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INTERNATIONAL JUSTICE IN MOTION

Perspectives from the courtroom and beyond



The Wayamo Foundation and the Rule of Law Programme for Sub-Saharan Africa of the Konrad Adenauer Stiftung are proud to present a video gallery featuring judges and experts who address the problem of how to achieve justice and accountability for international and transnational organised crimes. This video gallery affords an opportunity to reflect on and discuss the challenges of adjudicating cases involving these crimes in Africa.

The expert participants in *International justice in motion* examine the opportunities and challenges involved in adjudicating complex international crimes, whether prosecuted as international crimes, transnational organised crimes (such as terrorist offences), or ordinary domestic crimes.

This virtual gallery brings together judges from international and domestic courts, along with some senior international prosecutors.

Participating experts reflect on issues relating to judicial independence and the rule of law in the adjudication of cases concerning international crimes. This is a persistent and central concern in efforts to address international crimes. Consideration of judicial independence is particularly important in this context because these crimes are often committed as part of political or armed struggles involving governments. Such crimes will thus typically be committed either by state agents or their non-state adversaries.

Watch all the interviews at
internationaljusticeinmotion.wayamo.com

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Fatou Bensouda

Former Prosecutor of the International Criminal Court

Dr. Fatou Bensouda of The Gambia served as Prosecutor of the International Criminal Court (ICC) for nine years, from 2012 to 2021, having been elected to the post by consensus of the Assembly of States Parties on 12 December 2011 and sworn in on 15 June 2012.

Between 1987 and 2000, Mrs. Bensouda successively held the posts of Senior State Counsel, Principal State Counsel, Deputy Director of Public Prosecutions, Solicitor General and Legal Secretary of the Republic, and Attorney-General and Minister of Justice, in which capacity she served as Chief Legal Advisor to the President and Cabinet of The Republic of The Gambia. She has also served as a General Manager of a leading commercial bank in The Gambia.

Her international career as a non-government civil servant formally began at the UN International Criminal Tribunal for Rwanda, where she worked as a legal adviser and trial attorney before rising to the position of Senior Legal Advisor and Head of the Legal Advisory Unit in the years from 2002 to 2004, after which she joined the ICC as the Court's first Deputy Prosecutor.

Mrs. Bensouda has served as delegate to United Nations conferences on crime prevention, the Organization of African Unity's Ministerial Meetings on Human Rights, and as delegate of The Gambia to the meetings of the Preparatory Commission for the ICC.

Mrs. Bensouda has been the recipient of numerous awards, including the distinguished ICJ International Jurists Award (2009) presented by the then President of India P. D. Patil, and the 2011 World Peace Through Law Award presented by the Whitney Harris World Law Institute, Washington University, which recognised her work in advancing the rule of law and thereby contributing to world peace. In October 2021, at the end of her mandate, she was awarded The Outstanding Achievement Award by The International Law Association American Branch.

She is the recipient of honorary doctorates from Middlesex University and Vrije Universiteit, Brussels respectively, and holds a Master of Laws from the International Maritime Law Institute in Malta, making her The Gambia's first expert in international maritime law and the law of the sea.

Mrs. Bensouda has been listed: by Time magazine as one of the 100 most influential people in the world (2012); by the New African magazine as one of the "Most Influential Africans" by Foreign Policy as one of the "Leading Global Thinkers" (2013); and by Jeune Afrique as one of 20 African women who, by their actions and initiatives in their respective roles, advance the African continent (2014).

Independence and the rule of law are cardinal principles for the International Criminal Court (ICC), Fatou Bensouda says. As Chief Prosecutor of the ICC, she took this seriously, and insists that she was solely guided by the evidence, even if she was aware of the political contexts and conflicts in which the alleged crimes being investigated by her Office, had taken place. She was guided by whether the crimes under the Rome Statute

had been committed, and acted strictly on the basis of the ICC's legal mandate.

While Bensouda admits that pressure was applied in various cases before her at the ICC, she asserts that she was never influenced by it. In the case of Darfur, for instance, there was an African Union resolution seeking to bar cooperation with the ICC, and there

were African Union delegations sent to communicate that the ICC was targeting African leaders. Bensouda tried to explain that she was an African and what happened in Africa was important to her, and that she would never put Africa in a position where justice was misplaced: she applied the law strictly. Outside Africa, the Court experienced even more pressure, which she described as being even more “violent”. This included pressure exerted in the Palestine and Afghanistan situations, as well as the Executive Order which placed sanctions on the ICC, Bensouda herself and other ICC staff. She feels it is “really fortunate” that NGOs stood up and said that the ICC and the Prosecutor could not be sanctioned. States Parties helped too, though, according to Bensouda, some were too afraid of having ties with the USA destroyed for standing up for the ICC. The whole ordeal not only showed the “fragility of the Court”, but also the need for states to defend the institution that they created. She also claims that she has received public and private threats for her work in Palestine, but again, all she and her team did was follow the law.

“**People usually would ask whether there was pressure applied or whether I was kind of swayed because of pressure. I always say ‘there was pressure’, definitely, but the important thing is that that pressure should not make me act or not act, and this I ensured did not happen under my watch.**

Fatou Bensouda



Turning to the subject of human trafficking, Bensouda says that for three years or more she informed the UN Security Council that she was prioritising the investigation of this crime, and took steps to do just that at the ICC, as well as engage with states to stop the practice. She had a team exploring how best to work together with other states on this matter and what could be done. Tackling crimes against migrants requires more than just the Court, however: it needs various actors working and collaborating together.

Bensouda believes that Africa has played a role in shaping international criminal justice and that the field has had an impact in Africa. She stresses that African states have embraced the ICC more than any other regional block. Yet, while states have the primary responsibility to investigate and prosecute crimes, the legislation that would allow most States Parties to investigate or prosecute international crimes in domestic systems is simply *“not there”* or needs further development.

Bensouda stresses that victims deserve justice and that for many, their hope of justice is only in the ICC. More cooperation with other mechanisms, including regional ones, is necessary, with the sole goal of ensuring that justice is done.

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You will not forget the time there was this movement to have a mass withdrawal from the African continent. This was a propaganda, which the ICC could not even defend because we neither had the resources nor the reach. We had to do a lot of work to explain and to show that it is not because of politics that we are working.

Fatou Bensouda

As regards her future plans, Bensouda had this to say, *“I don’t know if I can leave the justice world. It’s just something in me. It’s innate”*; and even if she did step away, she does not think she would go very far. Other than that, she is looking forward to returning to The Gambia and contributing wherever she can, but then again, she feels sure that she will never be *“too far away from justice.”*





Richard Goldstone

Former Justice at South Africa's Constitutional Court
Founding Chief Prosecutor of the United Nations International Criminal Tribunals for Rwanda and the former Yugoslavia
Member of the Africa Group for Justice and Accountability

Richard J. Goldstone graduated from the University of the Witwatersrand with a BA. LLB. cum laude in 1962. After practising as an Advocate at the Johannesburg Bar, he was appointed Senior Counsel in 1976, made Judge of the Transvaal Supreme Court in 1980, and appointed Judge of the Appellate Division of the Supreme Court in 1989. From 1991 to 1994, he served as Chairperson of the Commission of Inquiry regarding Public Violence and Intimidation, which came to be known as the Goldstone Commission. From July 1994 to October 2003, he was a Justice of the Constitutional Court of South Africa, where he played a major role in the transition from apartheid South Africa to democracy. He is a member of the Africa Group for Justice and Accountability, an independent group of senior African experts on international criminal law and human rights, including political figures, members of international and domestic tribunals, and human rights advocates that came together in November 2015 to strengthen justice and accountability in Africa.

From August 1994 to September 1996, he served as the Chief Prosecutor of the UN International Criminal Tribunals for the former Yugoslavia and Rwanda. He has served as an expert in several commissions, high-level groups and task forces, including the International Independent Inquiry on Kosovo, the International Task Force on Terrorism, the Investigation into the Iraq Oil for Food Programme and the UN Fact Finding Mission on possible war crimes and international human rights violations committed in Gaza between December 2008 and January 2009. On 6 December 2019, he was appointed by the ICC Assembly of States Parties to the Independent Expert Review of the International Criminal Court and the Rome Statute System. As Chair of the Review, he led a team of eight other experts mandated to make recommendations on reforms to the Court.

Goldstone received the 1994 International Human Rights Award of the American Bar Association, the 2005 Thomas J. Dodd Prize in International Justice and Human Rights, and the 2009 MacArthur Award for International Justice, announced by the John D. and Catherine T. MacArthur Foundation. He is the author of *"For Humanity: Reflections of a War Crimes Investigator"* (2001), and the co-author of *"International Judicial Institutions: the Architecture of International Justice at Home and Abroad"* (2008).

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The rule of law is fundamental to democracy and without the independence of judges and prosecutors there cannot be a rule of law.

Richard Goldstone

In this wide-ranging interview, Justice Richard Goldstone begins by reflecting on the role of judges during apartheid South Africa. He observes that the *"rule of law is fundamental to democracy"* and that the independence of judges and prosecutors is essential to the rule of law. Even under apartheid, Goldstone comments, some judges were independent, and as such were able to identify loopholes



to enable them to rule in favour of equality and against racial discrimination. With respect to the International Criminal Court (ICC) and its relationship with Africa, Goldstone notes the persistent allegations of bias but claims that these are largely the result of perceptions rather than reality. He stresses the fact that the ICC opened most of its investigations into situations in Africa after being asked by African states to do so. He stresses the importance, among other things, of states domesticating the Rome Statute and holding perpetrators of international crimes to account domestically as a means of “protecting” themselves from the Court exercising its jurisdiction. Goldstone does, however, observe that the ICC has been criticised for being an inefficient body. He points out that an independent expert group, of which he formed part, was set up last year to study the Court’s operations and put forward recommendations on how its functioning could be improved. Many of these recommendations have already been adopted and he therefore feels optimistic that the group’s other recommendations will likewise be implemented. With a more efficient Court, African states could, he concludes, use the ICC to bring about justice for its own people.

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It is important for all countries, not only members of the Rome Statute, to domesticate international crimes to protect themselves from the jurisdiction of the International Criminal Court if domestic prosecutions are brought against suspects before the International Criminal Court.

Richard Goldstone



Akua Kuenyehia

Former First Vice-President and Judge of the International Criminal Court
Former Law Dean of the University of Ghana

In February 2003, H.E. Judge Kuenyehia was nominated by the Government of Ghana and elected as judge of the International Criminal Court, where she served in various capacities until 2015.

H.E. Judge Kuenyehia obtained her first degree from the Faculty of Law, University of Ghana, Legon. She then attended Somerville College, Oxford University, where she obtained a BCL, and shortly thereafter became the first female to be appointed as a law professor at the University of Ghana. While at the university, she taught criminal law, gender and the law, international human rights law and public international law.

She is a Barrister and Solicitor of the Supreme Court of Ghana and has extensive experience as a solicitor, advocate, and law teacher. Judge Kuenyehia served as Dean of the Faculty of Law of the University of Ghana for seven years before her election to the International Criminal Court. Outside the university sphere, she has, among other things, been a member of the UN Expert Committee of the Convention on the Elimination of all Forms of Discrimination against Women, the Council of Cape Coast University, and the Board of Directors of Barclays Bank, Ghana Limited. Judge Kuenyehia has also taught as a visiting professor at other institutions, including Leiden University, and Temple University in the USA. She is the President of Mountcrest University College, Ghana. She has been a pioneer as an advocate of equal opportunity, justice and development for women, both in Ghana and around the world. She is co-author of a textbook on Women and Law in Sub-Saharan Africa, published in August 2003, and in 2018, co-edited *“International courts and the African woman judge: unveiled narrative”*, a study on gender and judiciary in Africa. The Akua Kuenyehia Foundation, which was founded by her children in her honour, is a private foundation committed to the development and empowerment, through formal education, of women in Ghana.

On the matter of judicial independence, Kuenyehia states that the judiciary is totally independent from other branches and that judges work in accordance with their *“conscience and the law”*. Reflecting on her own experience, Kuenyehia maintains that she has never experienced an attempt to influence her work as a judge.

With respect to allegations of ICC bias against Africa, she says that this was the result of African states referring themselves to the Court, and adds that there is a lack of understanding of what the ICC was doing when referrals were made to it by states such as Uganda and the Central African Republic. Kuenyehia feels that states should work to build strong justice systems that are independent and that, if this is done, then international

“**The Rome Statute clearly says that if a country has a judicial system that is capable of dealing with international crimes, then the ICC doesn’t have to come in.**”

Akua Kuenyehia

crimes can be dealt with domestically rather than at the ICC.

Reflecting on the ICC's history, Kuenyehia observes that African states have contributed greatly, from the earliest days of the institution's evolution, and that they continue to be the largest regional block of States Parties. It was only when former Sudanese President, Omar al-Bashir, was targeted with a warrant that problems arose. Indeed, the warrant was the outcome of the United Nations Security Council referring Darfur to the ICC and, furthermore, Bashir was not above the law ...nobody is above the law! Even so, these developments strained relations between the ICC and the African Union. Nevertheless, Kuenyehia says that Sudan seems to be prepared to surrender Bashir to the ICC, and that the more the Court is able to hold fair and transparent trials, the more support it will garner as an institution doing its part to address impunity for international crimes.

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The Sudanese are prepared to transfer Bashir to the ICC for necessary prosecution. I believe that as the Court progresses and demonstrates its ability to hold fair and transparent trials, people will come round to see this is a credible court doing its bit to help deal with the issue of impunity, not just in Africa but in the whole world.

Akua Kuenyehia





Betty Murungi

Transitional Justice expert and Advocate of the High Court of Kenya
Member of the Africa Group for Justice and Accountability

Member of the Africa Group for Justice and Accountability, Kaari Betty Murungi is an advocate of the High Court of Kenya with over 30 years' experience in the practice of law at a national, regional and international level. Educated at the University of Nairobi and Kenya School of Law, she spent a year as a visiting fellow at the Harvard Law School's Human Rights Programme, researching transitional justice mechanisms. She is currently Professor of Practice in the Centre for Gender Studies at the University of London's School of Oriental and African Studies, and works as an independent consultant.

Ms. Murungi has broad experience in transitional justice processes, women's human rights, gender, constitutionalism and governance. Over the past two decades, the focus of her interest and work has been to advance gender justice in international justice and accountability mechanisms, and to promote women's human rights in the context of violent conflict. Ms. Murungi has worked on these issues in Sierra Leone, Rwanda, Northern Uganda, South Sudan and Kenya. She has been an integral player in the jurisprudence of international criminal law and international humanitarian law insofar as it pertains to gender.

Ms. Murungi served: as Vice Chairperson and Commissioner to the Kenya Truth Justice and Reconciliation Commission (2009-2010); as the Africa representative on the Board of Directors of the Trust Fund for Victims at the International Criminal Court (2009-2013); as Senior Transitional Justice Advisor to the Joint Monitoring and Evaluation Commission (JMEC), South Sudan (2016-2018); and, as a member of the Independent Commission of Inquiry for the Occupied Palestinian Territory appointed by the United Nations Human Rights Council (July 2018- March 2019). She is a member of the Africa Group for Justice and Accountability, an independent group of senior African experts on international criminal law and human rights, including political figures, members of international and domestic tribunals, and human rights advocates that came together in November 2015 to strengthen justice and accountability in Africa.

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What everyone would want to see is the precedents set in the ICTR being utilised in national courts, which we haven't seen as much as we would have wanted to see, especially in our part of the world.

Betty Murungi

Asked about how to achieve justice for gender crimes, Betty Murungi says that it is important to focus on international crimes because gender crimes “do not occur in a vacuum” but rather in connection with broader contexts of violence, including conflicts, and the commission of other crimes. Still, there are practical and legal challenges in addressing such crimes. For example, in times of conflict, there are many perpetrators and victims, and it is unlikely that victims will be found where crimes have been committed because they are often forced to flee. The number of crimes –and victims– can be enormous. In many cases, there are also no institutions or courts to address these crimes,



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The will to investigate and prosecute remains a challenge. Even where you have criminal justice institutions and prosecuting authorities, you do not have the will to prosecute because, most likely, the armies or the militias or the people that are implicated in the commission of the crimes, are still in power. So, obviously there is no willingness to prosecute their own, even if they could.

Betty Murungi

or those that do exist have been decimated or lack capacity. Legal challenges also persist, though many are not unique to conflict situations: even members of the Rome Statute of the International Criminal Court (ICC) have not adopted all the relevant norms and standards which lend themselves to the adjudication of gender crimes. Moreover, there is often a lack of willingness to prosecute such crimes, in part because the armies or militias that are implicated, retain power.

Murungi also mentions a recent class action case relating to sexual violence perpetrated in the context of Kenya 2007/08 post-election violence, and the claimants success in court. She underlines its importance as the result of a collective, victim-centred effort. The ruling of the court, according to Murungi, is that the victims are entitled to some form of compensation, something that she believes is of great significance for advancing accountability for both gender crimes and victims. She also believes that it will bring about policy reflections, given the failure of the state to protect the victims who brought forward the case.

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The International Criminal Court is a court of last resort. It was never intended to be a court of first resort. The courts of first resort are the national courts. Our judges, our prosecutors, our lawyers, they are all trained in international law. It's not as if it's nuclear science. It's something they should be able to do. However, the willingness is what is lacking.

Betty Murungi

On the legacy of the International Criminal Tribunal for Rwanda, Murungi says it is relevant in Africa and beyond, highlighting the fact that it had expanded the definition of rape. The *Akayesu* case's treatment of the subject was extremely important, including its assessment of the element of coercion when it comes to the commission of rape in the context of genocide. Murungi notes that it has inspired subsequent jurisprudence as well as the ICC's definition of rape as an act of genocide.

When thinking about the relationship between peace and justice, Murungi feels that it is important to recognise that many accountability mechanisms are born of peace agreements, such as the Special Court for Sierra Leone. She also speaks about ongoing developments in relation to peace and justice in South Sudan, including the establishment of a truth commission and a hybrid court to investigate and prosecute international crimes in the country. Murungi insists, however, that it is not simply about establishing a court but rather thinking about how to sequence different transitional justice mechanisms.

Murungi stresses that national courts are the courts of first resort, even on issues of international crimes, and should exercise jurisdiction over their own citizens. Yet she makes the point that there is often a lack of

willingness to prosecute atrocities. In addition, there is the whole question of independence and the need for adequate resources, if international crimes are to be effectively investigated and prosecuted.

Murungi concludes that the future of international justice looks “bleak” because of what she sees as a widening of the impunity gap and an increase in non-conventional armed conflict. This has transpired, she says, in spite of the creation of the ICC and the specialised mechanisms that have been established around the world. There needs to be a recommitment by States Parties to these international instruments, in order to localise international norms and standards in their own countries. To her way of thinking, this is the “missing link” that must be put in place.





Elizabeth Ibanda Nahamya

Judge of the International Residual Mechanism for Criminal Tribunals

Elizabeth Ibanda Nahamya is a judge at the United Nations International Residual Mechanism for Criminal Tribunals, a position she has held since 22 March 2018. She served as a distinguished judge at the International Crimes Division of the High Court of Uganda from 2009 to 2017. In 2013, she was listed on the roster of eminent judges for the Residual Special Court for Sierra Leone.

Justice Nahamya began her legal career in Uganda, where she worked as a lawyer in private practice, with a short stint at the Ministry of Justice. She subsequently went on to establish her own private law practice, where she worked from 1993 to 1996. After acting as Trial Chamber Coordinator at the UN International Criminal Tribunal for Rwanda in Arusha from 1996 to 2004, she served as Principal Defender and later Deputy Principal Defender at the Special Court for Sierra Leone, between 2004 and 2008.

Justice Nahamya has lectured at the Ahmadu Bello University Kaduna State Nigeria, National University of Lesotho, and Law Development Centre in Uganda. In addition to her work with the Central Bank of Lesotho, she has acted on a consultancy basis for a number of organisations, including the Ministries of Finance and Justice in Uganda, and the World Bank.

She has a Masters degree in Criminal Justice from the University of New Haven, CT (1980), a Bachelor's degree from Makerere University Kampala, Uganda (1975), and several professional certifications.

The International Residual Mechanism for Criminal Tribunal (ICRMT) took over from the international tribunal for Rwanda and the former Yugoslavia tribunals when they concluded operations. Asked about the legacy of these courts, Nahamya described it as *“rich jurisprudence, which I would call a repository of one of*

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The rich jurisprudence of the ICTR and ICTY is a repository of one of the most extensive and developed sources of international criminal law, international criminal procedure, and evidence relating to the adjudication of international crimes.

Elizabeth Ibanda Nahamya

the most extensive and developed sources of international criminal law, international criminal procedure, and evidence relating to the adjudication of international crimes.” Nahamya notes that this jurisprudence has been and will continue to be used by domestic, regional and international courts, and that the ICRMT has lessons on how sentences can be enforced. Nonetheless, challenges remain for the ICRMT, specifically with respect to witness protection and the use of protected witnesses by other courts. Such witnesses can only be asked to testify in national courts with their consent. Moreover, some fugitives from the ICRMT remain on the run.

The crimes that the ICRMT investigates and prosecutes were perpetrated in the early and mid-1990s. Despite the time elapsed since then, justice must continue to be pursued. Nahamya stresses that doing so is a balancing act between fugitives alleged to have committed horrendous crimes being allowed to get off scot-free and victims who are still waiting to get justice.



Nahamya also discusses the relationship between other means of justice –including those focusing on reconciliation– and the ICRMT, as well as the challenges of addressing international crimes during her time at Uganda’s International Crimes Division (ICD), which, according to her, were numerous. They included, among others, questions about the applicability

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It is very hard to maintain judicial independence when powerful people are involved because you may not get the cooperation you need and you may be threatened. They should be tried by a neutral court, preferably outside the country or after they have left power and are no longer influential.

Elizabeth Ibanda Nahamya

of customary international law as well as amnesty provisions in the case of former Lord’s Resistance Army commander, Thomas Kwoyelo, whose case at the ICD is ongoing. That said however, *“Today, the ICD has rules of its own on the adjudication of international crimes”*.

On the subject of judicial independence in cases that involve powerful actors, Nahamya admits that this is a difficult matter: *“It is very hard to maintain judicial independence when they are involved because you may not get the cooperation you need and you may be threatened... They should be tried by a neutral court, preferably outside the country... or after they have left power and are no longer influential.”* While Nahamya has not personally felt pressure or influence, she insists that if she ever did, she would stick to her judicial oath and have no fear or favour.

Nahamya sees the future of prosecuting international crimes on the African continent *“bleak”*, given that even those states which hosted international tribunals do not have specialised courts to prosecute international crimes, and most states have not yet ratified the Malabo Protocol. There is a lack, she says, of political will and support for courts handling such cases.



Binta Nyako

Judge of the Federal High Court of Nigeria

The Honourable Ms. Justice B.F.M Nyako has been a Judge of the Federal High Court in Nigeria since July 2000. She began her legal career as a State Counsel with the Ministry of Justice, Kaduna State, in 1983.

Justice Nyako trained as a legal draftsman, obtaining the Commonwealth Fund for Technical Corporation Certificate of Legal Drafting in 1987. She worked as a legal draftsman from 1987 to 1992, rising through the ranks as she gained more responsibilities. She served as Solicitor General and Director General from 1989 to 1992, before moving to the Ministry of Agriculture in November 1993 as Director General. She thereafter served as Attorney-General and Commissioner for Justice between 1994 and 1996. Justice Nyako later became a member of the Local Government Council Election Appeal Tribunal, before rising to the position of judge. Justice Nyako is one of four judges who was assigned to the Boko Haram terrorism cases held in Wawa Cantonment, Kainji, in 2017 and 2018, and will also be part of the judiciary in the upcoming Kainji trials. She is currently presiding over the trial of Nnamdi Kanu, the leader of the Indigenous People of Biafra, a Biafran separatist organisation whose stated aim is to restore an independent state of Biafra in the old eastern region of Nigeria.

The Honourable Ms. Justice Binta Nyako is one of the four Nigerian Federal High Court judges who presided over the three mass trials of Boko Haram suspects held in 2017 and 2018. She refutes the contention that these trials failed to respect fair trial rights and due process, stating that the defendants were served with the charges and had the right to defend themselves in person or through legal counsel, the proceedings were conducted in a language that they understood, and the trial was public, despite the obvious restrictions imposed by the fact that the venue was located within a military camp. While the majority of the convictions were summary sentences for belonging to a terrorist

organisation and/or not divulging knowledge of the identity of suspected Boko Haram members, many of the suspects (800) were actually discharged due to lack of evidence.

Justice Nyako asserts that she was able to keep her integrity and independence intact throughout, even though she was dealing with terrorist trials. In her opinion, it is clear that trials are conducted on the basis of the facts placed before the court –and nothing else.

When it comes to charging terrorist offences, she does seem to be open to innovative approaches, saying, *“If somebody is terrorising people with sexual offenses, why not charge this person with acts of terrorism?”*

When asked about the International Criminal Court and Nigeria, she maintains that the Court is not there to profile Nigeria in any negative way, but rather to assist Nigeria which is going through a challenging time.

With respect to the future trials of Boko Haram suspects, she has no hesitation in prioritising the need for expeditious trials, *“which”*, she maintains, *“will help dislodge the idea of human rights abuses”*. Indeed, she

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We conducted trials, we handed down sentences and we released a large number of people. To my greatest surprise, a lot of these people are still in Kainji.

Binta Nyako



can see no real obstacle to the creation of special courts designated to deal with all the terrorism suspects, as it is evident that *“we need to do the trials fast and on a permanent basis”*.

She also realises how vital it is that prosecutors work with investigators as early on in the proceedings as possible, as it is only a trained prosecutor fully conversant with the finer details of an offence who can explain to an investigator what the latter should be looking for.

She ends on a slightly critical note, describing how she and her fellow judges conducted the trials in 2017 and 2018, handed down sentences, and released a large number of people, only to be informed recently that many of these same people were still in Kainji. Mentioning the role of the Attorney-General's Office in these kinds of law-enforcement operations, she concludes by saying, *“We cannot shy away from our responsibility”*.

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The ICC does not want to profile
Nigeria in any negative way;
it wants to assist the country
because we are having a difficult
time and need all hands-on deck.**

Binta Nyako



Susan Okalany

Judge of the International Crimes Division, High Court of Uganda

Lady Justice Susan Okalany is a judge of the High Court of Uganda following her appointment to the Bench in 2016. She currently serves in the International Crimes Division of the High Court. She graduated with a Bachelor of Laws from Makerere University in 1992 and received a Diploma in Legal Practice from the Law Development Centre in Kampala, Uganda, the following year. She thereafter worked in international and private organisations, before joining the State Attorney's office in Uganda, where she served in various districts across the country. She later joined the Directorate of Public Prosecutions in roles of increasing responsibility, including Head of the Department of Gender, Children and Sexual Offences, and lead prosecutor on the Kampala Bombings case. In recognition of her role in this case, she received the *Prosecutor of the Year Award* from the International Association of Prosecutors in 2017.

In June 2020, Lady Justice Okalany was shortlisted as one of four contenders to take over as Prosecutor of the International Criminal Court by the Committee on the Election of the Prosecutor.

As a judge at the International Crimes Division (ICD), Susan Okalany notes that the Division has faced many challenges, chief among which is a lack of resources to investigate, prosecute, and adjudicate international crimes. This has hampered ICD proceedings, including that of former Lord's Resistance Army (LRA) commander, Thomas Kwoyelo. Okalany says that the fact that Kwoyelo has constantly awaited trial is *"unfair"* and that *"justice delayed is justice denied."* Furthermore, while witness protection is crucial, it likewise requires adequate resources; without a robust witness protection programme, the orders of the court risked being *"empty"*. With respect to the Rome Statute of the International Criminal Court, Okalany notes that it has been domesticated but that expertise on the matter must be further developed and built. Asked whether she had ever personally experienced undue influence as a legal officer, Okalany said that she herself had not faced direct pressure but that indirectly she had noted that there were attempts to influence the judicial sector. In order to resist such pressure, Okalany says that legal officers must conduct themselves without fear or favour, and the justice system must be adequately funded. In light of her work at the ICD, Okalany believes the subject of linking international and transnational crimes is crucial: for example, she bemoans the fact

“**It is now becoming common that perpetrators of international crimes cross borders where they also partake or participate in other transnational crimes and terrorism, so linking international and transnational crimes at the earliest possible during the investigations is relevant.**

Susan Okalany

that Sudan's role in providing assistance to the LRA did not receive greater scrutiny during Kwoyelo's case. Trafficking of various kinds needs to be linked to international crimes at the earliest possible time, she concludes. Unfortunately, there is no relationship between the ICD and regional courts, although there is some relationship with the ICC, including training programmes. Okalany considers many other subjects relevant to the investigation and prosecution of international crimes before turning to how she views the future. She says that she is *"always optimistic"*, observing that the judiciary's budget was increased this year, and that if money trickles down to the ICD, it could promote the adjudication of international crimes in Uganda and abroad.

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Every judicial officer must stick to the oath that they made that they will execute justice without fear or favour.

Susan Okalany





Mohamed Chande Othman

Former Chief Justice of Tanzania
Member of the Africa Group for Justice and Accountability

Mohamed Chande Othman is a former Chief Justice of Tanzania, a position he held from 28 December 2010 to 18 January 2017, after stints as both a High Court and Appeal Court Judge. He currently holds the following posts: Chancellor of Ardhi University, Tanzania; Chairperson, Council of Sokoine University of Agriculture and Applied Sciences; member of the Board of Trustees, The Aga Khan University; member of the Elders Council of the African Judges and Jurists Forum; and, member of the Africa Group for Justice and Accountability, an independent group of [senior African experts](#) on international criminal law and human rights, including political figures, members of international and domestic tribunals, and human rights advocates that came together in November 2015 to strengthen justice and accountability in Africa. Aside from acting as one of the Special Advisers (without portfolio) to the Prosecutors of the International Criminal Court, Othman also serves as an Eminent Person, appointed by the UN Secretary-General under a UN General Assembly mandate and charged with the examination of new information relating to the tragic death on 17-18th September 1961 of the 2nd UN Secretary-General, Dag Hammarskjöld, and other members of his party. In 2019-2020 he acted as one of nine experts appointed by the Assembly of State Parties to the Independent Expert Review of the International Criminal Court and the Rome Statute System.

Justice Othman's previous experience includes that of Prosecutor General of East Timor, Chief of Prosecutions of the International Criminal Tribunal for Rwanda (ICTR), and Senior Legal Adviser to the Prosecutor of the ICTR. He has also served as a member of the UN Human Rights Council's High-Level Commission of Inquiry into the Situation in Lebanon following the Israel-Lebanon Armed Conflict in 2006, and as the UN Human Rights Council's Independent Expert on the human rights situation in the Sudan (2009-2010). In addition, he has also worked with the International Federation of the Red Cross and Red Crescent Societies.

His publications include books and peer-reviewed articles on international humanitarian law, refugee law, criminal law and evidence, and peacekeeping.

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Giving victims a voice is an important aspect of the ICTR's legacy. They were able to come and tell their story.

Mohamed Chande Othman

Mohamed Chande Othman calls the creation of the International Criminal Tribunal for Rwanda (ICTR) a watershed moment and says that twenty-seven years later, it has left a tremendous legacy. Among other things, it contributed to the fight against impunity, particularly in the context of Rwanda where it helped to put an end to the cycles of violence which contributed to the onset of the 1994 genocide. It also gave a voice to victims, with over 3,000 testifying in seventy-five trials over the course of thousands of hours. They were able to tell their story. Chande Othman further cites state cooperation and the court's jurisprudence as key facets of the ICTR's legacy. He also notes that the ICTR transferred cases to Rwanda, which had an influence on the national justice system there.

Challenges continue to face judiciaries in Africa. Among these, Chande Othman singles out access to justice, resource limitations, and capacity development. Protecting judicial independence and the rule of law requires some stress on having highly qualified judges, and thus it is important that the process for nominating, election, and selection of judges is merit-based, competency-based and transparent. This is something, Tanzania has worked on. The judiciary must also be functionally and structurally independent in order to be able to operate impartially and independently.

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A qualified judiciary, one of quality, of competence, is able to protect its own independence. But when judges are elected for other considerations, then the propensity for influence is much higher.

Mohamed Chande Othman



While Chande Othman says that he has not faced direct pressure personally, he freely acknowledges that attempts to exert indirect influence are made in sensitive or public interest cases, such as those concerning electoral or constitutional disputes. He claims that it is possible to insulate oneself from such pressures, by, among other things, expeditious disposal of difficult or contentious cases.

Chande Othman foresees the future of international criminal law in Africa as being in domestic prosecutions

of international crimes, in reinforcement of complementarity, and, to a lesser degree, in regional efforts. He notes that the Malabo Protocol is still a long way from being adopted, since states have not yet ratified it: state commitment is needed for regional mechanisms to operate. He is nonetheless hopeful about domestic bodies, such as the International Crimes Division in Uganda. Moreover, many other transitional justice mechanisms can be envisaged to ensure that there are overlaps between the pursuits of peace and justice.



Howard Varney

Senior Programme Adviser at the International Centre for Transitional Justice and Advocate at the Johannesburg Bar, South Africa

Howard Varney is a senior programme adviser at the International Centre for Transitional Justice (ICTJ). His areas of expertise includes investigations, prosecutions, institutional reform and reparations. He is also an advocate at the Johannesburg Bar where he practices public interest and constitutional litigation. Varney is a member of Asia Justice & Rights' International Board of Advisers. He is a faculty member of the Geneva Academy of International Humanitarian Law and Human Rights and a member of the London-based Guernica 37 International Justice Chambers.

In the early 1990s, Varney was an attorney with the Legal Resources Centre in South Africa, where he represented victims of political violence in public interest litigation, judicial inquests, and commissions of inquiry. In the mid-1990s he led an independent criminal investigation in South Africa into organised political crime, which resulted in significant criminal trials. He was the Chief Investigator for the Sierra Leone Truth and Reconciliation Commission and has worked with several truth commissions around the world.

As a consultant for ICTJ he has assisted with the development of transitional justice initiatives in several countries in Africa, Asia, the Middle East, the Americas, and the Balkans. He continues to represent victims of past conflicts in the courts of South Africa to vindicate their rights. He has published papers and articles on truth and reconciliation commissions, commissions of inquiry, post-conflict justice, amnesties, the relationship between war crime tribunals and truth commissions, small arms control and guarantees of non-recurrence.

Howard Varney starts by discussing his work on the case of Hoosen Haffajee, an anti-apartheid activist who was tortured and died in security detention in 1977. Varney states that in early 2022, he will present closing arguments in the case. He also refers to the paucity of apartheid-related cases, and the lack of trials arising from the Truth and Reconciliation Commission's recommendations relating to those individuals that the Commission believed did not warrant amnesty and should instead face trial.

Citing pressure among legal officers, Varney says that, regrettably, these trials have not proceeded. This, he claims, is due to political interference, of which there is a great deal. He adds that he and others have been trying to persuade the authorities to prosecute perpetrators for apartheid as well as crimes against humanity. Until yesterday, these efforts had been unsuccessful, but now

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We have been trying very hard to persuade the national prosecuting authority to amend some of these indictments to include crimes against humanity under customary international law.

**– on prosecuting apartheid-era crimes
in South Africa**

Howard Varney



the Director of Public Prosecutions in Johannesburg has agreed to indict two perpetrators accused of murder and crimes against humanity, under customary international law, in relation to apartheid-era crimes.

On the subject of judicial independence and the rule of law, Varney feels that courage is needed in the face of attempts to pressure prosecutors. He accepts that this may place prosecutors at risk, sometimes significantly so. He adds that civil society should protect judges and prosecutors, and insists that the judiciary and prosecution services are meant to be independent and act free of interference. Moreover, Varney claims that where there are encroachments on judicial independence, these should be litigated in higher, apex courts.

Finally, Varney sees the future of international criminal justice in Africa as uncertain but feels that there is some cause for hope, even as regards the prosecution of apartheid-era crimes as crimes against humanity,

something that appears to be in underway. He is of the opinion that in The Gambia, the energy for justice suggests that international crimes will be prosecuted by a relevant mechanism.

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It is correct to say that prosecutors and judges on the continent of Africa are facing considerable political pressure. Indeed, this isn't just a phenomenon in Africa but in many countries around the world.

Howard Varney



From top left to bottom right
1. Betty Murungi, 2. Fatou Bensouda
3. Elizabeth Ibanda Nahamya, 4. Akua Kuenyehia

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