REPORT ON THE SOUTHERN AFRICAN CHIEF JUSTICES' FORUM ANNUAL CONFERENCE HELD AT COUNTRY CLUB HOTEL, WINDHOEK, NAMIBIA, FROM 22ND TO 25TH SEPTEMBER, 2016

INTRODUCTION

The Southern African Chief Justices' Forum (SACJF) held its 2016 Conference and Annual General Meeting, under the Theme "**Contemporary Issues in the Prevention of Organised Crime**", from 22nd September, 2016 to 25th September, 2016. The Conference was officially opened on 23rd September, 2016 by the Speaker of the Namibia National Assembly, Hon. Prof. Peter H. Katjavivi.

The official programme started with welcome remarks from Chief Justice Peter. S. Shivute, the Chief Justice of Namibia and Chairperson of SACJF. He told the delegates that the SACJF, which he had the privilege of chairing for the previous two years, was founded on 7th December, 2003, in Benoni, Johannesburg, Republic of South Africa. He explained that SACJF consists of 16 incumbent Chief Justices or equivalent officers. He added that the objectives of the SACJF include the following:

1. to promote the rule of law, democracy, and the independence of the courts in the regions of its operation;
2. to encourage the publication and dissemination of judgments of the highest courts in member states; and
3. to promote the use of information technology.

Chief Justice Shivute stated that, since its formation, the SACJF annually organises a Judicial Conference followed by an Annual General Meeting. He disclosed that at its genesis, the Forum attracted Chief Justices and senior Judges from Judiciaries in East and Southern Africa and that the Conference and AGM of 2016 was not an exception as it was being attended by 12 Chief Justices and 30 Judges.

He went on to say that although the majority of the members of the SACJF are drawn from the SADC Region, the membership extends beyond Southern Africa with the Chief Justices of Tanzania, Kenya and Uganda being members of the Forum. He added that in the pursuit of excellent judicial services, the SACJF fosters judicial education and training for judges, with the aim of imparting the necessary knowledge and skills in many areas of the law for the effective delivery of justice.

He told the delegates that the overall objective of the Conference was to provide an opportunity for the judiciaries in the Eastern and Southern African Regions to explore the current trends on the prevention of transnational organised crimes with special reference to terrorism, cybercrime, money laundering, trafficking in persons and proliferation.

He stated that the Conference was organised by the SACJF Secretariat in partnership with the Office of the Judiciary of Namibia, the African Programme of the International Commission of Jurists (ICJ) and the Democratic Governance and Rights Unit (DGRU) of the Faculty of Law at the University of Cape Town, with technical support from the United Nations Office on Drugs and Crime (UNODC) as well as the Financial Intelligence Centre (FIC), a directorate of the Bank of Namibia, Namibia's Central Bank. Chief Justice Shivute thanked the above institutions and entities for the financial and technical support extended to the SACJF.

He stated that participants were all aware of the tremendous efforts that were being made by the Region in the fight against organised crime. He added that what was required was for countries to be attentive and responsive at all times to the constant change of trends in transnational organised crime. He advised that, to that end, the judicial minds in the region needed to become part of the transformation.

Chief Justice Shivute pointed out that the Conference was an excellent opportunity to extend and enhance the understanding of transnational organised crime, financing of terrorism and radicalisation and illicit financial flows, and to ensure that responses are organized beyond the tactics, strategies and systems of syndication of any form of law-breaking.

He concluded his remarks by welcoming all the delegates to Namibia, the land of the brave. He urged all the delegates to feel at home and experience the warmth of the people of Namibia.

SESSION ONE

Topic: **"Introduction to Transnational Organized Crime"**

Chairperson: **Chief Justice Peter Shivute, Chief Justice of Namibia and Chairperson of the SACJF**

Presenters: **Mr. Mpho Letsoalo- President, ARINSA**

Mr. Fitz – Roy Drayton (UNODC)

This session commenced with opening remarks from **Dr. Shnutz Rudolf Durr - Venice Commission and Representative of UNODC.** He congratulated Namibia for having enacted a new Constitution that separated the Judiciary from the Ministry of Justice. He stated that organized crime was a threat to all in the World and urged all the delegates to ensure that measures were put in place to combat it in their various jurisdictions.

Presenter: **Mpho Letsoalo**

Mr. Letsoalo began his presentation by giving a background to the Asset Recovery Inter-Agency Network Southern Africa **(ARINSA).** He stated that ARINSA is a multi-agency informal network of prosecutors and investigators

used to share intelligence regarding asset recovery and draft legislation. He added that member countries include Namibia, South Africa, Zambia, Tanzania, Swaziland, Lesotho and Zimbabwe.

Mr. Letsoalo stated that the network among prosecutors started from South Africa. He added that South African law allows non-conviction based applications for the recovery of proceeds of crime. He explained that these non-conviction based applications, which are civil applications, go side by side with the criminal prosecution. He further explained that the prosecutors' network has a way of attaching prosecutors to South Africa's National Prosecution Authority (NPA) for a month so that they have a feel of how these non-conviction based civil applications are made.

He went on to state that NPA South Africa spearheaded the formation of prosecutors' network. He told the Conference that ARINSA also conducts retreats where asset recovery programs are discussed. He expressed the view that investigators and prosecutors cannot work alone and that Judges also need similar trainings so that they move at the same pace with the prosecutors and investigators.

He outlined the following as ARINSA's objectives:

1. to establish itself as a Centre of Excellence in all aspects of tackling the instrumentalities and proceeds of crime;
2. make recommendations to other bodies like the Eastern and Southern African Anti-Money Laundering Group (ESAAMLG) and SADC, relating to all aspects of tackling the proceeds of crime, including wildlife and timber crime;
3. act as an advisory group to appropriate authorities;
4. establish a network of contact persons; and
5. facilitate and promote the establishment of centres of excellence in all aspects of tackling the proceeds of crime.

In terms of progress made by ARINSA, he stated that the organization had achieved the following:

1. 355 cases of assets confiscated in 2016 alone;
2. 237 cases where funds were seized;
3. 8 countries are at an advanced stage or have established an Asset Recovery Unit; and
4. 94 cases in which assets have been forfeited.

In terms of value, he state that-

1. $23m worth of assets have been seized since January, 2016;
2. $5.6m in gold has been seized; and
3. 173 vehicles worth $2m have been seized.

He clarified that the above figures exclude South Africa and Seychelles.

Mr. Letsoalo concluded his presentation by stating that moving forward, ARINSA intended to place investigators into mentorship programs like the one for prosecutors. He added that apart from judicial retreats, ARINSA wanted to train all stakeholders in transnational organized crime. He told the Conference that this training would be jurisdictional based to make it relevant and suitable to a particular jurisdiction.

2ND PRESENTER

MR. FITZ – ROY DRAYTON (UNODC)

Mr. Drayton's presentation focused on wildlife crime as an example of organized crime. He began his presentation by stating that money was at the centre of organized crime and that in the region, there were a number of emerging threats.

He stated that as a result of organized crime, trading in rhino horns and elephant tasks had become sophisticated. He added that between 2010 and 2012 more than 100,000 elephants were killed.

During plenary, the presenters clarified that the office of the receiver of South Africa was the one that managed seized assets in South Africa and that non-conviction based civil applications ran parallel to the criminal proceedings.

SESSION TWO

Topic : "Financing of Terrorism and Radicalization"

Chairperson : Chief Justice A. Nyirenda, SC, Chief Justice of Malawi

Presenter : Mr. William Malone (UNODC)

Mr. Malone, commenced his presentation by defining the term 'terrorism'. He stated that terrorism is a crime that knows no boundaries. He explained that there is no one definition of terrorism but that there are commonalities throughout the world which draw from the UN definition of terrorism.

On radicalization, he defined it as a process by which an individual or group adopts increasingly extreme political, social, and religious ideals and aspirations that reject or undermine the status quo or undermine the contemporary ideas and expressions of freedom of choice.

He outlined the following as contributing factors to radicalization:

1. feeling of being disfranchised from something;
2. disrespect to a faith;
3. foreign military intervention;
4. hopelessness;
5. poor social economic conditions;

6. isolation and marginalization;
7. unemployment;
8. lack of education; and
9. advancement in technology and social media.

Mr. Malone went on to discuss terrorist financing and explained that terrorists engage in the vice because they need money for the following:

1. military equipment (guns, ammunition, uniforms);
2. food;
3. shelter;
4. pay their "employees";
5. communications; and
6. transport or logistics.

He gave examples of some of the financing methods that are used by terrorists as the following:

1. Zakat- giving of alms for the poor or needy as prescribed by the Quran. Zakat is the primary means within the Muslim world for terror organizations to legitimately receive money.
2. Islamic Banking– when conducted as prescribed by the Quran, serves to legitimately facilitate funds collection and disbursal.
3. Hawala – an informal funds transfer system is the primary means of distributing similar sums of money around the world in a safe and record free manner.
4. Money Laundering- concealing the true origin of illicit funds.
5. Drug trafficking
6. Fraud/identity thefts- cloning of credit cards, creating false identities and using them to acquire credit.

Mr. Malone stated that the fight against terrorism has challenges. He mentioned the following as some of them:

1. technology savvy terrorist groups;
2. apathy or complacency among citizens;
3. lack of cooperation (domestic/foreign);
4. analytical capacity;
5. over reliance on technology; and
6. difficulty in tracing small dollar amounts.

As to the way forward, he stated that the following would be the key success factors:

1. continued vigilance;
2. national threat assessments;
3. cooperation amongst domestic agencies;
4. cooperation amongst international intelligence agencies;
5. good domestic laws;
6. vigorous enforcement; and
7. need to work closely with various ethnic and religious communities.

He concluded his presentation by urging participants to understand terrorism empasising that Judges were the gate keepers of justice.

In plenary, the Director of the Namibian Financial Intelligence Centre stated that Countries in Southern, Eastern and Central Africa needed to do more to fight terrorism because there was an impression that terrorist attacks were restricted to other Countries.

SESSION THREE

Topic : **"Trafficking in Persons"**

Chairperson: **Hon Chief Justice Adelino M. Muchanga, Chief Justice of Mozambique**

Presenter : **Ms. Samantha Mundeta- UNODC**

Ms. Mundeta began her presentation by stating that UNODC works with the SADC Secretariat with whom they have a Memorandum of Understanding on fighting trafficking in persons.

She defined human trafficking as the recruitment, transportation, transfer, harbouring, or receipt of persons by improper means (such as force, abduction, fraud, or coercion) for an improper purpose including forced labour or sexual exploitation.

She stated that trafficking and smuggling of people started as far back as the 1900 during the slave trade.

She differentiated trafficking from smuggling as stated in the box below-

TRAFFICKING	**SMUGGLING**
Act- internal or transnational	Act- transnational
Means– coercion	Means- volunteer
Purpose- exploitation	Purpose- material benefit, illicit profit
Victim- individual	Victim is the state

The presenter gave examples of cases decided in Zambia, Swaziland, and Lesotho on trafficking and smuggling.

She concluded her presentation by discussing some of the challenges faced in the fight against trafficking. She stated that diplomatic immunity was one of them. In this regard, she gave an example of a case in Zimbabwe involving the Kuwait Embassy. The Embassy was involved in taking young women to other countries, promising them good working conditions. The Embassy staff would facilitate issuance of visas and make travel arrangements for the women whose phones would be confiscated upon arrival. She disclosed

that one woman managed to smuggle in her phone and contacted her brother in Europe who alerted the police and this led to the rescue of the women.

SATURDAY – 24TH SEPTEMBER, 2016

SESSION FOUR

Topic : "Money Laundering"

Chairperson: Hon. Chief Justice of South Africa, Mogoeng Mogoeng

Presenters : Judge Micheal Hopmeier

: Mr. Alexander Mills

Judge Hopmeier started his presentation by stating that money laundering is linked to corruption. It is a way of making illicit money clean. He stated that flows of illicit money can damage the integrity, stability and reputation of the financial sector and threaten the internal market of a country. He went on to state that money laundering, terrorism financing and organized crime are major problems that can adversely affect the economy of a country. He gave examples of countries that have laws for fighting money laundering. He also highlighted penalties for the offence of money laundering applicable in various countries.

This session was concluded with a mock application for a restraint/freezing order in a money laundering case.

SESSION FIVE

Topic : Cyber – Crime and the Judiciary Responses

Chairperson: Hon. Justice Maruping Dibotelo, Chief Justice of Botswana

Presenter : Mr. Alexander Mills (UNODC)

Mr. Alexander Mills commenced his presentation by stating that cyber-crime is a new type of crime and most of the laws dealing with this crime in various jurisdictions are new. He stated that the increase in internet usage had led to the increase in cybercrime.

He highlighted the following issues that Judges should look out for when dealing with cyber-crime matters:

1. **Jurisdiction**

   This is because cyber space transcends across various jurisdictions.

2. **Anonymity**

   It is difficult to know who is behind the cyber-crime. In this regard, he urged Judges to be patient, use mutual legal assistance legislation, pay attention to corroborative evidence and in some circumstances, require expert evidence.

3. **Expertise**

   He stated that most investigators in these jurisdictions lack expertise to overcome cloud computing, encryption and steganography.

4. **Rules of evidence.**

   On rules of evidence, he urged Judges to be alive to general evidentiary issues, the presumption of regularity and matters relating to hearsay evidence.

5. **Sentencing cybercrime**

   Judges should consider full aggravating features such as the level of automation and anonymity of the person behind the crime. In concluding his presentation, he urged Judges to consider confiscating computers used in committing cyber-crime.

During plenary, the Chief Justice of Mozambique stated that his Country had challenges when it came to mutual legal assistance. He explained that twice, his country had written to a named Country for mutual legal assistance but received no response.

He urged countries to consider mutual legal assistance as a good tool in fighting cyber-crime.

SESSION SIX

Topic : Towards Adopting Guidelines on Judicial Appointments in Africa

Chairperson: Hon. Justice Makarau, Supreme Court Judge, Zimbabwe

Presenter : Christopher Oxtoby: Senior Researcher: DGRU- UCT

Mr. Oxtoby opened his presentation by stating that at the 2015 Annual General Meeting of SACJF, a resolution was adopted that a sub-committee of Judicial Service Commissions be formed to look into the development of a set of principles and guidelines for judicial selection and appointment of Judges in Southern Africa. He reminded the delegates that it was resolved that once finalized, these guidelines would be adopted by SACJF at their 2017 AGM and then implemented in the countries that participate in SACJF.

He stated that his organisation's role in assisting to implement the resolution had been to conduct background research into the systems of judicial appointments and selection in member countries of SACJF.

He highlighted some of the findings of the research as follows:

1. That there was need for greater **transparency**. This was manifested in some specific cases and respondents identified this as being crucial to legitimacy and public confidence.

2. That many respondents noted need for greater clarity on the **criteria** that prospective Judges must meet in order to be appointed.
3. That several respondents raised the issue of the need for diversity in the Judiciary.
4. That it was widely accepted that there was need for a **fit and proper standard** to ensure that persons appointed as Judges are of a high ethical standard.
5. That subjects identified the need for greater regulation of the process of **application and / or nomination**, and of **short listing.**
6. That concerns were raised about failure to advertise vacancies; the lack of written procedures for the Judicial Service Commissions to follow.
7. That it was noted that in some jurisdictions, legislation not only requires that vacancies be advertised, but contains quite detailed requirements of what the advertisement should contain. This was an attractive idea as it focuses the process closely to the appointing criteria.
8. That there was a need identified for a fit for purpose standardised questionnaire, to be completed by candidates. Concerns were expressed about the lack of standardised nomination forms and application procedures in several jurisdictions.
9. That there was need for more extensive **vetting** of candidates. Concerns were expressed that where the Judicial Service Commission lacked capacity to do this, the Executive often takes over this task, which, it is felt, potentially leaves the process open to manipulation.
10. That in Kenya, Judges have to submit wealth declarations. This was an interesting approach and a question was posed if it should be adopted as best practice.
11. That a need was also expressed for greater opportunity for **comments** to be made on candidates like an invitation to the legal profession, civil society etc.

12. That respondents identified a need for the Judicial Service Commission to be administered by its own **Secretariat**, which is independent from the court administration.
13. That the majority of participants expressed a preference for candidates to be **interviewed**.
14. That on decision-making, some jurisdictions use a score sheet system, and there was an argument as to whether this helps align selection with the identified criteria.
15. That several concerns were expressed about the use of **acting judges** and **contract judges.**
16. Two points that go beyond the immediate scope of the appointment process, which are intimately connected to it and these are:
    a) Some respondents suggested that the principles need to highlight the need for **ongoing judicial education** after appointment; and
    b) The importance of **security of tenure** for judicial independence, once appointed.

During plenary, Judge Hopmeier stated that in the United Kingdom, the appointment of Judges was done by senior Judges who would simply approach lawyers they liked and ask them to join as Judges. But that in 2006, the Judicial Appointments Commission was established and it is tasked to select people of good character with diversity, such as sexual diversity. He stated that, however, there were few female Judges on the higher bench.

The Hon. Chief Justice of South Africa stated that transparency is good but that Judges should be involved in the recruitment of Judges. He was of the view that Judges should be trusted and allowed to recruit Judges without embarrassing Judges by subjecting them to public interviews. He went on to say that in South Africa there was a call to interview Judges in public with the media present. He wondered why the media should be present. That even in the UK, there is no such procedure. That hence the DGRU should show the Members of SACJF where this was happening before making proposals that

will be impracticable and damage the reputation of candidates who may be interviewed.

CLOSING SESSION

Closing Remarks: **Arnold Tsunga- International Commission of Jurists (ICJ).**

The first closing remarks were made by Mr. Arnold Tsunga. He gave a brief background on the work of the ICJ. He stated that the ICJ had worked with SACJF consistently since 2008, in supporting all SACJF Annual Conferences and plan to keep doing so. Mr. Tsunga stated that the quality of SACJF Conferences had been improving. He explained that the first few Conferences focused on structural issues of independence of the Judiciaries and the various threats to it. He stated that in 2010, SACJF took a significant step of re-asserting and re-affirming independence of the Judiciaries from all threats in the Region but also adopted a policy that is consistent with overall African Union policy that SACJF will not be indifferent if there are significant threats to judicial independence in a member state.

He added that in July, 2012, SACJF Maputo Conference resolved that a strategic plan be developed and a strategic plan was developed and adopted for the period 2016-2019. He disclosed that in 2015, the Conference focused on guaranteeing the right to fair trial in Africa through comparative presentation of best practices. The 2015 Conference also agreed to initiate a process that would result in the development of guidelines and principles on judicial appointments for possible adoption by Chief Justices at the 2017 Conference.

He added that that year's Conference introduced a more technical theme on serious financial crimes. He expressed the view that this was key for any legal system in tackling organized crime. He added that the ARINSA programme, in partnership with UNODC, was critical in containing organized

crime. In concluding his remarks, he thanked the Chief Justice of Namibia for the excellent organization and hospitality.

Closing remarks by Chief Justice Shivute

Hon. Chief Justice Shivute started by saying that the success of a Conference is not measured by the quality of papers alone but also by what happens after the Conference. He stated that that year's Conference focused more on the topical issues that affected various jurisdictions. He stated that he was pleased that the Conference was a resounding success.

He thanked all who put in an effort in the organization of the Conference. He also thanked UNODC, DGRU and ICJ for the support and hoped that the partnerships with these organisations would continue.