were not enough. An effective response required co-operation and strengthened capacity of relevant national agencies. An important factor in countering terrorism and such transnational crimes was to enhance mutual assistance and networking. For example, this would enable information to be exchanged in real time over secure channels as in the case of international police to police cooperation. Needless to say, one had to make use of networks that were already in place. Lastly, while co-ordination between police and prosecutors was often a problem, **SDF** had been led to understand that in East Africa there had been some progress in this respect.

Turning to what she termed possible "*action streams*", **SDF** said there was a need to target these action streams or "*enablers*" that facilitated these types of crimes and criminals, namely, travel and mobility, online presence, weapons and materials and finance, through Identification of terrorists/ organized crime gangs and their networks. The main aim in tackling these was detection and prevention. In conclusion the investigation and prosecution of transnational crime brought a range of complex issues that had to be addressed. These included issues of sovereignty, freedom of expression, human rights, legality, and proportionality.

When it came to fighting TOC, we were "*all in it together!*"

q&a

Mechanisms to control markets responsible for illegal trade in wildlife and drugs

CW: Every country was either a source, transit point or destination. Drugs had very localised source areas and, in most cases, Africa was not a destination but a mere a transit area. However, in countries that were a destination, the trade caused great damage and a response was required to look at the "*whole criminal chain*".

Nicholas Mutuku from the floor: By way of an example, he mentioned an entire ivory shipment which had been confiscated in Sri Lanka and burnt as symbolic gesture. Thanks to a combination of capacity building, targeting Internet use for criminal purposes, and exerting pressure, an increasing number of countries were taking steps to ban the use of ivory, as had been done in the case of the trade in tortoise shell.

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

Terrorism: rumours of Kenyan military involvement in sugar and charcoal smuggling along Somali border

SDF: In conflict situations it was common to find a nexus between criminals (e.g., smugglers), terrorism, corruption and the military. There was no single solution.

Nicholas Mutuku from the floor: Kenya had entered Somalia to cut the lifeline to Al Shabaab and had largely achieved its objective. However, there had been sporadic attacks of late which were difficult to link to Al Shabaab. He wanted to know where this information had come from and felt that it should be shared. Personally, he had seen no evidence of the alleged connection.

Corruption

CW: Corruption was a "*huge problem and facilitated all the other problems*". Its eradication called for multiples responses. The UNODC was working with the wildlife segment to identify the potential for corruption, as a way of fostering prevention. The organisation was likewise engaged on the enforcement side, by working with law enforcement and prosecutors to ensure that the investigations are not limited only to the crime but also consider any surrounding corruption that facilitated the offence.

SDF: Part of the solution was to involve all stakeholders, including prosecutor associations. Ultimately it came down to political will and the individual.

UNODC and new technologies

CW: The UNODC was looking at cybercrime and trying to support countries by providing technical assistance.

Alleged killings and disappearances by Burundian security forces: difficult to understand why ICC had not intervened.

Anton Steynberg from the floor: The OTP had opened a preliminary examination into the Burundi situation and would decide whether or not it was going to investigate. It was too soon to say that the ICC was doing nothing.

PANEL IV

The potential and promise of linking the investigation and prosecution of transnational organised crime to that of international crimes

MODERATOR

JOSEPH ROBERTS-MENSAH

Africa Director, Wayamo Foundation

EMMANUELLE MARCHAND

Legal Counsel, Civitas Maxima

Emmanuelle Marchand (EM): On the designated topic of linking the investigation of the two types of crimes, **EM** planned to discuss one of Civitas Maxima's cases, that of Belgian/US businessman, Michel Desaedeleer (MD), who had been involved in the so-called blood diamond trade during the Sierra Leone civil war. The trade had been organised by the Revolutionary United Front (RUF) and former Liberian President, Charles Taylor. Using forced labour, the RUF had pillaged natural resources by extracting and selling diamonds to Charles Taylor and people like MD, in exchange for arms and ammunitions. Until MD's indictment, no businessman since the end of World War II had been charged with the crime of pillage.

In 2010, Alain Werner worked to bring evidence to the Belgian authorities. After meeting with witnesses on the ground, it was clear that they were victims of slavery and that they wanted MD to be held accountable. As to the appropriate jurisdiction to bring a criminal case, it appeared that there were three possibilities, namely, Sierra Leone on the basis that the crimes had occurred there, Belgium on the basis of MD's citizenship, and the USA on the basis of MD's citizenship and physical presence. Of these, Belgium was seen as the one that afforded victims the best chance of redress. In 2010, a complaint was filed with the assistance of a Belgian lawyer but the case was halted, due to the fact that MD was living outside Belgium and that no judicial co-operation was forthcoming from Sierra Leone. It was then that civil society organisations and the lawyer joined forces to make the evidence available to the Belgian authorities.

In 2015, acting in response to a European arrest warrant, the Spanish authorities arrested MD en route to the USA and surrendered him to Belgium, where he was charged and jailed. Later that same year, the Sierra Leonean authorities granted the request from the Belgian authorities to travel to Sierra Leone and investigate. However, on the very day in 2016 when it was finally announced that the case would go to trial, MD committed suicide. Nonetheless, a precedent had been set: no businessman could again escape justice for his role in pillaging natural resources.

There were 3 important aspects to the case:

- **Co-operation**

(a) between judicial authorities (Belgium, Spain and Sierra Leone).
(b) between judicial authorities and civil society; and
(c) between civil society organisations.

- **Use of different forms of jurisdiction**

Countries can have: jurisdiction over crimes committed on their territory, and/or by their own nationals; passive jurisdiction over crimes committed against nationals even if the crime is committed by a foreign national in a foreign

country; and universal jurisdiction. In many countries, however, the exercise of universal jurisdiction is in practice restricted to potential accused persons who are present on their territory and who can realistically be investigated and/or arrested. Those different forms of jurisdiction, especially universal jurisdiction, are wonderful tools that are not used to their full potential. Indeed, the ICC and other international tribunals are not competent to try all the existing conflict situations. In addition, when such courts have jurisdiction over a certain situation they are usually competent to judge the "*most responsible*" or "*most senior actors*".
Universal jurisdiction could be used to fill this impunity gap. For instance, Civitas Maxima's work with the different form of jurisdiction had led to the arrest of 4 war criminals.

- **Investigative capacity**

This case had shown that, even with restricted investigative capacity, one could go some way towards fighting impunity. Criminals were creative in the commission of crimes and it was therefore "*up to us to be innovative*".

MARK KERSTEN

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

Mark Kersten (MK): He was engaged on a working paper with an intentionally provocative title, viz., "*This mass atrocity was brought to you by the ivory trade: linking transnational and international crimes*". His research examined the nexus between international crimes and TOC. While this aspect was still relatively new in international law, in the field of conflict studies/conflict resolution it was already quite old, dating from the end of the Cold War.

Might there be a "*chicken and egg*" relationship, he wondered, and if there was a link, which of the two came first? However, he did not feel that looking at these crimes linearly was actually useful. It was, he suggested, of more interest to see how they interacted in an "*international-transnational crime complex*", and in this regard, proposed to discuss 4 cases.

- **Ethnic cleansing and organ trafficking in Kosovo**, where the conflict had been characterised by mass atrocities on all sides. During and after the war, the liberationist paramilitary Kosovo Liberation Army (KLA) had set up human-trafficking networks and pursued a campaign of "*counter-ethnic cleansing*", partly as a response to the ethnic cleansing committed against the Kosovo Albanian population. The fact that these networks participated in human- and organ-trafficking of prisoners of war was known to tribunals (such as the ICTY) but was never adjudicated. Similarly, neighbouring forces turned a blind eye to organised crime committed by criminal elements in the KLA. The new Kosovo hybrid court might finally examine and investigate these crimes.

- **The diamond trade and war crimes in the civil war in Sierra Leone**, where there had been a very clear interaction between TOC and international crimes. In return for his support, Charles Taylor had received blood diamonds from the Revolutionary United Front, which he in turn had used for "*buying arms to fuel the civil war in the neighbouring state*". Taylor was eventually convicted and sentenced to 50 years for aiding and abetting, war crimes and CAH in Sierra Leone.

- **Ivory poaching and the war between the Lord's Resistance Army (LRA) and the Ugandan Government in Central and East Africa**: though the LRA was now a spent force in what might be termed "*survivalist mode*", it was nevertheless engaging in ivory poaching and trading as a way of remaining fed, armed and belligerent. .

- **The war against Islamic State (ISIS) and the oil trade**: in this instance, it appeared that the illegal oil trade was solely a means for ISIS to sustain itself, whereas it used mass atrocities as a tenet of policy.

These cases showed that the international-transnational crime complex existed irrespective of geographic location or the type of actor involved.

MK now turned to the possibility of the ICC linking the investigation and prosecution of international crimes and TOC. Though such an approach was not envisaged under the Rome Statute, there might be instances where TOC could qualify as war crimes per se. e.g., human-trafficking in Libya. Another possibility lay in prosecuting perpetrators of TOC for aiding and abetting international crimes, e.g., illegal mining and exportation of coltan fuelling international crimes in the eastern Democratic Republic of the Congo (DRC). However, it was important not to confer secondary status on TOC by simply regarding these crimes as a mode of liability or as a means to aid and abet international crimes. Furthermore, the ICC already had "*its hands full with core international crimes*" and there was nothing to be gained by adding yet more crimes to its workload.

Arguably, the best way forward was through positive complementarity, with the ICC encouraging domestic and regional bodies to link the investigation and prosecution of these two types of crime (though even this had been viewed as possibly lying outside the Court's remit).

ANTON STEYNBERG

Former Chief of investigations, UN International Criminal Tribunal for Rwanda

Anton Steynberg (AS) Twenty-five years as a prosecutor in South Africa, 8 years spent fighting organised crime, and his experience at the ICC only went to confirm what his fellow panellists had noted, namely, that there was often a clear link between international crimes and TOC.

International crimes might often be committed for ideological rather than commercial reasons but this was not always the case. In some cases, the goal was to gain access to and exploit natural or scarce and valuable resources, with the resultant ability to control the resources of government. And, even where ideology was the primary motivation, money and resources were still needed to support a rebellion or war, and so groups might resort to TOC to fund their activities (e.g., narcotics trafficking, kidnapping in Mali and the Middle East, people-smuggling in Libya, exploitation of natural resources by the LRA).

However, the ICC's goal was to fulfil its core mandate, which does not include the prosecution of TOC per se. A better approach would be through positive complementarity by sharing evidence gathered in countries that were conducting their own investigations. The ICC was also looking at the possibility of joint investigation and prosecution of pillaging of natural resources, e.g., in cases where this occurred during the course of an armed conflict.

There were clear synergies between the investigation and prosecution of TOC and international crimes. Since both involved large, complex investigations, often involving numerous crimes committed by large groups over a prolonged period, many investigative techniques that worked for one would also work for the other. Joint investigation teams, with prosecutors, investigators and analysts working together, had proved the best way of investigating and prosecuting these crimes. The traditional Commonwealth system, with a police docket being opened and then passed to the prosecution, might work well in the short term but complex, longer-term cases demanded prosecution-led investigations. Analysts were crucial, as were financial investigators/forensic accountants to give the court the "*big picture*".

Lastly, **AS** sounded one caveat. The danger of combining the investigation of TOC and international crimes in domestic law enforcement units was that the omnipresent nature of TOC meant that international crimes would tend to "*take a back seat*". He therefore wished to stress the importance of maintaining a dedicated capacity focused solely on pursuing international crimes.

panel QUESTIONS

Before opening up the discussion to the floor, Mark Kersten asked each panellist a question

Joseph Roberts-Mensah: Was it the job of Civil Society Organisations (CSOs) to involve themselves actively in investigations? Despite their successes, they had been known to exaggerate the dangers.

EM: Civitas Maxima was filling the gap due to a lack of political will to prosecute the cases. CSOs in the field are documenting human rights violation even though they are not specialised in investigation. Moreover, CSOs were often deployed in areas where formal investigators were unable to go. CSOs were drawn into present situations where international crimes are committed and the answer therefore lay in capacity building: currently, initiatives were underway to train first responders and draw up documentation protocols for CSOs.

MK: There was a certain inevitability to CSO involvement, and had to rely on organisations on the ground. In this connection, there were areas of increasing professionalisation among CSOs, such as in Syria.

AS: NGOs had an important role to play but there were limitations. In addition there was the time factor, i.e., the intervening lag before a prosecution could be brought. In a best-case scenario this might be several months; in a worst-case scenario, such as Georgia, it might be several years. To fill the gap, NGOs were vital when it came to collecting photographs, videos, evidence that might be "*lying around*", though, needless to say, capacity building was required. The ICC had, of course, to be seen to be independent and it therefore had to conduct its own detailed, time-consuming investigation and interviewing. Then again, certain NGOs, such as the Red Cross and UN agencies, might endanger their status and staff by co-operating with the ICC publicly.

Joseph Roberts-Mensah: There were "*cases that did not seem to go anywhere*", due to their complexity. Was there an "*Al Capone approach*", i.e., a tendency to convict suspects on a lesser charge?

MK: Yes, there had been instances of charging individuals on a minor count, as in the case of Charles Taylor, but in the case of TOC, the greatest challenge was to disrupt the market and make it unattractive: this was sometimes difficult "*because the beneficiaries were upstream*".

AS: His prosecutorial strategy had always been to bring the simplest charge possible, while still trying to be broadly representative of the scope of criminality. It was a matter of balancing pragmatism against the interests of the victims.

BH: While she recognised the constraints imposed by time, **BH** felt that indictments should reflect "*the totality of criminality*".

q&a

Role of CSOs

Samuel Akorimo (SA): Every effort should go into fostering and consolidating the partnership between CSOs and tribunals. Rwanda had been a good example of this, with the tribunal using CSO reports as leads for its own investigations.

Brenda J. Hollis (BH): The fact of the matter was that CSOs were gathering evidence and so the question was how to handle it.

EM: CSOs were bound by confidentiality until such a time as the investigation became official, at which point the authorities' rules applied. CSOs did their utmost to ensure that evidence was not corrupted.

AS: NGOs' role limited as they neither enjoyed coercive investigative powers (e.g. search and seizure, wire taps etc.) nor had access to confidential information from the authorities. Their role was restricted to observation and/or interviewing witnesses.

Use of joint teams

BH: She stressed the importance of using "*integrated teams*" made up of investigators and prosecutors, a tactic that had been used in both the former Yugoslavia and Sierra Leone.

SA: "*I couldn't agree more!*"

In the DRC, was it possible to fight international crimes without fighting TOC?

AS: There was no need to create a ranking of international crimes and TOC: it was merely that the ICC would concentrate on the former. A more holistic approach was required. The best way would be to combat both types by cutting off funds and arresting the leaders. Unfortunately, to do this in the DRC one would need a more stable situation. Often a peacekeeping or military solution was required to apprehend responsible leaders.

MK: The answer was not to prioritise either type of crime. Indeed the problem was that people tended to look at one or the other rather than at the intersection between the two. It was sometimes necessary to look upstream before deciding if and/or which to prioritise.

ICC, victims and witnesses

AS: The ICC had witness- and victim-protection programmes. Under the Rome Statute it was bound to avoid putting people at risk. There was a Protection Strategy Unit to assess the risks of accessing certain areas and witnesses, and individual risk analyses were also conducted to ascertain the feasibility of interviewing or using a given witness. In addition, there was the Victims and Witnesses Unit which could protect those witnesses who appeared before the Court. Aside from affording protection *in situ*, its powers extended to witness relocation, in appropriate cases. However, being in a witness-protection programme was "*no fun*" and much of the work involved "*protecting witnesses from themselves*", i.e., preventing them from becoming careless and putting themselves at risk. The task of witness protection was further complicated by the sheer size of many witnesses' extended families.

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

Positive complementarity

BH: She acknowledged that she did not like the term "*positive complementarity*" because it somehow implied that there was "*negative complementarity*". What one was really talking about here was a change in primacy.

AS: In response, **AS** said that the opposite of "*positive complementarity*" was not "*negative*" but "*passive complementarity*".


UNE 2017
Allan Ngari

CLOSING REMARKS

It was at this juncture that the proceedings were brought to a conclusion by **SA**, who handed out a bibliography of the literature available at the MICT, and by **BA**, who thanked all the panellists and participants, and said that the symposium had given everybody "*food for thought*" and shown that "*linkages were clearly a fascinating area, where both types of crimes could be jointly investigated and prosecuted*".

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AFRICA GROUP
FOR JUSTICE AND ACCOUNTABILITY

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With the financial support of:

Federal Foreign Office