

JUDICIAL INDEPENDENCE

*A Foundation for Combating International and
Transnational Crimes*



With the financial support of:

SYMPOSIUM REPORT

7 AUGUST 2017 | ARUSHA, TANZANIA

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Judicial independence and ethics
in the fight against international
and transnational crime

- PANEL 2 -

Role of the judiciary in addressing
transnational organised crime –
a case study: human trafficking
and cyber crime

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Relationship between domestic,
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in combating serious crimes

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EXECUTIVE SUMMARY

On 7 August 2017, Arusha played host to an international symposium at the Mount Meru Hotel, aimed at exploring: judicial independence, integrity and ethics in the fight against international and transnational crime; case studies on the role of the judiciary in addressing human trafficking and corruption; and the relationship between domestic, regional, and international courts in combating serious crimes.

Co-convened by the Wayamo Foundation and the American Bar Association (ABA) Rule of Law Initiative (ROLI), with the financial support of the German Federal Foreign Office and the United States Agency for International Development, the symposium brought together senior judges, including **Ibrahim H. Juma, Acting Chief Justice of Tanzania**, and **Mohamed Chande Othman, former Chief Justice of Tanzania and member of the Africa Group for Justice and Accountability (AGJA)**, **Sonia Sotomayor, Associate Justice of the Supreme Court of the United States**, and **Appeals Court Judge M. Margaret McKeown, Navi Pillay, Former UN High Commissioner for Human Rights and AGJA member**, and **Bertram Schmitt, Judge at the International Criminal Court (ICC)**. Other participants included experts on international criminal justice, academics and practitioners from the fields of international and transnational criminal law, and members of civil society. Participants and speakers came together to discuss the adjudication of international and transnational crime, human trafficking and corruption, and prosecution of core international crimes and other serious crimes.

Throughout the symposium, the panellists expressed their **commitment to protecting and enhancing judicial independence, as well as increasing co-operation among judiciaries, courts, and relevant institutions, both regionally and internationally**. This was particularly important in order to tackle crimes that were of relevance across borders, i.e., not only international crimes, but also transnational crimes such as poaching, human trafficking, cybercrime, and corruption. There was widespread acknowledgement of the need to ensure sufficient political will to investigate and prosecute these crimes effectively, and ensure the independence of judiciaries and courts. Representatives from local, regional and international courts, as well as the International Residual Mechanism for Criminal Tribunals (MICT), reiterated their shared interest in working together to combat impunity and improve collaboration between institutions.

OPENING REMARKS



BETTINA AMBACH

Director of the Wayamo Foundation



PAULETTE BROWN

Immediate Past President of the ABA and Chair of the ABA ROLI Africa Council

Bettina Ambach (BA) welcomed participants to the International Symposium on Judicial Independence, and explained that it was a component of the “Fighting Impunity in East Africa” Project (2017-2018). Within the framework of this project, Wayamo would be training investigators, prosecutors and judges in international criminal justice and transnational organised crime, holding public outreach activities, and building diplomatic and political collaboration with key regional and international stakeholders. In order to develop the capacities of the region’s legal and judicial structures, Wayamo would support the establishment of a network of Directors of Public Prosecutions and Directors of Criminal Investigations, for serious international crimes and transnational organised crime in East Africa.

Paulette Brown (PB) greeted the participants and outlined the activities of the ABA ROLI, which operates in 60 countries across five regions. The ABA ROLI engaged in a number of programmes to promote the rule of law, such as providing training in domestic violence, gender equality, environmental issues and the like. **PB** said that she was “most keen on hearing and listening to all of the panels” and highlighted that it was an extraordinary opportunity “to learn something new”.

4 TOPICS COVERED AT THE SYMPOSIUM:

Judicial independence

Integrity and ethics in the fight against international and transnational crime

**JUSTICE IBRAHIM H. JUMA**

Acting Chief Justice of Tanzania

**JUSTICE MOHAMED CHANDE OTHMAN**

Former Chief Justice of Tanzania
and AGJA member

Justice Ibrahim H. Juma (IHJ) extended a warm welcome to all participants on behalf of the Judiciary of Tanzania. He looked forward to the sharing of experience and knowledge on the issue of judicial independence, and had this to say, *“The challenge of law enforcement authorities in every nation is that sovereignty, a fundamental principle which grounds the relations of states, is also a major tool utilised by criminal elements (...) Criminals depend heavily upon the barriers of sovereignty to shield themselves and the evidence of their crimes. Thus, to combat the growth of transitional organised crime, regional and international co-operation is needed”*.

Justice Mohamed Chande Othman (MCO) opened the symposium on behalf of the Africa Group of Justice and Accountability. MCO reminded the audience of the link that existed between wildlife trafficking and transnational organised crime. He also stressed the fact that, when it came to wildlife trafficking cases, not only was the risk of facing a criminal charge low but the sentences were also low. In East Africa, the strengthening of judicial independence was a constant concern. Justice Othman concluded that *“judicial independence is indispensable for accountability and the fight against impunity”*.

Case studies on the role of the judiciary in addressing human trafficking and corruption

The relationship between domestic, regional, and international courts in combating serious crimes.

CONVERSATION



JUSTICE SONIA SOTOMAYOR

Associate Justice, Supreme Court
of the United States



JUDGE M. MARGARET MCKEOWN

United States Court of Appeals and
Chair of the ABA ROLI Board

Judge M. Margaret McKeown (M3) started by introducing **Justice Sonia Sotomayor (SS)**, who had been appointed to the Supreme Court of the United States in 2009 after a career that had included stints in the prosecution service, private practice, and 6 years on the Bench of US Second Circuit Court of Appeals.

SS recounted her path from public housing to the Supreme Court, noting the crucial importance of promoting equality through education. She emphasised that judicial independence would never be possible unless judges were passionate and motivated by a commitment to the rule of law, *“If you become a judge without passion, you will never have judicial independence”*. She also described the small differences and issues that judges had to keep in mind at the different levels, especially in the highest courts, where politics should have no influence.

In answer to **M3**’s next question as to whether judges merely had to apply rules to solve a legal problem or if there was also a human element in judging, **SS** explained that people came to judges when there was a grey zone that needed clarification and interpretation. She stressed the importance of the human element and concluded that, *“judgment requires human understanding”*.

On the issue of the social role of judges in societies, **SS** said that judges had to share their love for the rule of law and raise awareness about civic responsibility. Judges had a duty to inspire citizens to exercise

their civic responsibility, by recognising the power of their right to vote and participate in how laws were made. She encouraged judges to make a practice of speaking to the public, in schools, hospitals and even prisons.

M3 then addressed the international aspect of the symposium and asked about the role of international law in domestic courts. **SS** indicated that ideas have no boundaries, *“If you read a decision from another court and that decision persuades you, you can’t just ignore that idea. Nothing persuades more than conversation and thoughts”*. She concluded: *“I believe that every thought*



***If you become a judge without
passion, you will never have
judicial independence.***

Justice Sonia Sotomayor
Associate Justice, US Supreme Court





should be considered. It doesn't mean that you should always agree but you should think about it".

Finally, **M3** raised the question of technological development and liberties. **SS** explained that the Supreme Court tended to rule very narrowly in this area to avoid affecting the development of technology, *"We let society experiment more but there are disadvantages: we permit intrusion into people's lives that they may not realise. There are not that many laws controlling that invasion of privacy. The idea of privacy is changing rapidly, but human dignity depends on some level of privacy"*.

SS concluded by saying that she had been deeply impressed by the judicial actors and lawyers whom she had met on this trip to Africa, and by how hard they were working and thinking about improving the legal systems on the continent. She commended the symposium participants for their dedication to justice and the rule of law.



GUEST SPEAKERS



NAVI PILLAY

Former UN High Commissioner for Human Rights and AGJA member

Navi Pillay (NP) briefly described the journey of international criminal justice. Following a half-century hiatus after the Nuremberg war crimes trials and the International Military Tribunal for the Far East, the issue of individual accountability for gross violations of human rights and humanitarian law resurfaced on the international agenda in the 1990s. This was when the UN Security Council established the ad hoc International Criminal Tribunals for the former Yugoslavia and Rwanda (ICTY and ICTR) to prosecute individuals for serious international crimes committed in the Balkans and Rwanda respectively.

The accountability “train” continued, with the establishment of the Special Court for Sierra Leone, and Special Chambers in the Courts of Bosnia-Herzegovina, Cambodia, Kosovo, and East Timor. The ICC was eventually established when States Parties signed the Rome Statute, which came into effect on 1 July 2002. **NP** stressed the importance of complementarity in international criminal law, *“International criminal justice is necessary to end impunity for serious crimes and to act as a deterrent but we must recognise its limitations: no such system can prosecute every offender involved in genocidal acts. If impunity is to be truly and successfully confronted, there must be real partnership between national and international legal systems. Effective complementarity requires sustained progress of developing national will and national capacity to investigate and prosecute serious crimes”*.

NP also shared her experience as an international judge, *“The initial shock and dismay I felt in realising that a great responsibility lay on our shoulders, that a larger role was expected of us, to realise the ultimate goal of achieving peace and reconciliation in these war-torn countries”*. As an international judge in newly created systems, she had found it necessary to *“get involved over and above adjudication of the cases”* brought before her. She spoke of the various challenges that she had to face during her tenure as a judge at the ICTR, which had included working with members from common and civil law backgrounds, co-operation difficulties with governments, and witnesses being prevented from coming to court.





JUDGE BERTRAM SCHMITT

Judge at the International Criminal Court, The Hague

Judge Bertram Schmitt (BS) addressed the notion and importance of judicial independence at the ICC, touching on the institutional safeguards and challenges. As against domestic courts, the significance of independence at the ICC was even greater and the challenges both numerous and serious. The ICC had jurisdiction over genocide, crimes against humanity and war crimes, described in the Preamble to the Rome Statute as *“the most serious crimes of concern to the international community as a whole”*. The suspects likely to be brought before the ICC could include cabinet ministers and state presidents, which meant that, *“the ICC is operating in a highly political environment and its*

involvement can never be completely separated from international politics”.

BS explained the ICC’s independence as an institution and listed the various Articles of the Rome Statute that facilitated this status, e.g., Article 4 which established its international legal personality independent from the States Parties, Article 2 which provided for the ICC’s independence from the UN, and Article 48 which granted ICC privileges and immunities in the territory of each State Party for the fulfilment of its purposes. As States Parties and the UN Security Council (UNSC) had the right to refer a situation to the ICC, it might seem

that this alone would amount to substantial political influence on the Court. However, the Prosecutor, whose independence was enshrined in Article 42, did not automatically open an investigation once he/she had received a referral. Furthermore, neither States Parties nor the UNSC could choose which people became the subject of investigations. **BS** added that the final text of the Statute allowed the Prosecutor to initiate an investigation *proprio motu*.

“

Judicial independence is not a quality that is picked up once you put on the robe. It is a state of mind that has to prove itself when independence is in danger of being compromised.

Judge Bertram Schmitt
Judge at the International Criminal Court,
The Hague

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Financial constraints might also pose a threat to the independence of the ICC, and the Rome Statute sought to solve this potential problem by placing State Parties under an obligation to contribute to the Court’s budget. Each year, the Court proposed a budget, which was then discussed and eventually adopted by the Assembly of States Parties (ASP), a formalised and transparent process that went a long way to avoiding undue political influence.



Another potential challenge to the independence of the ICC could be seen in voluntary contributions made by states to the Court. States Parties were mindful of this potential problem and adopted a resolution, requesting any state that wished to make a voluntary contribution, to declare that such contributions were not intended to affect the Court’s independence. Furthermore, the ICC Registrar was under an obligation to ensure that a voluntary contribution did not affect the independence of the Court, and in case of doubt had to refuse it. A similar problem could arise with contributions to the Trust Fund for Victims, which was to a large extent dependant on voluntary contributions from states and other entities. To avoid any political influence, the Trust Fund Regulations laid down that, when making contributions, states could not earmark the money for specific purposes or for specific victims or groups of victims.

A further challenge to judicial independence might lie in the attitude of States Parties to the Court. The fact that the ICC was fully dependent on States Parties meant that the latter's co-operation had an enabling effect while their lack of co-operation had a restraining effect. Although States Parties had a statutory obligation to co-operate (Articles 86 and 87), in practice such co-operation was far from satisfactory. Findings of non-compliance by the Court were merely declaratory and referral of the matter to the ASP or the UNSC has generally had no effect.

In addition to institutional independence, **BS** also explained that the ICC judges themselves are independent, despite the fact that the appointment to the ICC Bench is, as in the case of any other international tribunal, a process inevitably influenced by politics. First, a candidate must become a candidate in his/her home country and canvass for support among the States Parties in order to be elected. This is followed by "horse-trading" between governments to support the other side's candidates for other high-profile international posts. However, for the first time in the history of international courts, the ASP has set up a safeguard to ensure, as far as possible, that the most highly qualified individuals are ultimately appointed. This is an Advisory Committee on Nominations of Judges, made up of nine eminent members with established competence and experience in criminal or

international law, who may not be representatives of states or take instructions from States Parties, other states or any other organisations and persons. Moreover, ICC judges are elected for nine years and, unlike the International Court of Justice or ICTY, there is no possibility of re-election. This makes for a substantial term of office, with no pressure to surrender to any outside influences in a re-election campaign. There are detailed statutory provisions designed to ensure accountability of judges, e.g., they may not engage in any other activity likely to interfere with their judicial functions or any other occupation of a professional nature. In addition, the judges have adopted a Code of Judicial Ethics which further clarifies and emphasises the importance of their independence. Finally, public confidence in the judiciary largely depends on the transparency of the proceedings and adherence to the Court's legal instruments. Publicity and transparency are especially important for the ICC because the Court is far away from the situation countries and therefore far more removed from the interested public than are national courts. The legal framework of the ICC fully complies with the UN Basic Principles for judicial independence.

BS concluded by saying, *"If we look at the ICC's practice as a whole it gives every appearance that ICC-judges are approaching their work with independence and integrity. ICC Pre-Trial Chambers have declined to confirm charges against four suspects (Abu Garda, Mbarushima, Kosgey, Ali). ICC Trial Chambers have acquitted one person (Ngudjolo), while vacating charges against two others (Ruto, Sang). These rulings are final. The Prosecution also dropped cases against two persons with confirmed charges prior to trial (Muthaura, Kenyatta). When you add this up, then to date, in the history of the Court, nine persons were convicted (Lubanga, Katanga, Bemba, Al Mahdi, Bemba et al. with 5 persons convicted for offenses against the administration of justice), while the proceedings against another nine persons against whom charges had been brought by the Prosecutor, ended without a conviction. This strongly suggests that any fears or accusations of tainted or manipulated justice at the ICC are unfounded. Judicial independence is not a quality that is picked up once you put on the robe. It is a state of mind that has to prove itself when independence is in danger of being compromised".*



PANEL 1



Judicial independence and ethics in the fight against international and transnational crime

MODERATOR



JUDGE M. MARGARET MCKEOWN

United States Court of Appeals and Chair of the ABA ROLI Board



JUSTICE IBRAHIM H. JUMA

Acting Chief Justice of Tanzania

Justice Ibrahim H. Juma (IHJ) began by saying, *“it is not enough to have constitutions, institutions and rules to ensure the independence of the judiciary. The reality on the ground is different and proves that independence isn’t only ensured by rules and structures”*. Independence of the judiciary was one side of the coin: the other side was accountability of the judiciary, and there was a need to find a balance between the two.

He proceeded to list the potential issues that could hinder judicial independence. Firstly, public confidence was one of the strongest safeguards of independence and it was therefore important to nurture it: cases had to be completed expeditiously, and the Attorney-General had to be advised on law reform needs. It was also crucial to maintain public confidence and this was where transparency played a role. The public should be able to see and understand how the judiciary was working. There were dedicated phone numbers assigned to corruption reporting, and whenever there was an accusation regarding a judge, a committee



composed of executive officers and members of the judiciary was set up to look into the matter. Along with local confidence, the judiciary needed international confidence when it came to adjudicating international and transnational organised crimes. Tanzania also needed to gain international confidence and improve domestic processes to deliver justice within a reasonable time frame. Finally, **IHJ** made the point that the *“public is reluctant to come out and report”*: in a recent survey, 82% of those interviewed had said that they would not report corruption if they witnessed it.



JUSTICE STEVEN B.K.KAVUMA

Deputy Chief Justice of Uganda

Justice Steven B.K.Kavuma (SBKK) provided an overview of the how Uganda was tackling international and transnational crimes. Uganda was in the final stages of passing an Administration of Justice Act. With regard to confidence in the judicial system, Uganda was faced with limited resources and funding: if one wanted an independent judiciary, one needed sufficient resources. There was a backlog of cases in the High Court, which was understaffed. Increasing numbers of Ugandans were resorting to the courts to settle their affairs and these case files had to be dealt with.



Uganda had put in place a number of measures to enhance public confidence and access to justice, e.g., it had set up a fast-track “small claims” procedure for claims not exceeding 10 million shillings, which had resulted in speedy decisions and thus created confidence in the system. Not only was there a telephone line to report crime and corruption, but there were many radio and TV shows that aired judicial questions, and judicial staff now wore name tags so as to be easily identified. Furthermore, parties

The panellists presented the different sets of rules designed to enhance judicial independence and ethics in the fight against international and transnational crime in their respective countries.

were encouraged to use mediation. In the sphere of international and transnational crimes, as a signatory to the Rome Statute, Uganda had created a special International Crimes Division, as well as domesticating international conventions which had become domestic laws under the Constitution. Challenges still remained, in that transnational crimes were becoming extremely sophisticated. The country was embracing technologies to cope with such crimes.



JUSTICE AIMÉ MUYOBOKE KARIMUNDA

Judge of the Supreme Court of Rwanda

Justice Aimé Muyoboke Karimunda (AMK) addressed the issue of judicial independence and the judicial reforms initiated in 2004 in Rwanda to promote the rule of law and the stability of the country. *“There is no doubt”, she said, “that judicial independence is one of the fundamental elements of a successful constitutional democracy”.* The concept of judicial independence could be divided into two main components, namely, institutional independence vis-à-vis the political branches of government, and personal independence. There were generally six factors that led to effective judicial independence: (1) appropriate institutional arrangements; (2) credible appointment processes for judicial officers; (3) reasonable terms of office; (4) transparent and just removal and suspension of judges; (5) financial autonomy; and, (6) reasonable privileges and immunities.

In the case of Rwanda, it was clear that before 2004, judges had been missing both types of independence. In addition, until 2003, only 10% of the judicial staff had a law degree: the remainder implemented political decisions rather than delivering justice. There was a significant gender imbalance: women accounted for only 15% of the 702 judges and 26% of the country's 82 court presidents. Judges continued to be appointed by the Head of State, who could summarily accept or reject applications. By law the Judicial Council was presided over by the Minister of Justice, but all the other members were appointed by the Head of State. This state of affairs continued after the 1994 genocide. There was therefore a pressing need to restructure and modernise the judiciary in order to make it functional, efficient and easily accessible. Judicial reforms were initiated in 2004 and had brought significant change. Instead of five courts operating as different supreme courts, there was now a single Supreme Court exercising judicial power and enjoying administrative and financial autonomy. Four Courts of Appeal had been merged into a single High Court. New ordinary



and specialised courts or chambers (commercial courts, Gacaca courts, separate chambers for international crimes, juveniles, labour law, administrative cases, etc.) had been introduced to deliver speedy and good quality justice. All 288 judges were now qualified lawyers and most of them held a professional diploma in legal practice; 39% were women. Other institutions in the justice chain, such as the Prosecution Authority, Judicial Police and Bar, had either been created or reformed to meet the new requirements of justice. The judiciary had its own budget and was in charge of implementing it. Furthermore, there was a code of conduct that prohibited judges from hearing cases in which they had already expressed opinions, had some interest or had shown animosity towards one of the parties. There were tremendous efforts to monitor corrupt behaviour in the judiciary and very heavy sentences had been imposed on judicial personnel convicted of corruption. Judges were prohibited from combining their duties with managing active business concerns, and a court inspectorate had been established to monitor the judges' conduct and the quality of their judgments.

Summing up, **AMK** said, *“These changes have promoted the rule of law and the stability of the country (...) Rwandans feel that they have competent courts that can resolve their disputes impartially and fairly. They are also ensured that the state will enforce decisions of the courts. Nonetheless, challenges remain, mainly as regards personal independence and professionalism of judge. However, that can only come progressively”.*



JUSTICE OMAR MAKUNGU

Chief Justice of Zanzibar

By way of introduction, **Justice Omar Makungu (OM)** said, *“Judicial independence is not for the benefit of judges, the legislature or the executive; it is for the benefit for all of those who approach the court for relief”*. Impartial application of the law could only be achieved if the judiciary was independent. The challenge of all governments was to maintain an independent judiciary.

All of the judicial members came under the Judicial Service Commission of Tanzania, which was headed by a judge and not by the Chief Justice, an issue that was currently under discussion. Another challenge lay in limited financial resources: a Bill that would create judicial funds for Zanzibar was currently being drawn up and would be discussed during the forthcoming session in September/early October 2017. Lastly, corruption remained a challenge in Zanzibar, as it did in many parts of the world.

Regarding transnational organised crimes, such as drug trafficking, smuggling and human trafficking, these led to human right violations and had a negative impact on societies. Firstly, as these crimes were a global

phenomenon, combating them required co-ordination, *“integrated action is needed at the international level”*; secondly, the public should be educated about such crimes; thirdly, criminal justice systems had to use intelligence and technology; and finally, capacity building was needed for investigators, prosecutors and judges.



JUSTICE SONIA SOTOMAYOR

Associate Justice, Supreme Court of the United States

Justice Sonia Sotomayor (SS) noted that all of the steps and observations presented by the Justices have been made in America as well. There were written codes of ethics, internal checks, and the Chief Justice issued a report every year to advise Congress about the problems and challenges that the Court was facing. It is only in 2017 that the USA would go fully electronic, which was no easy task. Additionally, the Supreme Court had helped to create the Supreme Court Historical Society, an independent corporation intended to educate the public on the function of the Supreme Court and on law in general. Judges took their problems to the Society, which then raised funds for programmes to help and bring more attention to the judiciary.



PANEL 2



Role of the judiciary in addressing transnational organised crime – a case study: human trafficking and cyber crime

MODERATOR



MARK KERSTEN

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



JUDGE VIRGINIA KENDALL

United States District Court for the Northern District
of Illinois

Judge Virginia Kendall (VK) began by explaining that a “discussion of transnational crime cannot exist without a thorough discussion about one of the most lucrative transnational crimes involving the most significant abuse of human rights globally– human trafficking”. She analysed how public officials (state, local and federal public office holders) permeated the underground world of human trafficking in a variety of ways: they were the border officers who accepted bribes to allow the movement of victims into and out of countries, the immigration officers who accepted money to alter identification documents, and the local police who turned their backs on the trafficking in their communities, while lining their own pockets. **VK** stressed that “Where corruption exists, trafficking exists; where corruption is higher, trafficking flourishes”. She then gave examples of human trafficking in Cyprus, Bangladesh, Egypt, Kenya, Zambia, Croatia, Latvia, Lithuania and the USA, where local police allowed the different criminal groups to operate before their eyes but did nothing to stop them, due to “bigger issues” or crimes that had been prioritised by their superiors.



At its most basic, public corruption comprised the taking of money for an official act, e.g., accepting a false identification document, allowing a border crossing without immigration documents, neglecting to perform an official duty such as inspecting a building or arresting an offender, and facilitating the sale of humans. When viewed more broadly, public corruption was also the refusal of elected officials to prioritise the already existing laws to protect the weakest, and “by failing to enforce trafficking laws, public authorities are sending the very real message to the victims, the weakest of our society, that they are not worthy of protection”.

VK observed that across the length and breadth of the USA, the number of trafficking prosecutions paled in comparison to the numbers of trafficked victims. There were four main reasons for this: (1) countries focused on the prosecution of traffickers without prosecuting the bribe takers and facilitators; (2) there remained certain archaic practices worldwide that perpetuated public authority abuse. One such practice was to allow authorities to pay a fine and have their crime erased, rather than face prosecution or serve a jail sentence; (3) top leaders rarely address the magnitude of this human rights violation at a global level, thereby sending out the message that it is less important than other issues facing a country, or worse still, that the victimisation is less real. A sceptical public cannot be a partner for change; and, (4) world leaders need to understand that the psychological manipulation and injury were so great that the victims barely survived. It had to be made public that over 30 million individuals were being discarded yearly.

VK proposed six concrete ways to save those who were imprisoned around the world.

- First, public corruption crimes should be added in countries' annual Trafficking in Persons Reports.
- Second, it was necessary to work together as a global community to enforce international laws and domestic



CHARITY N NCHIMUNYA

Executive Secretary, African Union Advisory Board on Corruption (AUABC)

Charity N Nchimunya (CNN) provided an overview of the regional and international conventions designed to combat corruption, and explained that, though corruption was an old phenomenon, international and regional efforts to combat corruption were quite recent.

laws, by providing effective mutual legal assistance in promptly gathering evidence and arresting offenders through formal treaties and informal co-operative efforts.

- Third, the judiciary had to be educated about the unique victimisation of this crime against humanity, so that their rulings were enlightened and informative, and could serve as a beacon to survivors, while educating the general public.
- Fourth, institutions such as the World Bank should be encouraged to debar companies that used World Bank Funds to finance trafficking activities.
- Fifth, it had to be recognised that businesses profited from forced/child labour, and as such had to be held accountable to keep the supply chains free of human rights violations. It was necessary both to encourage corporate responsibility to ensure that human rights violations were eliminated from the supply of goods and services, and to encourage the consuming public to reject products that were made with the sweat and blood of forced/child labour.
- Sixth, codes of conduct had to be adopted for the judiciary and for each entity that held the public trust.

Up until a few decades ago, the fight against corruption was the exclusive preserve of sovereign states and confined mainly to a few provisions of domestic criminal and administrative law. However, the phenomenon of corruption became a transnational issue very quickly, which meant that, like transnational organised crime or transnational terrorism, the reality of this offence was across borders. Hence, the first efforts to combat transnational corruption were through international co-operation at a domestic level: it took some time for the emergence of real anti-corruption efforts based on

international law and international conventions. The first specialised convention dated from 1996, when the Inter-American Convention Against Corruption was adopted, and many of the existing treaties were still regional. For instance, in the African region, the 2003 African Union Convention on Preventing and Combating Corruption (AUCPCC) came into force in 2006. This Convention was a significant step towards efforts to develop international standards to tackle corruption across the continent and placed obligations on States Parties to the Convention to take an active role in the international fight against corruption. Some of the Regional Economic Communities on the continent had also come up with specific protocols and treaties to deal with corruption in their respective regions. In 2003, a global convention had also been adopted, i.e., the



United Nations Convention Against Corruption (UNCAC). Some earlier international law instruments to counter transnational organised crime had likewise included some provisions dealing with corruption. Chief among these was the United Nations Convention against Transnational Organised Crime (UNTOC), specifically Articles 8 and 9.

All these treaties were mainly aimed at criminalisation, prevention, and international co-operation. They frequently included review mechanisms to monitor the implementation of conventional obligations. The UNCAC as well as the other regional conventions and treaties recognised the need for the global challenge of corruption to be tackled at an international level, and

*The panel analysed the role of the judiciary in addressing transnational organised crime **with the focus on human trafficking and cybercrime.***

called for enhanced co-operation and collaboration in this regard.

In conclusion **CNN** said that significant steps had been made to develop international standards to counteract systemic corruption, both at a global and at an African Union level. *“Corruption by its very nature can permeate government institutions and the judiciary is no exception.*



AIMÉE COMRIE

Crime Prevention and Criminal Justice Officer, GLO. ACT, Human Trafficking and Migrant Smuggling Section, United Nations Office on Drugs & Crime (UNODC), Vienna, Austria

Aimée Comrie (AC) used the example of a Vietnamese boy aged 14 years, a victim of human trafficking who had been working in a cannabis plantation near Bristol, to explain why the role of the judiciary was so critical. The boy had eventually been arrested, charged, tried on drug-cultivation and drug-trafficking charges and sentenced to 2 years in juvenile detention. In a landmark judgment, the UK’s highest Court had overturned the conviction on appeal, applying the principle contained in the European Directive on Trafficking in Human Beings and the Council of Europe Convention on Trafficking in Human Beings, to the effect that an accused had the right to go unpunished for crimes he had been compelled to commit as a direct result of his trafficking-related exploitation.

Judges had a key role as they may identify victims of trafficking. Despite near universal ratification of the **UN Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children**, which supplemented the UNTOC, the rate of investigations

Therefore, closer collaboration with the judiciary to discuss corruption-related topics is a good starting point, as the judiciary interprets and adjudicates on these transnational crimes. If the judiciary is permeated by corruption, the fight against corruption and other transnational crimes will have been lost”.



and prosecutions remained very low. Reliable data were hard to come by but figures ranged from 20-40 million victims around the world. The UNODC, GLO. TIP, identified 33% of all victims as children, and 71% as women and children. This was mainly due to the fact that victims did not seek help and, indeed, tried to avoid detection, since they had been told that the authorities would charge them for their role in illicit activities. Furthermore, whereas force and the threat of force had been predominant at the time when the Protocol came into force, now subtle means of coercion were the norm. In some cases, victims were willing and actually consented to being exploited, often because of the desperate situation in which they found themselves. In Nepal for example, hundreds of poor desperate



people were selling their kidneys for as little as US\$250. In this connection, AC challenged her audience with the following thought, *“Does the fact that they have been paid or that they signed a consent form negate their victimisation? On this issue, the Palermo Protocol is very clear – the consent of the victim is irrelevant when any of the illicit means are present”*. Moreover, the role of the judiciary was so critical because *“national judges breathe life and context into international framework through national practice”*.

Judges could apply the full spectrum of remedies and sanctions by: guaranteeing a fair trial; enhancing the accused’s access to a defence; ensuring that victims participated where appropriate; promoting realistic expectations of what a traumatised victim’s evidence

might look and sound like; ensuring respect for a victim’s privacy, e.g., through preventing names being printed in the media; and issuing confiscation/seizure orders against the perpetrator’s illicit gains.

Finally, **AC** explained how the UNODC could support judges in the field, and listed the various initiatives such as its Regional Programme, the Global Action to Address and Prevent Trafficking in Persons and Smuggling of Migrants, and the Global Programme on Judicial Integrity and Judicial Integrity Network. The UNODC also drew up new standards and tools for judges, such as a case law digest and databases, and issued papers on consent, abuse of position of vulnerability, and forms of exploitation.



EMILIA SIWINGWA

Independent Legal Adviser and member of the ABA
ROLI Africa Council

Emilia Siwingwa (ES) explained that *“Civil society looks to the judiciary to inspire, ensure and maintain the public confidence, as one of the pillars of government”*. A credible, efficient, independent, impartial, honest and corruption-free judiciary was essential for promoting, upholding and preserving peace and the rule of law in any society.

With the introduction and popularisation of cyber laws in East Africa, citizens had expressed concern about the overreaching intent and impact of such laws, complaining that they encroached upon fundamental rights and freedoms. Some instances of this were: mandatory SIM card registration in the region, in the absence of what some viewed as adequate privacy and data-protection laws; some of the laws in the region permitted the interception of communications, and allowed internet intermediaries to monitor users and block or remove content, and in various ways, introduce or extend the reach of the law in regulating online content and activity; the threshold for criminal liability in certain cyber activities was unreasonably low; and criminalisation of what was considered “legitimate” cyber activity and the legitimate exercise of fundamental rights and freedoms.

ES noted that it was *“a delicate dance”* to ensure that the right balance was struck between the legitimate regulation of cyber activity and a citizens’ right to expression and association. It was essential that such rights extended to the internet and other digital technologies.

She also discussed to what extent national judges should consult, refer to and rely on universally accepted human rights standards and relevant international instruments, when presiding over transnational criminal matters and drafting their judgments. Most East African jurisdictions were common law jurisdictions and thus under international law. The majority of these jurisdictions were dualist and there were often prolonged delays in domesticating international treaties. Even so, it was neither abnormal nor even exaggerated to suggest that judges referred to and relied on sub-regional, regional and international standards and instruments in their analyses and rulings. With respect to cyber crimes, for example, there was an East African regional effort to harmonise cyber laws, with the support of the UN Conference on Trade and Development (UNCTAD).

ES believed that a more open, rights-based approach (which adopted international law standards and obligations in the analysis of facts and evidence in cyber law matters before national courts) was required. The public would indeed be assured that their countries and the region had a credible, efficient, independent judiciary that would provide adequate checks and balances, particularly where there were deficits in democracy and the rule of law.

PANEL 3



Relationship between domestic, regional and international courts in combating serious crimes

MODERATOR



BETTINA AMBACH

Director, Wayamo Foundation



JUSTICE EMMANUEL UGIRASHEBUJA

President, East African Court of Justice

Justice Emmanuel Ugirashebuja (EU) distinguished between two main types of jurisdictions and their role in combating serious crimes, i.e., criminal jurisdictions and fundamental rights jurisdictions. Domestic, regional and international courts had jurisdiction to deal with serious crimes, e.g., the ICC, the defunct East African Court of Appeal, and the proposed African Court of Justice. Some regional or international courts did not have criminal jurisdiction but could deal with the fundamental rights attaching to criminal jurisdiction: examples included the International Court of Justice in the Yerodia Arrest Warrant Case, the East African Court of Justice in the Katabazi Case (respect for the rule of law), the African Court of Human Rights, the European Court of Justice, the Economic Community of West African States Court, the European Court of Human Rights, the Inter American Commission on Human Rights, and the Caribbean Court of Justice.

The relationship between domestic, regional and international courts could be direct or indirect. A treaty

provision illustrated the *direct* relationship between the domestic and regional or international courts, e.g., the Rome Statute provided that the ICC would not hear a case if a State Party prosecuted the conduct in good faith. An *indirect* relationship also existed, since regional or international courts could generate good practices in handling serious crimes case (e.g., treatment of witnesses) or jurisprudence (e.g., ICTR jurisprudence which classified rape cases as serious crimes), which might impact indirectly on the handling of serious cases at a domestic level. This indirect relationship could work in both directions.

EU felt that the “*emphasis should be on domestic courts to deal with serious crimes*” for three main reasons.

- Firstly, they enjoyed stable protection under national constitutions, whereas the jurisdiction of regional/international courts could easily be “*clipped*” at the stroke of a pen (e.g., the Southern Africa Development Community Tribunal) or subject to individual or collective withdrawal (e.g., threat by the AU to withdraw from the Rome Statute en masse).

- Secondly, jurisdiction in domestic courts was compulsory rather than consensual.



■ Thirdly, regional/international courts lacked an enforcement mechanism, and a legislative instrument that allowed for centralised change.

Co-operation and compliance with decisions of regional/international tribunals depended on the will of the signatory states concerned. Fourthly, justice was brought closer to where the crime had been committed.

However, there were exceptions to the above emphasis on the role of domestic courts. Indeed, domestic courts should be disregarded in favour of regional and/or international courts (where these existed) where there was a clear denial of justice (refusal of courts to entertain a suit; undue delay; inappropriate administration of justice; and clear, malicious misapplication of the law). Similarly, states could refer cases they were unable to handle for political or capacity-related reasons.

Whichever judiciary (domestic/regional/international) was vested with jurisdiction to deal with serious crimes, it had to be independent. In EU's words, *"To be able to provide the guarantee for rule of law in combating serious crimes, the judiciary must possess certain characteristics and attributes. I speak mainly of judicial independence. I speak of judges, who are bold, outspoken and fearless. Judges who are weak, timorous souls are less likely to be effective guarantors of the rule of law when combating serious crimes"*.



STEPHEN RAPP

Distinguished Fellow at The Hague Institute for Global Justice, former Ambassador-at-Large for War Crimes Issues, Office of Global Criminal Justice, Department of State, United States of America

Stephen Rapp (SR) analysed the role of states when it came to the prosecution of serious crimes. Domestic trials meant that trials were closer to the victims and affected communities. **SR** noted that *"currently core international crimes -genocide, war crimes, crimes against humanity, and aggression- have been tackled in internationalised court"* but that this could change if the Malabo Protocol was ratified and an African regional criminal court was granted jurisdiction over core crimes and transnational crimes such as piracy and trafficking in illicit goods.

When looking at why internationalised courts existed in the first place, **SR** concluded that international engagement was justified if there were deficits in: 1) political will; 2) capacity; or 3) legal tools. Political will could be very difficult for states to muster, particularly in situations where they had to pursue



defendants who had control over state institutions, or leaders of armed groups that were as powerful as state actors. Political will also had to be understood as including the will to deliver independent justice. Sometimes, after a change in regime, the new leaders were all too willing to execute their political opponents from the former regime. This was a concern that had been raised about the current Bangladesh trials in respect of the atrocities committed in 1971. Political will could change over time, as seen in Latin America, where it had become possible to have fair trials of former political leaders and military commanders 30 years after the crimes had been committed.

Capacity was always a problem after a destructive internal conflict, where many judges or lawyers might have died or fled. However, this could be cured over time with recruitment and training of new personnel.

In addition, legal tools were often lacking at the national level, in that genocide and crimes against humanity had not been codified before the crimes were committed, and top leaders may benefit from immunities. Domestic systems might not have recognised command responsibility or modes of liability, such as joint criminal

enterprise, which reflect the ways in which mass crimes were perpetrated.

The International Military Tribunal at Nuremberg pursued high-level actors whom a German domestic system could not have prosecuted in 1945-1949, for lack of will, capacity and legal tools. Two decades later, however, the Germans had gained the necessary will, capacity and legal tools to enable the officers responsible for death camps such as Auschwitz and

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In meeting the challenges to achieving the fair and effective prosecution of serious crimes, international actors must focus their attention on whether there is an absence of will, capacity, or legal tools, and offer the assistance or participation that can overcome the relevant deficit(s).

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Majdanek to be prosecuted domestically. These cases benefited from the evidentiary and legal foundation laid at Nuremberg, yet the fact that this was Germans prosecuting Germans contributed to Germany's transition to becoming the respected state that it is today.

The ICTY had been necessary primarily because there had been no political will in the former Yugoslavia to hold leaders responsible for atrocities to account. However, ten years after the ICTY's creation the UNSC asked it to begin transferring cases and investigations back to the region, which led the countries that had emerged from the former Yugoslavia to develop specialised units and chambers which could at least investigate and prosecute lower-level offenders.

Similarly, the ICTR had been necessary, not only because the genocide had devastated the Rwandan legal system, but also because many countries, including those in the region, had initially been concerned about the will of the Rwandan Patriotic Front-led government to provide independent justice. They were also concerned about the anticipated use of the death penalty. Cameroon and Tanzania denied requests to extradite suspects for trial in Rwandan courts. Without the ICTR, many of 80 or so alleged leaders of the genocide would not have been tracked down in 26 countries and transferred to face trial. Eventually, Rwanda built the capacity, conducted trials in which individuals were acquitted when the evidence was lacking, and abolished the death penalty. Now the cases of individuals detained or indicted in Arusha had been transferred to Rwanda, and other suspects had been extradited from Europe and North America to face trial in Kigali.

With regard to the prosecution of former Chadian dictator, Habré, in Senegal, there had eventually been the domestic will to prosecute plus international donors ready to assist with capacity issues. The only deficit was solely the matter of legal tools. The Economic Community of West African States (ECOWAS) court held that Senegal could not retroactively criminalise Habré's alleged conduct, and that it would require a court of "international character" to try him. This was accomplished by an international agreement between

The panellists analysed the relationship between domestic, regional and international courts in combating serious crimes.

the AU and Senegal to create the Extraordinary African Chambers, with only two international judges, one to preside at trial and other on appeal.

It was **SR**'s conviction that the best approach to overcome the three main challenges (political will, capacity and legal tools) was to set up internationalised courts that would eventually transfer the cases back to the national authorities.

SR then turned to assess whether an ICC-led system could contribute to overcoming deficits in will and capacity. He noted that the ICC was a permanent court with jurisdiction to try persons accused of core international crimes though only as a last resort, and it was thus “complementary” to national systems. It took cases only where there was an absence of domestic will and capacity to carry out a genuine investigation and prosecution. There was thus a “coercive” or “persuasive” aspect to complementarity which could overcome the problem of political will, in that national authorities might reluctantly prefer to prosecute their own citizens rather than having them taken to The Hague to face trial. This might have been a factor in convincing authorities in Colombia to establish a transitional justice framework, or judicial actors in Guinea to investigate the military officers responsible for the stadium massacre of September 2009. For this to work, the ICC had to appear to be effective in arresting and trying high-level perpetrators.

In the ICC-led system, there was also what was known as “positive complementarity”, referring to assistance in building capacity. The ICC itself did not have the resources to be a development agency and, while its judges and officers might speak at training conferences, it had to rely on national and multilateral development actors to provide the programmes and funding. Frankly, however, the donors did not provide enough in this area, and could be more active in developing capacity in the sphere of transnational crimes.

SR's closing words were, *“In meeting the challenges to achieving the fair and effective prosecution of serious*

crimes, international actors must focus their attention on whether there is an absence of will, capacity, or legal tools, and offer the assistance or participation that can overcome the relevant deficit(s)”.



DR. OLUFEMI ELIAS

Assistant Secretary-General and Registrar, UN Mechanism for International Criminal Tribunals

Dr. Olufemi Elias (OE) reviewed the historical background of the establishment of the ICTY and ICTR over 20 years earlier. The UNSC had decided to establish the ICTY in 1993 and the ICTR one year later, to adjudicate crimes against humanity, war crimes, genocide and other serious offences committed in the former Yugoslavia since 1991 and in Rwanda and neighbouring States in 1994. **OE** stressed that *“this was a milestone in the promotion of international criminal justice: it transformed the field of international law and justice, and revolutionised the approach taken –both internationally and nationally– by providing for international/individual criminal responsibility under international law for the most serious of crimes”.*

The UNSC's resolve to establish the MICT had been in appreciation of the fact that it was vital to have a mechanism in place which would continue the jurisdiction, rights, obligations and essential functions of the ICTR and the ICTY after completion of their respective mandates: *“It is one of the core functions of the Mechanism to assist national jurisdictions in cases that are before domestic courts and related to crimes committed in Rwanda and the former Yugoslavia. It is the way in which, the MICT contributes to the relationship between domestic and international courts in combating serious crimes”.* To prepare for their closure, the completion strategy provided that the Tribunals could refer mid-



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Success in combating serious crimes such as those falling under its jurisdiction requires co-operation at all levels.

Dr. Olufemi Elias
*Assistant Secretary-General and Registrar,
 UN Mechanism for International Criminal
 Tribunals*

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and lower-level cases which had previously been under the Tribunals’ jurisdiction to domestic courts, entrusting these with the responsibility to investigate, prosecute and try such cases. In light of the information, evidence and expertise gained throughout the existence of the Tribunals, it was pertinent to place the Tribunals and the MICT under the obligation to assist these national jurisdictions with the cases now before them. Between 1 July 2013 and 1 September 2015, the ICTY and MICT Office of the Prosecutor (OTP) had received and responded to 417 requests from national prosecution authorities in the former Yugoslavia, providing 237,170 pages of documents and 386 items of audio and video material. The referral of cases to competent national jurisdictions serves as a tool in completing the mandate and closing the Tribunals.

The ICTR’s capacity-strengthening activities had been stipulated in its mandate, and had relied purely on voluntary contributions from Member States plus its own creativity. These activities, which had included training programmes for members of the Rwandan Bar, had benefited almost 150 lawyers, by enhancing their knowledge of ICTR jurisprudence. Workshops were organised on the referral of cases, as well as, for instance, on training in information and evidence management. Furthermore, as part of its legacy and in the interests of transferring knowledge, the ICTR

had drawn up manuals on best practices and lessons learnt (available on the MICT website in the ICTR legacy compendium).

OE summed up by saying that *“success in combating serious crimes such as those falling under its jurisdiction requires co-operation at all levels”*. To this end, the MICT recently organised a judicial colloquium that had brought together judges from the Tanzanian judiciary, the regional courts in Arusha and the Mechanism. The colloquium had afforded a valuable opportunity to assess the complementary roles of all four judicial institutions, within their respective mandates, in addressing different aspects of international crimes and collectively contributing to accountability and an end to impunity.



SELEMANI KINYUNYU

**African Governance Architecture (AGA)
Focal Point at the African Court on Human
and Peoples’ Rights**

Selemani Kinyunyu (SK) spoke about the potential of the proposed African Court of Justice and Human and Peoples’ and Rights (African Criminal Court) in dealing with serious crimes. While the Court would have a complementary mandate with the ICC over crimes under international law, i.e., the crimes of genocide, war crimes, crimes against humanity and aggression, the future criminal configuration of the African Court would also give it jurisdiction over transnational crimes, such as trafficking in drugs, persons and hazardous waste. In addition, the Court would have jurisdiction over

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The Protocol vesting the African Court with a criminal jurisdiction is therefore a reflection of the specific needs of the African Continent in dealing with international and transnational crimes and potentially serve as a useful tool in the prosecution of international and transnational organised crimes.*

Selemani Kinyunyu
African Governance Architecture (AGA)
**Focal Point at the African Court on Human
and Peoples’ Rights**

other international crimes, such as piracy, terrorism, mercenarism, money laundering, corruption, illegal exploitation of natural resources and unconstitutional changes of government, all of which could be transnational or organised in nature.

As had been noted, there had always been a link between core crimes and transnational and organised crime, and transnational organised crime had a corrosive effect on the rule of law in democratic governance in fragile states, several of which were in

Africa. Transnational organised crimes could destabilise states and give rise to commission of core crimes. This understanding had been reflected in the recent ICC OTP Policy Paper on Case Selection and Prioritisation, which laid down that the OTP would seek to co-operate with states in respect of conduct which constituted a serious crime under national law, such as the illegal exploitation of natural resources, arms trafficking, human trafficking, terrorism, financial crimes, land grabbing or the destruction of the environment. In this light, countries like Kenya and Uganda which had established specialised courts to deal with core crimes, had expanded their mandate to include transnational crimes.

SK further explained that a complementary relationship with national courts and regional courts was envisaged for the future African Court with criminal jurisdiction. In addition, the African Court would be entitled to seek the co-operation and assistance of regional or international courts, non-States Parties or co-operating partners of the AU and could conclude agreements for that purpose. In recognition of the need to cultivate this relationship, the AU, through the African Court, had taken the lead in organising a biennial continental judicial dialogue among national judiciaries, the Courts of the Regional Economic Communities and international courts. The first such dialogue had been held in 2010, and the fourth edition would be held in 2017 in Abidjan (Côte d'Ivoire) in November. The threat of serious crimes, especially transnational organised crimes in Africa, was too vast and too complex. It had to be met and confronted by increased judicial co-operation and mutual legal assistance.

In conclusion, **SK** said that *“the Protocol vesting the African Court with a criminal jurisdiction is therefore a reflection of the specific needs of the African Continent in dealing with international and transnational crimes and potentially serve as a useful tool in the prosecution of international and transnational organised crimes”*.







CLOSING REMARKS



INMI PATTERSON

Chargée d'Affaires, US Embassy in Tanzania

In her closing remarks, **Inmi Patterson (IP)** stressed the importance of having an independent judiciary and highlighted this as pertinent, in view of what she described as unsettling developments in various corners of the world. In these recent developments, included those in Hungary and Poland, the judiciary had been limited, which had graphically demonstrated the essential role that it played in every healthy democratic system of checks and balances. An independent judiciary was often the only entity capable of containing or blocking any attempt at overreach by the executive or legislative branches of government. She continued, *“As discussed during this symposium, an independent judiciary is indispensable to the fight against international and transnational crimes”*. Moreover, she was *“certain that your conversations advanced the understanding of and appreciation for the work you and your colleagues do in the judiciary”*.

IP thanked the organisers for convening the symposium and the participants for their continued efforts to defend and support a robust judiciary.



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