INTERNATIONAL SYMPOSIUM

Networks of accountability:
Justice for international and transnational organised crimes

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STRATHMORE UNIVERSITY

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Within the framework of the ***"Fighting Impunity in East Africa"*** *project, an initiative funded by the* ***German Foreign Ministry****, the* ***Wayamo Foundation*** *and* ***Africa Group for Justice and Accountability*** *organise judges' retreats, workshops for investigators and prosecutors, and public outreach activities such as the public symposium held in Nairobi, Kenya, on 27 February 2018, entitled* ***"Networks of Accountability: Justice for International and Transnational Organised Crimes"****.*

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EXECUTIVE SUMMARY

In February and March of this year, the **Wayamo Foundation** concluded a series of five key events (two meetings and three activities) in so many days in Nairobi, Kenya, as part of its "*Fighting Impunity in East Africa*" project, an initiative funded by the **German Foreign Ministry**.

INTERNATIONAL JUSTICE SYMPOSIUM

The International Justice Symposium, held under the banner of "*Networks of Accountability: Justice for International and Transnational Organised Crimes*", was opened with welcoming remarks by, among others, **Luis Franceschi**, Dean of Strathmore Law School, **George Kinoti**, Kenya's Director of Criminal Investigations, and **Githu Muigai**, the country's outgoing Attorney-General. The moderators and panellists were eminent experts drawn from a wide variety of fields, and included: **Adewale E. Iyanda**, Office of the Legal Counsel, African Union Commission; two representatives from the International Criminal Court (ICC) in the Hague, **Philipp Ambach**, Chief of the Victims Participation and Reparations Section, and **Gloria Atiba Davis**, Head of the Gender and Children Unit in the Office of the Prosecutor; **Aimée Comrie**, Crime Prevention and Criminal Justice Officer at the United Nations Office on Drugs and Crime; FBI Supervisory Special Agent, **Jennifer Barnard**; **Christine Alai** from Physicians for Human Rights; AGJA members **Betty Kaari Murungi**, Professor **Tiyanjana Maluwa**, and **Fatiha Serour**; and a judicial trio consisting of former Judges **Navi Pillay** and **Richard Goldstone** (both AGJA members), and **Judge Isaac Lenaola** of the Kenyan Supreme Court and East African Court. The topics were thought-provoking, the comments frank, direct and, at times, hard-hitting, and the impact undeniable, as was plain from the string of reports carried in the social media and national press.

The stated objectives of the Symposium were to discuss the status of international criminal justice, analyse transnational organised crimes, and explore the linkages between the two sets of crimes. The Symposium was followed by a training session for a select group of senior East African investigators and prosecutors, a high-level network meeting of Directors of Public Prosecution and Heads of Criminal Investigations from Kenya, Rwanda, Tanzania and Uganda, as well as a special media component for journalists from the region.

OPENING SESSION

Welcoming remarks

MASTER OF CEREMONIES

JOSEPH ROBERTS-MENSAH

Africa Director, Wayamo Foundation

LUIS FRANCESCHI

Dean of Strathmore Law School, Nairobi, Kenya

In welcoming everybody to the Strathmore Business School, **Luis Franceschi (LF)**, a self-described "*Kenyan by choice*", recalled his long friendship and collaboration with Wayamo dating back some six years, when **Bettina Ambach** had initiated the discussion on international criminal justice and universal jurisdiction, "*a very sensitive and complicated topic at the time*". Indeed, a former Chief Justice had gone on record as saying that the advent of the ICC marked a reduction in Kenyan sovereignty.

At present, there were interesting discussions at the Law School about digitising Africa's future. It was necessary to talk to policy makers about this and about open-border policies when it came to tackling crime because, without such an approach, nothing could be achieved, e.g., while wildlife and other crimes recognised no borders, police were nonetheless required to apply for visas, making it necessary "*to open up jurisdiction and borders!*" Pressed for time because the morning's agenda included a visit to the campus by the country's President, **LF** noted wryly that "*a lawyer with a microphone is a terrible thing*", but adopting an altogether more serious tone he then went on to remind the audience that, "*we are all on the floor…we are all participating in order to get something out of here in the shape of new ideas and new policies*".

BETTINA AMBACH

Director, Wayamo Foundation, Berlin

Bettina Ambach (BA) said she was really happy to be back at the University and see so many "*old friends*". After briefly mentioning each of the AGJA members who were present, **BA** explained the reason for the symposium's focus on networks, pointing out that, "*the supply of justice does not meet the demand*". Moreover, transnational crime needed to be addressed, which made it essential to network justice and accountability. At present there is neither enough talk nor enough co-operation; the question therefore is, "*How do we co-operate, how do we network?*" There has to be "*productive interaction between the national and international level*", and in this regard, Wayamo believed in the complementarity principle, whereby the ICC will only intervene when states are unwilling or unable to exercise jurisdiction domestically.

The symposium formed part of an overall two-year East African project funded by the German Foreign Ministry and entitled, "*Fighting Impunity in East Africa*". It currently involved four countries (Kenya, Rwanda, Tanzania and Uganda) and rested on four pillars, namely:

- regional capacity building to address international crime and transnational organised crime (TORC);
- high-level network meetings of Directors of Public Prosecutions and Criminal Investigations (the end of the week would see the third in the current series) aimed at forming and developing a unique network that would combine investigators and prosecutors;
- public symposia. Not only was engaging with the media and civil society regarded as crucial, but Wayamo was also endeavouring to nourish a media network; and lastly,
- engaging with key decision-makers, particularly at the courts in Arusha and the ICC in the Hague.

Wayamo acts as Secretariat to the AGJA, and much that has been and is being achieved is thanks to the Group's invaluable contacts which served to "*open doors*".

The current activities in Nairobi followed on from preceding events held twice in Arusha and Kigali. **BA** welcomed the 16 investigators and prosecutors who had flown in from Tanzania, Uganda and Rwanda, as well as the representatives of the ICC, FBI, African Union (AU) and East African Court of Justice who had made the effort to be there.

GEORGE KINOTI

Director of Criminal Investigations, Kenya

George Kinoti (GK) felt honoured to be at Strathmore University for what he called "*this very important international justice symposium*", thanked the Wayamo Foundation and AGJA for convening it, and welcomed both participants and guests to Nairobi. This symposium provided an opportunity to discuss the status of international criminal justice, analyse international crimes and TORCs, and explore the linkages between the two sets of crimes. As a law enforcement practitioner, he considered "*the spirit of this symposium to be invaluable and necessary*", and was delighted that it would be followed by a training session for investigators and prosecutors, as well as a network meeting for regional Directors of Public Prosecutions (DPPs) and Directors of Criminal Investigations (DCIs).

The last few years had witnessed an upsurge in TORC in the region. Such crimes had been made more complex by advances in information communication technology, with it now being feasible for a crime to be

planned in Europe, financed in the USA, and committed in East Africa by perpetrators recruited in North Africa and trained in Asia. "*We, in the criminal justice system need to collapse our bureaucracies, and create and maintain even stronger networks and ties than those of the enemy*." Regional and international partnership and co-operation in the criminal justice system were a necessity.

He urged those present to feel free to discuss and network amongst themselves. Through the DCI, Kenya's National Police Service acknowledged and appreciated "*Wayamo's commitment in the arenas of international crimes and TORCs*".

JACINTA NYABOKE NYAMOSI

Senior Assistant Director of Public Prosecutions, Kenya

on behalf of **Dorcas Oduor**, Secretary and Deputy Director Public Prosecutions and Head of Economic, International and Emerging Crimes at the Office of the Director of Public Prosecutions

Appearing in lieu of Deputy Director Public Prosecutions, Dorcas Oduor (who sent fulsome apologies for being unable to attend), **Jacinta Nyamosi (JN)** extended a warm welcome to all participants.

She explained that, rather than merely reading out Ms. Oduor's speech, she would limit herself to stressing once again that one could not work alone when fighting TORC. International crime had expanded, developed and was using sophisticated networks to such an extent, that co-operation had become essential.

HASSAN BUBACAR JALLOW

Chief Justice of the Gambia and AGJA Chair

On behalf of his fellow AGJA members, Betty Kaari Murungi, Navi Pillay, Richard Goldstone, Fatiha Serour and Tiyanjana Maluwa, **Hassan Bubacar Jallow (HBJ)** welcomed all those present. The AGJA had been formed some years back as an independent group of experts concerned with justice and accountability. The Group had been carrying out its designated pro bono activities of advising, training and facilitating in East Africa, Nigeria, Central African Republic and Senegal, and would in future be including The Gambia. The AGJA enjoyed a very good relationship with Wayamo, its "*partner, Secretariat and implementing arm for capacity building*".

At the present time, complementarity is a very critical issue. The closure of the International Criminal Tribunal for Rwanda (ICTR) signalled an end to primacy, and "*what we're left with is complementarity*", i.e., a situation where primary responsibility rests with national jurisdictions. The experience of the last few decades had highlighted the strengths and weaknesses of international criminal justice. The ICC could deal with only a few cases, thus leaving the bulk of the work to be done at the national level, something that in turn required the necessary political will to ensure justice for victims.

GITHU MUIGAI

Attorney-General of Kenya

Githu Muigai (GM) wished "*to add his voice*" to those welcoming the participants to Nairobi and to Strathmore University which had been a venue for many such discussions.

He reaffirmed Kenya's commitment to international justice, saying there was "*no question about its commitment to justice and accountability*". Similarly, he confirmed the country's support for the ICC and its ideals, noting that Kenya had been one of the first states to ratify and domesticate the Rome Statute. In addition, Kenya strongly supported the AU and the idea of strengthening regional institutions in Africa, such as the African Court on Human and Peoples' Rights and the East African Court of Justice.

While Kenya regarded the ICC as an institution that "*ought to be having a constructive engagement with Africa*", a relationship with no acrimony, it had to be said that there had been profound differences between Kenya and the ICC about the Court's treatment of Kenyan nationals. Even so, "*Kenya has not withdrawn nor will it withdraw from the ICC*". The ICC remained the court of last resort, and he was grateful to **HBJ** for having mentioned the complementarity principle.

"*Kenya is a front-line state in the fight against international criminal gangs in terrorism, trafficking, wildlife, drugs, is proud of its leadership role in the East African region and wants to learn from other countries in the world*", said **GM**, assuring his listeners that he hoped the long-proposed International and Organised Crime Division (IOCD) would eventually be formed in the High Court.

TOPICS COVERED

PANEL I

Complementary tiers of accountability: international, regional and national justice

MODERATOR

ANGELA MUDUKUTI

International Criminal Justice lawyer, Wayamo Foundation

*By way of introduction, moderator **Angela Mudukuti (AM)** explained that international criminal justice was made up of many components which had to work together on three levels, domestic, regional and international, each of which would be respectively dealt with by her three panellists.*

TIYANJANA MALUWA

AGJA member and H. Laddie Montague Chair in Law, Pennsylvania State University School of Law

Addressing the subject of "*Challenges of complementarity and domestic justice in Africa*", **Tiyanjana Maluwa (TM)** said that the assumption that complementarity works depends on whether States Parties have put the necessary institutions in place. For instance, complementarity can only work if States Parties have passed the necessary implementing legislation. However, only seven African states have done so, with a further five on the way. A few years ago, a survey identified a number of issues, most of which -if not all- are still present. There is a gap in terms of legislative mechanisms, and some of the factors that account for this gap are:

I. a lack of awareness, i.e., a tendency to speak of the ICC in high-profile situations without being properly aware of the need for the necessary implementing legislation. **TM** sees this as exemplifying a pattern of behaviour that is typical across the continent, namely, an initial enthusiasm and readiness to sign, without a thought being given to the need to domesticate the ensuing treaty obligations;
II. a capacity shortfall in the form of a lack of qualified staff with sufficient expertise to draft implementing legislation. This means that, even where states are willing, they do not have the necessary resources to follow through. Indeed, this is precisely where foreign expertise could prove invaluable;
III. a failure to prioritise at the political level. One of the many academic theories seeking to explain this cites the cause as peer rivalry, which translates as a race to sign up and no more. In other words, despite states' apparent commitment, they stop short and do not pursue the matter any further;
IV. the perception of being regarded as a slave to neo-colonialism and/or the lackey of western powers;
V. issues of head of state immunity which cause states to think about the possible consequences of implementation;
VI. the perceived cost of the resources needed to provide facilities such as prisons, to avoid accusations of a lack of due process and/or violation of rights; and lastly,
VII. a lack of domestic pressure to follow up with implementation of the Rome Statute.

ADEWALE E. IYANDA

Office of the Legal Counsel, African Union Commission

Adewale E. Iyanda (AI) gave a brief summary of the African Union's most significant efforts towards "*Promoting justice and accountability in Africa*".

The AU's Constitutive Act, the organisation's legal and policy framework, includes respect for the rule of law, the sanctity of human life, and the right to intervene in states where international crimes are committed. Indeed, the AU has "*provided for criminalisation of international offences at the next level in continental instruments*" and would support Member States in pursuing accountability.

In terms of institutional mechanisms, the first internationalised tribunal to be set up by the AU had been the Extraordinary African Chambers in Senegal, which had successfully combined the Senegalese court system with the principle of universal jurisdiction. Its proceedings had resulted in Hissène Habré being sentenced to life imprisonment and compensation being set aside for the victims in the form of a trust fund with an initial allocation of US $5million.

The AU's most recent initiative was the proposed Hybrid Court for South Sudan, which had been preceded by a Commission of Inquiry (the first of its kind) mandated to look into offences committed in the country. As part of its findings, the Commission had recommended the establishment of an African-led hybrid mechanism, which was now in the final stages of being set up and would have jurisdiction over both national and international crimes.

Thirdly, the Malabo Protocol was intended to extend the jurisdiction of the African Court of Justice and Human Rights (ACJHR) to cover international and transnational crimes. Most transnational crimes had been criminalised at a national level but this criminalised them at a continental level. In this respect, the Court's relationship with the ICC was seen as horizontal rather than hierarchical. Furthermore, it was envisaged that there would be a trust fund for victims.

Lastly, the AU, like Wayamo, undertook capacity building with its Member States, an example being the offer of a Master's Degree at Loyola University.

PHILIPP AMBACH

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

On the topic of "*The track record and trajectory of International Criminal Justice Mechanisms*", **Philipp Ambach (PA)** had this to say, "*For both terms there is a short and a long answer: the short answer will make one look bad and the other look good…but in either case it will give us the wrong picture!*"

On the "*bad*" side, **PA** quickly reviewed the track record. Going back to the origins, 24 indictments had been read out at the International Military Tribunal (IMT), with 19 convictions. While the International Criminal Tribunal for the former Yugoslavia (ICTY) had indicted 161 individuals, sentenced 90 and referred 12, the ICTR had indicted 93, sentenced 62 and referred 10. Of a total of 13 indictments, the Special Court for Sierra Leone (SCSL) had handed down 9 convictions. After citing similarly

low figures for the Extraordinary Chambers in the Courts of Cambodia (ECCC) and the Special Tribunal for Lebanon (STL), **PA** turned his attention to the ICC, where there had been 31 arrest warrants, with 9 convictions since 2002. Costs had run to billions of euro in the past 20 years, with the ICTY and ICTR accounting for more than 100 million at their peak, and the ICC having spent over 140 million in this year alone. This amounted to less than 200 convictions for an outlay of billions!

On the "*good*" side, there was the trajectory. From just one IMT in 1946, this had grown to today's tally of one permanent International Criminal Court, one remaining Mechanism for International Criminal Tribunals (for ICTY and ICTR follow-up), the STL, ECCC, Kosovo Specialist Chambers, Cour Pénale Spéciale Centrafricaine, future Hybrid Court for South Sudan and for Syria, and a "*plethora of international criminal justice mechanisms*". "*We really have a large body of international criminal justice*".

"*The problem*", said **PA**, "*is that neither of the short answers is helpful; and while they are not wrong, they nonetheless set the wrong focus*". Looking at the track record, the conclusion is that very little has been achieved for a lot of money and, what is worse, wars have not diminished since the advent of all these international criminal justice mechanisms. Hence, there is a temptation to say, "*Let's rather put all that money into development aid and really help the victims*".

Nonetheless, "*quite a lot*" has been achieved, in that:

- since 1947, international crimes have been defined in much more detail, enlarging the protective shield of the law for many victims;
- the Ntaganda case at the ICC has set a precedent, whereby sexual abuse of child soldiers by their own forces constitutes a war crime;
- the existence of international criminal law and of core crimes is solidly anchored in international law, and states are obliged "*to prosecute or extradite*";
- justice as a means to end or prevent conflict has become so entrenched that the UN Security Council (SC) has managed to agree on creating not one but two tribunals;
- there is even a permanent ICC;
- heads of state have been indicted and prosecuted (Milosevic at the ICTY, Taylor at the SCSL); and,
- over 13,000 victims have participated in proceedings at the ICC to date.

The trajectory thus shows that the world had gone from one to many courts, and in the interim between the IMT and today's ICC international criminal justice has become much more inclusive, with victims having the right to participate and claim reparations. More courts might be equated with more rule of law and more protection of human rights, yet this has to be set against what PA terms the "*shadowy side*", namely:

- not all hybrid courts have been success stories, and victims have not always received their due;
- the "*trickle-down effect*" from international criminal justice mechanisms to domestic justice has remained modest;
- domestication of Rome Statute crimes is still pending in more than 50 of the 123 States Parties;
- international crime divisions have been developed but often remain understaffed and marginalised;
- complementarity falters and/or fails where weak emerging administrations are overburdened by an explosive judicial caseload; and,
- extension of subject-matter jurisdiction to transnational crimes may suffocate hybrid courts with "*jurisdictional overkill*".

Summing up, **PA** said that the track record and trajectory of international criminal justice institutions had shiny and shadowy parts, and so "*we have to bank on the shiny aspects*". On the track-record side, "*we have the law, the courts and jurisprudence/precedents*"; on the trajectory side, we have to support all alternatives without unduly favouring one over another, and bear in mind the plight of victims, while remaining honest as to what can be achieved.

> *"International criminal law has a trajectory like a bullet, so let's keep it flying, and let's keep it dangerous."*
>
> **PHILIPP AMBACH**

q&a

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

Before opening the discussion to the floor, **Angela Mudukuti** first asked each of her panellists a tailor-made question.

Domestication of Rome Statute

AM: How do we make the domestication of the Rome Statute a political priority?

TM: States, leaders and legislators have to be reminded that the primary responsibility for trying crimes lies with states. The whole issue of complementarity suggests that the ICC only steps in when states are unwilling or unable to prosecute. Obligations are meaningless unless they are given effect. Very few countries take the necessary steps to align their domestic legislation with their treaty obligations, and in this regard, civil society and academia have an important role to play.

Head of state immunity

AM: The Malabo Protocol includes immunity for sitting heads and states and senior government officials, which means that one would have to wait until the suspect was out of office. In the meantime, memories fade, victims die and evidence disappears, raising concerns about the quality of justice that a proposed African court with criminal jurisdiction would deliver. How does the AU intend to address these concerns?

AI: One would have to ask whether head of state immunity really affected justice at a national level. In most countries, sitting heads of state are immune from criminal (and sometimes from civil) proceedings, and most AU Member States have taken the position that sitting heads of state should be immune at the local level. Seen from a purely personal stance, it is transnational, rather than international, crimes that have the greatest impact on African states. Moreover, in the case of fragile states, in interests of peace and justice, prosecution of sitting heads of state could be damaging.

Ad hoc courts and local capacity

AM: Have ad hoc courts based outside The Hague done enough to build the capacity of nationals in the countries in which they are situated?

PA: The question here is what is meant by the term "*capacity building*". Generally this is taken to mean "*public outreach*", which is part of the ICC's mandate; in contrast, capacity building is not. Hybrid courts have not done enough in the way of public outreach. This has always been a deficiency, in some cases due to a lack of money. The ICC cannot and does not undertake capacity building (and for that matter neither did the ICTY or ICTR). Similarly, the new legacy project, financed by other funders, does not cover capacity building. Returning to this topic at a later point in the Q&A session, **PA** mentioned initiatives designed to blend international and national prosecution staff, so that capacity remained after the tribunal's work was done, an idea that worked in Sarajevo but not in Cambodia.

Should we be looking at the cost-benefit element through the lens of victim support?

PA: The trend in international justice is towards victim participation; and, though the cost-benefit element is problematic, it nonetheless makes sense and is something that should be pursued.

How are the AU and ICC creating a platform for civil society organisations?

PA: There is no doubt that the ICC is attentive to civil society organisations (CSOs). In the case of Afghanistan, for example, they provided evidence of victims' voices to the pre-Trial Chamber in the lead-up to the opening of a preliminary examination.

AI: The AU has a number of structures which allow for engagement with civil society, though more needs to be done in this regard. Sometimes funding can be an issue.

How does the shift to low-intensity conflict, often in failed states, affect international justice?

PA: The Prosecutor has to look into alleged crimes, and if these meet the legal threshold, then the ICC will prosecute. So, rather than being a matter of politics, it is one of application of law.

Complementarity

AI: The Malabo Protocol envisages the Court being able to seek assistance from other mechanisms, regional, national and continental.

TM: During the drafting of the Malabo Protocol, there was some debate as to whether a direct mention of the ICC should be included. It had been decided that this could not be done because there was no way of assuring that all the parties would also be Rome Statute signatories. One needs to understand what complementarity under the Rome Statute means.

Perceived failure of international justice: expectations raised but not fulfilled; the need for effective justice systems and genuine accountability mechanisms; Uganda/The Gambia

PA: In international situations, one has to assume that a state will not co-operate, which could lead to serious difficulties. If there is no conviction, this is construed as failure; and yet, this is preferable to convicting someone who is innocent. Having said this, it is necessary to talk to the affected communities and analyse "*where we went wrong*". In the case of Uganda, **PA** disagreed with the view that the issue of an ICC arrest warrant had kept the conflict going: "*Peace versus justice is a debate of yesterday!*"

AI: The situation in The Gambia had not evolved to a point where the AU had to develop justice and accountability mechanisms. In other words, the justice system had not collapsed. After all, primary responsibility lies with the states themselves.

PANEL II

Transnational organised crime and its linkages with core international crimes

MODERATOR

TIYANJANA MALUWA

AGJA member and H. Laddie Montague Chair in Law, Pennsylvania State University School of Law

MARK KERSTEN

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

"*A Nobel Peace Prize winner, a supermodel, a Hollywood actress and a warlord president walk into a party*", said **Mark Kersten (MK)** to a momentarily perplexed audience expecting to hear about "*Linkages between transnational organised crime and core international crimes*". The mystery was cleared up when the audience learnt that the Nobel Peace Prize Winner had been Nelson Mandela, the supermodel, Naomi Campbell, the Hollywood actress, Mia Farrow, and the warlord president, Charles Taylor; and that the party, which had taken place in 1997, was subsequently cited at Taylor's SCSL trial as the occasion when Taylor allegedly presented Naomi Campbell with some diamonds. These were not just any diamonds, but so-called "*blood diamonds*" or "*conflict diamonds*", which Taylor had traded in order to buy the weapons used to arm the Revolutionary United Front, enabling it to commit war crimes and crimes against humanity in Sierra Leone. Taylor was found guilty of aiding and abetting atrocities in Sierra Leone, and sentenced to 50 years in prison.

Despite the trial time devoted to blood diamonds and the clear connection between the illicit diamond trade and mass atrocities, no explicit link was made between the investigation and prosecution of international crimes and transnational organised crimes. However, as far back as the 1990s, scholars of conflict and peace studies had conceptualized emerging trends in war and highlighted that 'new wars' where characterized by belligerents committing both TOCs and atrocity crimes. To students of war and violence, this is orthodox thinking, yet law — and international law in particular — tends "*to follow rather than lead*". One result of this is that war crimes tribunals, including the ICC, have only

ever been given jurisdiction over a limited number of core international crimes.

Nonetheless, these two types of crime are inextricably interwoven, with some eminent examples being provided by Charles Taylor and blood diamonds, the Kosovo Liberation Army and organ trafficking, the Lord's Resistance Army and the ivory trade, and ISIS and oil and antiquities. The phenomenon is neither limited geographically nor unique to any one type of actor. Even so, there is no "*neat and tidy relationship*", and crimes are fuelled by a series of motives, varying from wealth and greed to vengeance, survival, or even a desire to project the image of a pseudo-state economy: "*It is not a chicken and egg issue!*"

What is to be done?, asked **MK**. In the case of the ICC, adding crimes to the Rome Statute would seem neither viable nor advisable. Certain transnational organised crimes could be prosecuted under "*aiding and abetting*", although something is undoubtedly lost when one does not focus on the prosecution of the crime as such. Alternatively, use could be made of other institutions and avenues, including:

- special international and organised crime divisions, such as those formed in Uganda and, possibly at some future date, in Kenya;
- new courts established under a different statute, such as the Malabo Protocol, or hybrids; and/or
- TORCs being prosecuted as international crimes by the ICC, e.g., human trafficking as a war crime

More importantly, however, tribunals are in need of a theory of crime that links international and transnational organised crimes. On the positive side, the investigation of international crimes is improving. Furthermore, it does not tend to be confined to these crimes alone, in that a dragnet operation is set in action which collects information on any and all crimes — even when the focus of an investigation is on ascertaining a specific subset of international crimes. All too often, however, this information is not shared with other entities that could prosecute such crimes. What is needed is thus a network of institutions and actors which can share and coordinate the information gathered in the process of comprehensive investigations. If the ICC cannot stop TOCs from being committed, it should share the information it receives with partners who can. Doing so might even help to deter international crimes themselves.

Perhaps, there is a lesson to be learnt from the so-called "*Al Capone*" model famously used by the FBI, whereby when a major offence cannot be proved, a conviction is instead obtained on a lesser charge (tax evasion in the case of Capone). A symbolic element might be lost in the process but if the goal is to prevent and stop perpetrators of serious international crimes, we need to think outside of the box. Understanding the links between core international crimes and TOCs does just that.

AIMÉE COMRIE

Crime Prevention and Criminal Justice Officer, Human Trafficking and Migrant Smuggling Section, Organised Crime and Illicit Trafficking Branch, UNODC

"*Human trafficking*": **Aimée Comrie (AC)** recounted that in 2017 she had participated in a Vatican Summit presided over by Pope Francis, who declared human trafficking to be one of the most heinous crimes, and said that it should be deemed a crime against humanity. However, the Pope is not alone in noting the growing convergence between these two legal regimes, the transnational and the international. The Italian Government has suggested that the transnational organised crimes of human trafficking and migrant smuggling would be better addressed by the ICC and international tribunals; and the ICC Chief Prosecutor herself has also signalled her willingness to investigate these crimes in relation to the situation in Libya.

It is clear that effective investigation and prosecution of TORC is a key strategy when it comes to promoting complementarity and ending the impunity gap. Investigation and prosecution of human trafficking faces the same challenges as those encountered in cases of sexual slavery/enslavement and the use of

child soldiers. The United Nations Office on Drugs and Crime (UNODC) is the custodian of the UN Protocols on Trafficking in Persons and Migrant Smuggling. Data on human trafficking are extremely hard to come by, with estimates ranging anywhere from 20 to 40 million; the true figure is not known but as it is a profit-driven business, any figure will inevitably be "*the tip of the iceberg*".

There is a diversity of forms, going from sexual exploitation (forced prostitution, forced marriage, sexual slavery, enslavement) to labour exploitation (domestic servitude), and child and organ trafficking. There are large, medium and small or family networks involved, depending on the typology of the crime. Conflict-related trafficking tends to target mass migration flows. Among the population that stays behind, sexual exploitation exacts a higher toll among women and children.

In East Africa, the majority of victims tend to be children. Both boys and girls are targeted, with boy victims being thought to be connected with trafficking for forced labour and child soldiers, and girl victims with trafficking for forced marriage. In terms of offenders, there is a high prevalence of women. Trafficking flows head towards Western and Southern Europe, the Middle East and North Africa. Much of the region's legislation is recent, with the result that the number of convictions is very low, i.e., overall only 10% of those investigated were convicted!

Human trafficking as a crime against humanity
Under Article 7 (1)(c) of the Rome Statute, "*enslavement*" is defined as the exercise of any or all of the powers attaching to the right of ownership over a person, and includes the exercise of such power in the course of trafficking in persons, in particular women and children. However, it is not clear how the contextual elements under the Rome Statute could be applied to human

trafficking.

Recent trends in jurisprudence show a shift away from the need for total enslavement towards evidence of a "*climate of fear*". This is very important in human trafficking situations because until now, there has been a lack of comprehension on the part of judges and prosecutors as to what prevents victims from escaping: it has to be understood by all concerned that there are far subtler means than brute force, including deception, psychological and economic coercion, and abuse of a position of vulnerability. Another problem in such cases is that victims do not give linear testimony, so that gaps in testimony lead to cases being dismissed. Rather than expecting traumatised victims, particularly minors, to give flawless statements, better interviewing and questioning techniques are called for. Lastly, there are problems of a legal and/or ethical nature surrounding the case of former victims who become perpetrators.

AC ended her address by suggesting that the future might possibly lie in these crimes being prosecuted in national courts.

JENNIFER BARNARD

Supervisory Special Agent, FBI

A Certified Public Accountant and an FBI agent of 10 years standing, **Jennifer Barnard (JB)** explained that she was currently serving as a programme manager in the Bureau's complex financial crimes unit.

When it comes to "*Financial investigations and international crimes*", there are all kinds of financial investigations. With the exception of certain violent crimes, practically every other type of crime has a financial element. Criminals are greedy, driven by financial gain or money. Hence, investigators "*need to follow the money*":

I. to gather evidence, in order to prove that the crime was committed, or alternatively, to lead to other individuals involved in the crime;
II. to show where the money came from and where it went or how it was spent; and,
III. to ascertain the entire scope of the criminal activity and the criminal organisation.

Financial investigations are worthwhile because they serve to obtain information one would not otherwise obtain. Secondly, in these cases there is a paper trail, and paper does not lie. Paper is great evidence: it is the same today as it will be tomorrow …and a year from now! That said, financial investigations are document-intensive, and can therefore be extremely tedious.

Challenges include the ever increasing use of technology and "*an international and borderless world*". Today an email can be sent to millions, meaning that "*the victim pool has become infinite and easily accessible*". This in turn leads to another set of difficulties confronting international investigations, such as:

- language differences, which require interpretation and translation services;
- time differences, which delay or slow the flow and pace of work;
- differences in laws and ways of conducting investigations, which allow for certain investigative techniques to be used in one country but not another.

Communication is vital. Partnerships and/or agreements with other countries make the sharing of information easier, but even where these do not exist, people can still work together and help one another. Relationships make for successful investigations/ prosecutions: "*We should all take advantage of this incredible opportunity to meet someone new, someone not from our country but someone we might be able to work together with tomorrow or some day in the near future, should the need arise*."

> *"We can't let the bad guys continue to get away with hurting innocent people because of a lack of co-operation!"*
>
> **JENNIFER BARNARD**

q&a

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

The shift in the concept of enslavement and its effect on the position of child recruitment

AC: Agreeing with the questioner (AGJA member, Fatiha Serour), **AC** said that the "*climate of fear*" concept not only fitted the situation of child soldiers, but was indeed exemplified by the case of Boko Haram abductees. Accordingly, there was a need for capacity building on these issues.

Problems raised by transborder cases

AC: "*International co-operation is absolutely essential*" because the problem is not so much one of mismatched legislation as the lack of state co-operation.

TORC in the context of war and conflict

MK: TORC needs more than judicial accountability, in that it is necessary to disrupt the climate that makes it possible. Obviously this is more difficult where failed states are involved. The transnational element allows for a spread of accountability mechanisms and/or regional mechanisms, with the "*upstream approach*" (i.e., recourse to the conflict zone) being the most difficult.

Should there be a new crime of human trafficking?

AC: Rather than a new crime, this should be dealt with using either the national human trafficking legislation (transnational criminal law) or if appropriate, in limited circumstances, human trafficking as a crime against humanity (international criminal law). Both of these crimes are challenging for prosecutors to prosecute, and there is a tendency to opt for simpler crimes to prosecute like document fraud, prostitution, irregular migration.

MK: While he agreed in principle with **AC** on the idea of trafficking being prosecuted as a crime against humanity because of its symbolic value, if this were to mean fewer prosecutions then it might be "*a dubious decision*".

Money laundering and corruption

AC: Money laundering and corruption are undermining the rule of law.

Speaking from the floor at this point, **Tiya Maluwa** noted that the Malabo Protocol covers corruption.

MK: Personally, he felt that states would be "*terrified*" of having a court devoted to cases of corruption. Corruption is a necessary link in TORC, e.g., although the highly prized metallic ore, coltan, is almost exclusively mined in the Democratic Republic of Congo, it is Rwanda -a country with no reserves whatsoever- that is its largest exporter! Since the ICC is unlikely to "*worry about where violence comes from*", he would like to see it implement information sharing under Strategic Goal no. 9.

Role of intermediaries

AC: This is a key issue, in that recruiting agencies and corrupt officials use Facebook and the like as a means of feeding the human-trafficking supply chain, thereby raising the question of how to tackle this problem.

Social media: a problem for investigators?

MK: While social media can tend to complicate things, they have also been "*tremendously useful*". By way of example, he cited a recent ICC arrest warrant, issued for Mahmoud Mustafa Busayf Al-Werfalli, which was the result of evidence almost entirely derived from social media.

AC: While there are positive aspects which enable investigators to share information more quickly than they would through formal channels, it is nonetheless true that social media raise some difficult issues. In an effort to clarify the situation, a Kenyan investigator, speaking from the floor, explained that information could be obtained from Whatsapp by applying via an official account.

PANEL III

The view from the Bench

MODERATOR

ANGELA MUDUKUTI

International Criminal Justice Lawyer,
Wayamo Foundation

ISAAC LENAOLA

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

Isaac Lenaola (IL) initiated his address on "*Judicial independence in Kenya and obstacles faced by regional judges*" by remarking somewhat drily that, "*Kenyan history is full of interesting episodes*".

In the words of former Chief Justice Dr. Willy Mutunga, "*I found an institution that was designed to fail. It was an institution so frail in its structures, so socially uprooted in its mannerisms and culture, so thin on resources, so low on its self-confidence, so segmented in its human resource formation, so unprofessionalised in its administrative cadre, so overwhelmed by the Executive that it still puzzles me to date how we maintained a modicum of operations.*"

So, how had the Kenyan judiciary got there?

IL told an amused audience how the first black judge had arrived from the UK in 1971 "*by mistake*" because the then Attorney-General had relied on what appeared to be an archetypal English surname and was most surprised when he met the candidate face to face. Things had changed with what he called the "*radical surgery*" of 2003 and the adoption of the Kenyan Constitution, which ensured the doctrine of separation of powers, under which each arm of government operates independently without any interference from the others, save for the necessary checks and balances.

The pillars of judicial independence could be described as:

- security of tenure which ensures that a judicial officer's term of office is not subject to external influences and powers. In the past, judges who refused to do the President's bidding were removed, but now the removal of a judge from office may only be initiated by the Judicial Service Commission (JSC);

- a robust appointment process which, in the case of Kenya, is likewise in the hands of the JSC. Among this Commission's various watchdog functions, it submits nominees to the President; and lastly,
- impartiality and accountability in determining issues and interpreting the law.

Having said this, **IL** went on to discuss some of the challenges faced by the Kenyan judiciary, explaining that, despite the constitutional and legislative guarantees, there had been occasions on which judicial independence had been threatened by both the executive and legislative branches. Not only had the President been openly heard to threaten the judiciary, but the appointment of judges had also been delayed for no good reason. For its part, Parliament had continually interfered with judiciary's independence by using budgetary cuts to impede its work. "*No judge can feel comfortable if there are petitions for his/her dismissal or if the President criticises his/her decisions …and this is happening today!*", said **IL**, depicting the Kenyan judge as "*a hunted man*". It had to be said that there had even been instances of judges themselves interfering with the administration of justice and thus undermining judicial independence.

Another aspect was the need for financial independence. "*Here in Kenya, the government is using funding as weapon!*" As he had already mentioned, the judiciary had been subjected to budget cuts because of decisions that had angered the legislature.

IL now enumerated the challenges confronting the East African Court of Justice (EACJ), an ad hoc court that sits four times a year:

I. it has a very limited mandate, consisting of interpretation and application of the EAC Treaty;
II. its judges have in some instances suffered pressure from their own states in controversial cases; and,
III. the appointment of judges is "*opaque*", leading to fears that some had been appointed because they were close to the ruling political class. This highlighted the need for a competitive appointment procedure.

"We must all defend judicial independence!"

ISAAC LENAOLA

Justice must not only be done but also be seen to be done, inasmuch as decisions or orders issued by the court must be perceived as being free of external interference or influence. According to the preamble to the Bangalore Principles of Judicial Conduct judicial independence is a "*pre-requisite for the rule of law and a guarantee of a fair trial.*"

NAVI PILLAY

AGJA member and former UN Commissioner for Human Rights

Before embarking on her review of the "*Challenges facing international court/tribunal judges*", **Navi Pillay (NP)** confessed that she was "*deeply disturbed*" by IL's account of the pressure under which the Kenyan judiciary found itself, and agreed that "*it is everybody's duty to defend independence because justice is the cornerstone of democracy*". "*Less intrusion*" is called for.

Redirecting her attention to the matter of challenges and speaking from her experience at the ICTR and the Appeals Division of the ICC, **NP** said that she had found international tribunals to be staffed by impartial and independent persons free of national loyalties. There was safety in that. Nonetheless, it was something that many people failed to understand: at the ICTR, she herself had found it strange at first to see the need to respect others' systems and appreciate that, ultimately, the "*road was the same*".

Historically speaking, the ICTR -not the ICTY!- had been the first to prosecute a national leader. Even so, the media insisted on referring to the ICTR as yet another African institution doomed to failure. They had claimed that the ICTR was only hiring Africans because funders wanted to see the posts given to their own nationals. This was simply not true. In addition, she and her colleagues had been the target of tired racist slurs. In sharp contrast, when a Western lawyer was found to be fraudulent, there had been a reaction on the part of the UNO.

Co-operation was and is one of the main challenges facing judges. As states select their own candidates for the position of judge, one would expect them to co-operate. Yet this is not always so, especially when the focus is trained on them; and the same applies in the case of human rights in situations where state actors are involved, in that they would far prefer to see their opponents targeted. President Moi had allowed the

arrest of eight accused persons, so in that regard there had been some measure of co-operation.

Insofar as witness protection was concerned, finding a country willing to provide such protection had proved to be a real problem.

Lastly there was the matter of selective justice. While judges have no power over this aspect, they can and should certainly speak out about it.

RICHARD GOLDSTONE

AGJA member and former ICTY and ICTR Chief Prosecutor

Richard Goldstone (RG), in his capacity as a former member of South Africa's Constitutional Court, chose to speak on "*From apartheid to the 'new' South Africa: challenges and opportunities faced by the judiciary*". During the apartheid years, South African courts -"*a pale male Bench*"- had been held in low esteem nationally and internationally. The need for the Bench to be transformed had therefore been crucial. This, plus the fact that by now it was 70% black and 50% of the judges were women, had served to lift the standing of the South African judiciary.

Nelson Mandela had insisted on the establishment of a new Constitutional Court. Under apartheid the courts had enjoyed no power of review. Accordingly, the new Court was to be the guardian of the Constitution and its Bill of Rights, "*the highest power in the land*". It could therefore overrule the views of the majority, effectively putting an end to majority rule. Mandela's approach had thus "*eased the way to democracy*".

The first case to be heard by the Court involved the constitutionality of the death sentence, which it controversially held to be unconstitutional. The majority of the country may well have been against this decision and, to Mandela's disappointment, the Deputy President F.W. de Klerk suggested holding a referendum and if the majority wished to retain the death penalty, the Constitution should be amended accordingly. Mandela suggested that if there was to be a referendum, a second question should be white South Africans should be allowed to keep their property acquired during the apartheid era. There was never again a suggestion of a referendum! President Mandela had an instinctive understanding of the nature of a constitutional democracy. When, later, the Court ruled against the Mandela administration, he thanked the Court for showing the way.

All governments suffer from corruption, and apartheid South Africa was no exception, with corruption being "*rife*". Under the old regime, such things came to light thanks to investigative journalism, whereas under the new constitutional South Africa can also rely on the Office of the Public Protector and the efforts of civil society organisations. Indeed, it was the public groundswell that led to the ANC losing support and eventually forcing President Zuma to resign. "*The Constitutional Court*", said RG, "*has ruled bravely on these and other issues involving the ex-President*". The country's new president, Cyril Ramaphosa, has pledged to root out corruption, and has already sacked some suspect ministers.

In RG's view, the promise of "*a new dawn for a democratic South Africa*" would not have happened without an independent judiciary, and the current reach of judicial intervention is matched by very few countries around the world. It is no coincidence that the Chief Justice recently received a standing ovation from Parliament!

q&a

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

Checks on and accountability of judiciary

IL: The judiciary is bound by certain principles, and all judges are required to sign a common contract. Every year the Chief Justice reads a report on what each court has done. Not only is there connectivity with all court users, but there are also avenues for complaints.

NP: The judiciary is subject to checks of many kinds. Justice is a public process and decisions can be overturned on appeal. Judges are subject to the rule of law and the very "*statute that is in front of us*" at any given time. She recalled a case where Indian judges had gone so far as to publish a complaint against the country's Chief Justice.

RG: Judges can be held accountable in two ways: firstly, they are answerable to the public, in that they have to publish detailed, reasoned decisions; and, secondly, they are subject to removal through impeachment by parliament.

Judicial Service Commission

IL: The JSC has a constitutional mandate for the appointment and removal of judges. In addition, it should also be an effective means for protecting the judiciary. Indeed, it has tried to protect judges and has itself come under attack.

Complementarity

IL: The main attempt to make provision for complementarity was the initiative to establish the IOCD, an initiative that "*collapsed*".

Judiciary's relationship with the public

IL: To date, the Supreme Court has not been successful in ensuring that its decisions are communicated to and understood by the general public. Journalists have a role to play in this.

RG: He fully agreed with IL on the need to make judgements known to and understood by the public. In the case of South Africa, this problem had been approached by deciding to issue summaries, use straightforward jargon-free language, and allow television into the courtroom.

Way forward

NP: "*We just did our jobs properly*", said **NP**, describing the ICTR's way of handling its initial "*bad press*". Judges have to exercise their professional role "*based on sound jurisprudence*". In addition, they have to listen to civil society: and to illustrate the point, **NP** recalled being upbraided by a young, outspoken, Kenyan journalist about the ICTR's lack of convictions of sex-related offences and rape. "*She pricked my conscience!*", admitted **NP**.

Witness protection

NP: This is a major issue, calling to mind the way in which this factor had contributed to impede the ICC Office of the Prosecutor from proceeding with the Kenyan indictments. Judges had been the first to insist on moulding rules for witness protection.

RG: "*Of course this is a problem!, witnesses fear for their own lives and the lives of their families*". Most witnesses are reluctant to leave their homes and/or undergo plastic surgery. There is no perfect answer. One has to do what can be done, including relocation where necessary.

Threats and security

IL: "*Who defends the judiciary? ....Each of us!*", said **IL**, answering his own question and going on to say, "*We as judicial officers should also be guardians*". Recalling the traumatic night when the Chief Justice's driver had been shot, he said that such attacks would inevitably have some effect: after all, "*judges are only human!*"

PANEL IV

Vulnerable populations - children and victims of sexual violence

MODERATOR

FATIHA SEROUR

Director of Serour Associates for Inclusion and Equity and AGJA member

*Describing her session as that of the "last-but-not-least panel", **Fatiha Serour (FS)**, explained that it would be trying to bring together facets of the day's other panels, inasmuch as all mechanisms exist in an effort to protect human rights. This raised the issue of whether violence against children and sexual violence should be treated as war crimes. At bottom, one is talking about "justice for whom?"; and the short answer is, "the victims!" In this respect, the solution is best summarised by the maxim, "Actions speak louder than words".*

GLORIA ATIBA DAVIS

Head of the Gender and Children Unit in the Office of the Prosecutor, International Criminal Court

Gloria Atiba Davis (GAD): "*Tackling sexual violence and crimes against children at the International Criminal Court*".
As a member of the Office of the Prosecutor (OTP) of the ICC, she appreciated the chance to participate, as it afforded an opportunity to discuss and exchange ideas with representatives from other international entities, the AU and national jurisdictions on how to intensify efforts to deliver justice to victims and prevent such crimes.

"*Effective investigations lead to successful prosecutions!*"
To ensure this, the OTP's second Strategic Goal is to continue integrating an overall gender perspective and implement the policies on sexual and gender-based crimes (SGBC) and crimes against children, which were launched in 2014 and 2016 respectively. The OTP's Policy on Children recognises its duty towards witnesses under 18 who may be victims, as well as children of prosecution witnesses. The policy articulates the Office's approach to crimes against and affecting children, especially during evidence-collection and charging, and stipulates how staff should interact with children who have suffered grave violations during armed conflict, to ensure that their best interests are served. There is a two-step process to be followed when determining the best interest of a child in any given situation. The policy reinforces the OTP's child-sensitive approach in accordance with the rights of children under the 1989 Convention on the Rights of the Child.

The Rome Statute was the first international criminal law instrument to criminalise the recruitment or use of children in an international or non-international armed conflict. Indeed, the very first ICC trial, that of Thomas Lubanga Dyilo, resulted in a conviction for the war crimes of child recruitment and use of children to participate actively in hostilities. Similarly, some

ongoing trials, including those of Bosco Ntaganda in the Democratic Republic of Congo (DRC) and Dominic Ongwen in Uganda, have also included crimes against or affecting children. In addition, the Rome Statute criminalises the imposition of measures aimed at prevention of births and the forcible transfer of children from one national, ethnic, racial or religious group to another.

Turning to sexual and gender-based crimes, **GAD** observed that, while sexual violence is committed worldwide, it becomes exacerbated during conflict situations. Rape and other forms of sexual violence were recognised as being amongst the most serious crimes committed during war and armed conflict, thus making the Rome Statute "*one of the most solid documents codifying sexual violence*". The crimes of rape, sexual slavery, enforced prostitution, forced pregnancy, enforced sterilisation, gender-based persecutions, trafficking and other forms of sexual violence of comparable gravity were for the first time codified as war crimes, crimes against humanity and, in some cases, as possibly constituting genocide.

To end impunity for perpetrators and ensure justice for victims of SGBC, some specific areas should be highlighted:

I. investigation of such crimes should be an integral part of addressing any conflict;
II. unique challenges to the investigation and prosecution of SGBC include: identification and location of victims and witnesses; security and protection from perpetrators, their families and community; understanding the context within which the SGBC are committed and possible links with suspects (who are not necessarily the direct perpetrators); and difficulty in the collection of physical and forensic evidence (e.g., semen and DNA);
III. collecting sufficient evidence to prove the elements of SGBC calls for a multidisciplinary approach which includes social scientists, forensic experts, analysts, psychologists and investigators; and,
IV. courts and tribunals have a key role in developing jurisprudence in this area, e.g., the landmark decision in the Ntaganda case is an example of the intersection between two vulnerabilities, namely, child victims who are also victims of sexual violence, since the Appeals Chamber ruled that international humanitarian law does not contain a general rule which categorically excludes members of an armed group from protection against crimes committed by members of that same armed group.

CHRISTINE ALAI

Head of Office, Physicians for Human Rights (Kenya)

Christine Alai (CA) began by explaining "*Forensic Investigation of sexual and gender-based violence*". Physicians for Human Rights (PHR), is set against the current social and political backdrop. Existing systems, legal and institutional frameworks, determine states' ability to fulfil their complementarity obligations. National crimes present unique challenges, in that their investigation and prosecution come up against the prevailing cultural climate, something she described as "*the continuum of discrimination*". The gruesome nature of sexual and gender-based violence (SGBV), which includes things such as gang rape and repeat violations, set it apart, something that is further compounded by the breakdown in law and security, especially in cases where state employees are involved. Although Kenya has a progressive Sexual Offences Act, there has been relatively little progress in translating this into accountability.

"*What then is forensic evidence and what is its value?*", she asked. It is evidence obtained through science, including medicine, for use in criminal/legal proceedings to prove a connection: and, while forensic evidence is neither strictly necessary nor even indispensable, it nonetheless helps provide compelling evidence because it is the strongest, least contested type of evidence available. Moreover, it can help show the use of force, penetration, etc., and thus supports survivors' chances of obtaining justice. The entry point for intervention is when medical care is required for SGVB victims. Her organisation seeks to ensure that physicians have the necessary skills to collect, document and preserve evidence. PHR did not do anything "*extra*": it merely showed hospital staff how to go about handling and storing evidence to achieve accountability.

The evidence required goes beyond genital anal injuries and DNA: for instance, a broken hymen is not proof per se, and "*sperm gets lost within hours whereas an injury, scar, bruise lasts longer*". Physicians are therefore encouraged to collect evidence of violent injuries and psychological evidence, e.g., in the recent, precedent-setting case in the DRC, 37 children were successfully shown to have been raped by militia over time. Here, PHR-trained physicians had collected psychological evidence in the absence of physical evidence.

Hence, the ultimate aim is to enhance preparedness, extend training to all parties (including judges!) and achieve "*multisector pollination*".

BETTY KAARI MURUNGI

AGJA Member, Independent Consultant on Transitional Justice and Human Rights

"*Challenges facing vulnerable groups in conflict-affected situations*". In discussing the challenges, **BKM** said she would list these under five "*broad points*":

I. as a group, "*women are not inherently vulnerable*". They can be agents for good and bad. On the one hand, there are perpetrators/social actors who promote conflict and who happen to be women; on the other hand, women are first responders when it comes to providing for their families and will thus talk to rebels. It is therefore children and the elderly who are inherently vulnerable;
II. conflict changes everyone's circumstances. Vulnerability arises from conditions in war and/or conflict which result, among other things, in displacement and the sprouting of displaced persons camps. Such persons' vulnerability increases, with women often being forced to

assume new gender roles, becoming the head of the household, ensuring a livelihood and even setting up schools (e.g., Sierra Leone);

III. the type of violation that occurs usually takes the form of rape and sexual violence. Thanks to the headway made by the ICTR, the wording adopted in the ICC Statute covered abduction, sexual enslavement and enforced conscription, all of which, warned **BKM**, "*is happening today!*";

IV. vulnerability is increased by pre-existing inequalities, e.g., in Kenya, there is still discrimination against women despite the law. Furthermore, victims face a lack of legal remedies, an absence of medical care, the twin threat of stigma and ostracism, delays, weak or non-existent institutions, and a general lack of support for victims; and,

V. it is necessary to recognise the role of judges –in the form of judicial activism- and the need to work with investigators (i.e., the police) and prosecutors, with the aim of support them and not undermining their work. Similarly, collaboration with other actors is also called for.

"Institutional and penal reform needs to be the mantra."

BETTY KAARI MURUNGI

q&a

Remedies

BKM: "*The judicial measure most prized by women victims is reparations, to enable them to move forward. Retributive justice does not work for them.*" Women want to be part of the design of such programmes, "*they don't just want a pot of money!*"

Retraumatisation

CA: The judicial standard of evidence places survivors in a very vulnerable position. If physicians did "*a good job*" at the outset, this would avoid the need for the police to repeat the whole procedure. However, this required trust.

GAD: The person who elicits evidence of SGVB must be equipped to do so and must apply the right interviewing model and technique. It is important to provide psychological support for victims, because without that support, the necessary evidence will not be gathered

Victims of both sexes

CA: Men and women are both potential victims but before this can be satisfactorily addressed certain societal barriers will have to be broken down.

BKM: People are beginning to speak about this issue. The reason for SGBV is the same as that for attacking any community, i.e., a desire to destroy the community's ability to procreate.

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

Media

CA: The media are a key ally. There is a need for the media "*to dig deeper*" and find out, for instance, why certain cases have not been brought to court.

BKM: Some measures seek to maintain hearings in camera but in Sierra Leone, the women did not want this. Instead they wanted to testify and talk about their experience. There is also a need to work with non-traditional mechanisms, such as churches.

Accountability

CA: The questions were all interconnected. "*Accountability is not about some specialised unit in the DPP but about a mechanism that the state is obliged to put in place.*" There's a real distinction between gunshot and rape, and it is the factors that make sexual violence different which are responsible for the challenges. For many victims, "*rape means that their lives are over*". Hence, her organisation has brought an action against the Kenyan State in respect of post-election SGBV, alleging the State's failure to prevent violence, to protect civilians from attacks (including sexual violence), to conduct meaningful investigations, and to provide reparations.

CLOSING REMARKS

BETTINA AMBACH

Director, Wayamo Foundation, Berlin

In bringing the day to a close, **BA** firstly expressed her thanks to the public and panellists alike. She was "*happy about the day*" and gratified to hear about Kenya's commitment to international criminal justice. There was plainly a need, not only for the different layers to co-operate and collaborate, but also for an in-depth analysis of the linkages between international and transnational organised crimes. The "*judges' panel*" had graphically highlighted the challenges being faced by the judiciary, and the final panel had left no doubt that the problems posed by SGVB required a multi-sectorial approach.

NAVI PILLAY

AGJA member and former UN Commissioner for Human Rights

NP stressed the "*visible presence of the AGJA*" at the symposium, and the Group's willingness to do everything it could to engage with governments at the national, regional and international level. Lastly, she wanted to express her appreciation for the chance to hear directly from the public.

Notes:

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