



# International Justice in Africa: *Prospects and Challenges*

Report of Workshop Proceedings  
17 July 2008



## **Summary of Workshop Proceedings**

### **Background**

Over the last year the International Refugee Rights Initiative, with the generous project and technical assistance of the Open Society Justice Initiative, has been consulting regional experts to conduct a review of the experience of international justice in Africa. The first reflections from this project were presented at the workshop held in Kampala on 17 July 2008, the tenth anniversary of the adoption of the *Rome Statute of the International Criminal Court* (the Rome Statute).

At the workshop a draft discussion document was circulated summarising the principle engagements of international justice on the continent in the last ten years and highlighting areas of policy concern. In addition to seeking the input of participants to the document, the workshop was intended to mark the territory where further research, monitoring and advocacy are necessary, and provide a starting point for the building of an informed constituency for international justice in Africa. The workshop brought together a number of contributors to the project alongside other regional experts to identify key challenges and map out an agenda for action.

This report provides a summary of the workshop's proceedings and highlights key issues and action points that emerged during the course of the day's presentations and discussions. The final report of the project as a whole was published in November 2008 as *In the Interests of Justice? Prospects and Challenges for International Justice in Africa*.

### **Morning Session: The *Ad Hoc* Tribunals and the International Criminal Court**

Chaired by Yitiha Simbeye of the Open University of Tanzania, the first panel of the morning addressed the two *ad hoc* tribunals on the continent and the emerging justice institutions in Burundi.

#### *The International Criminal Tribunal for Rwanda*

The panel began with a presentation on the International Criminal Tribunal for Rwanda (the ICTR or the Tribunal), provided by George Mugwanya from the ICTR's Office of the Prosecutor. Mugwanya presented an overview of the establishment and accomplishments of the ICTR and highlighted the key challenges confronting the Tribunal. The overarching difficulties facing the Tribunal include identifying and locating those "most responsible" and bringing them to justice (many of the architects of the Rwandan genocide have fled to other countries); identifying witnesses (many are displaced, deceased or unwilling to testify); and engaging with the question as to whether the ICTR is contributing to peace building in Rwanda. Mugwanya was of the view that that the ICTR has at least had a deterrent effect, by providing a measure of accountability and strengthening the rule of law.

The most immediate challenge facing the ICTR is its completion strategy. As of 17 July, the Tribunal was expected to wind up its trial work by the end of 2008 and its appellate work by the end of 2010.<sup>1</sup> Mugwanya raised in particular the fate of suspects who will have been indicted but not brought to trial by the end of the year. The ICTR's strategy for such cases is to seek

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<sup>1</sup> On 21 July 2008, the United Nations Security Council extended the ICTR's mandate by one year, largely due to recent arrests. The Tribunal is now slated to complete first instance trials by 31 December 2009.

their transfer to national jurisdictions, in particular to Rwanda. There are certain requirements, however, which the Court demands in order to authorise transfer, including that the proposed forum have jurisdiction, adhere to international fair trial standards and not invoke the death penalty, determinations which must be made by the ICTR's Trial Chambers. Thus far, three different Trial Chambers had denied all three proposed transfers to Rwanda, primarily on fair trial grounds. Additional problems facing the Court are with respect to persons still at large and where files remain open but cases have not commenced. How to address these impunity gaps after the ICTR has wound up its work is a major challenge for the Tribunal and the international community.

### *The Special Court for Sierra Leone*

The second presentation by Ezekiel Pajibo concerned the Special Court for Sierra Leone (SCSL or the Court), in particular its impact in Liberia, the country formerly ruled by the Court's most famous indictee, Charles Taylor. Pajibo explained that Taylor's indictment was celebrated by the Liberian public and was viewed as a major step to bringing peace and democracy to the country. Indeed, Pajibo argued that since Taylor's arrest, Liberia had been on an "irreversible path to peace."

While acknowledging the importance of the Court, Pajibo also reflected on the work of Sierra Leone's Truth and Reconciliation Commission (SLTRC), which operates alongside the SCSL. He highlighted two of the SLTRC's particular features: it cannot grant amnesties for international crimes and it is mandated to investigate economic crimes. According to Pajibo, the latter is extremely important as it was the fight to control the country's rich natural resources that perpetuated the war in Sierra Leone and there is a risk that those who benefited economically from the war could recapture control of the state.

### *Burundi*

The final panellist Gerard Nduwayo presented a brief historical overview of the conflict in Burundi and then discussed the foundations of, and challenges to, justice there. Nduwayo explained that in 2005 a United Nations (UN) Security Council assessment mission to Burundi had recommended the establishment of a Truth and Reconciliation Commission (BTRC) and a Special Chamber within the Burundian judicial system (the Special Chamber). The UN mission urged that the BTRC be mandated to fact-find in relation to heinous crimes committed since 1962. The Special Chamber, by contrast, would cover the period from 1972 until the end of 1993 and would be comprised of Burundian and international judges and prosecutors.

The specifics relating to the functioning of the BTRC and the Special Chamber have yet to be fully articulated and the relationship between the two institutions remains unclear, despite the fact that in 2005 Burundi's transitional government established a delegation to work with the UN to articulate the specifics of the BTRC. Nduwayo thus highlighted the joint issues of the relationship between, and the sequencing of, the parallel activities of the BTRC and the Special Chamber as major challenges to bringing justice to Burundi. Other difficulties he identified included: that individuals alleged to have committed crimes in Burundi hold political power and are in a position to slow the wheels of justice; the impact of the amnesties provided in the 1993 Arusha Peace Agreement; and the ability of perpetrators to intimidate victims or flee to escape justice. Nduwayo concluded by noting that impunity was "the rule rather than the exception" in Burundi, with the country lacking an independent judiciary. There is thus an important role for the international community in helping to deliver accountability in Burundi.

## *The International Criminal Court*

The second panel of the morning was chaired by Achieng Akena, currently with the Open Society Initiative for East Africa, and focused on the International Criminal Court's (the ICC or the Court) situations and cases, all of which are in Africa.

The panel began with a presentation on the Democratic Republic of Congo (DRC) by Georges Kapiamba of the African Association for the Defense of Human Rights. He provided an overview of the ICC's involvement in DRC and reflected on local reactions and the primary challenges to the Court's work in DRC. People in DRC have wondered why the ICC seems to have singled out Congolese people as its first target – despite four ongoing investigations only Congolese indictees have so far been transferred to the Hague for trial. Kapiamba attributed such misunderstandings about the operation of the Court to insufficient outreach in DRC. In addition to a perception that the Congolese have been the ICC's 'guinea pigs,' individuals in DRC are concerned about the recent ICC decision to release Thomas Lubanga. Those who cooperated with the ICC's investigation in the case are particularly worried and a number have fled DRC, fearing retaliation by Lubanga or his supporters.

According to Kapiamba, the primary challenge to effective international justice in DRC is a multi-dimensional impunity gap. The ICC's limited temporal and jurisdictional mandate, which means that many crimes committed in the DRC are beyond the Court's reach, and the enactment of the 12 July 2008 Congolese amnesty law, which is not applicable to international crimes but does mean that certain perpetrators will escape domestic justice, contribute to this. A third element of the impunity gap relates to DRC's failure to adopt domestic legislation that would allow national courts to prosecute international crimes. In light of this, Kapiamba urged sustained political and civil society action to promote accountability: "political leaders...and NGOs have to make it impossible for leaders to escape accountability."

The second presentation by Chris Dolan of the Refugee Law Project concerned the ICC's involvement in Uganda, which Dolan argued imposes a foreign conception of justice and has led to a false polarisation of the interests of justice and peace. Dolan urged a recognition of the distinction between negative and positive peace, with positive peace characterised by sustainability and local ownership. If not correctly pursued, international justice could, he argued, undermine the latter. The correct approach to the pursuit of justice involves a negotiated conception of justice characterised by local ownership, which likely involves compromising on the international community's retributive version of justice. It also necessitates greater respect for the principle of complementarity. Dolan acknowledged that, further to the agreements reached during the accountability and reconciliation phase of the Juba peace process, it is now time for the ICC Prosecutor to step back and allow domestic institutions to work.

The final panellist was Ali Mohamed Agab, who spoke about Darfur, Sudan, with a particular focus on the 14 July application by the ICC Prosecutor for a warrant of arrest for Sudanese President Omar Al Bashir on charges of war crimes, crimes against humanity and genocide. Agab provided an overview of the government of Sudan's reactions to the Prosecutor's application and the ICC investigation in general. He explained that the government regularly argues that because Sudan has signed, but not ratified, the Rome Statute, it is not bound by the UN Security Council resolution that referred the situation in Darfur to the ICC. This position

is legally incorrect but is used within Sudan to manipulate public understanding of Sudan's obligations. Agab also explained that the government has repeatedly stated that it is willing to use domestic judicial processes to bring the situation in Darfur to justice. He doubted, however, the genuineness of any such processes. Finally, Agab noted that a likely result of any eventual ICC arrest warrant would be an attempt by Bashir to cling to power in order to attempt to avoid transfer to the Hague.

Agab noted that much of the public reaction in the region to the Prosecution's application centres on concerns around the effect that it will have on the Darfur peace process. Agab was of the view that the application is a positive development and that the imposition of justice could promote or even lead to peace. He also highlighted the positive effect ICC involvement in Darfur could have on ensuring accountability for gender-based violence, a phenomenon extremely prevalent in Darfur. Agab explained that it is difficult for victims of the crime of rape to seek redress, as under Sudanese law a woman's allegation of rape may constitute an admission of the crime of adultery. International justice may therefore provide a direct avenue of redress for victims of gender-based violence and act as a driver of law reform.

### **Afternoon Session: Building a Regional Constituency for International Justice**

Building on the morning's overview of the *ad hoc* tribunals and the ICC, the afternoon session focused on building an African constituency for international justice. Nobuntu Mbelle of the Darfur Consortium and the Coalition for an Effective African Court on Human and Peoples Rights chaired the first panel. It began with an introduction by Don Deya of the East Africa Law Society to selected international, African Union (AU) and sub-regional mechanisms that may have a role in bringing accountability to Africa's conflicts, beyond those mechanisms treated in the morning session.

#### *African Regional and Sub-Regional Mechanisms*

Deya opened his presentation by raising fundamental questions about the scope of the term international justice. What he termed the 'conservative' definition circumscribes 'international justice' to the process of identifying individual criminal responsibility for international crimes: genocide, war crimes and crimes against humanity. A broader definition encompasses concepts such as economic justice, justice in international relations and fairness in the world order. Deya noted the International Court of Justice and the International Centre for the Settlement of Investment Disputes as venues that could adjudicate the economic crimes encompassed by this broader conception of international justice. Ultimately, however, Deya decided that for purposes of the discussion he would adopt a 'conservative' definition of international justice, focusing on the crimes within ICC jurisdiction.

At the regional level, Deya noted that AU judicial institutions have potential to address issues of justice, including the newly created (but not yet operational) African Court of Justice and Human Rights (the African Court). The African Court was formed through the merger of the African Court of Justice and the African Court on Human and Peoples' Rights, and there is potential in theory for its jurisdiction to be extended to include either permanent or occasional criminal jurisdiction. Deya also mentioned the African Commission on Human and Peoples' Rights and the African Committee of Experts on the Rights and Welfare of the Child as venues for the pursuit of accountability.

Reflecting on what he called “the intersectionality of human rights, international justice and peace and security,” at the normative level Deya referenced legal instruments such as the *Constitutive Act of the African Union*, the *Protocol Relating to the Establishment of the Peace and Security Council of the African Union*, the *African Charter on Human and Peoples’ Rights*, the *African Charter on the Rights and Welfare of the Child*, the *Protocol to the African Charter on the Establishment of an African Court on Human and Peoples’ Rights* and the *Protocol to the African Charter on the Rights of Women in Africa*. AU political institutions with scope to address issues of justice include the AU’s Assembly of Heads of States and Governments, the AU’s Peace and Security Council, the Permanent Representatives Committee of African Ambassadors, the AU Commission, the Pan African Parliament, the AU’s Economic, Social and Cultural Council, the Conference on Security, Stability, Development and Cooperation in Africa and the New Partnership for Africa’s Economic Development.

At the sub-regional level, legal developments with the capacity to impact the pursuit of international justice include the International Conference on the Great Lakes Region and regional economic communities (RECs) such as the East African Community (EAC) – the judicial organ of which is the East African Court of Justice – the Southern African Development Community, the Economic Community of West African States and the Inter-Governmental Authority on Development. Deya cited the Final *Communiqué* of the EAC’s meeting regarding the situation in Zimbabwe. It was the first time a REC has issued a statement regarding a non-member state, an example of the ability of the RECs to employ public censure around issues of justice. In conclusion, Deya urged that the promise of existing AU and sub-regional institutions to address issues of justice ultimately depends on political will with dynamic civil society as the catalyst.

#### *Universal Jurisdiction*

Godfrey Musila of the Institute for Security Studies was the second panellist. Arguing that the domestic sphere must be the primary site of international justice, he spoke about universal jurisdiction and described the case against Hissene Habré, the former leader of Chad, as an example of the principle in practice. Despite Senegal’s progress towards prosecuting Habré, Musila argued that the effect of the SCSL’s trial of Charles Taylor has been to make it more difficult to prosecute heads of state.

#### *The Role of Civil Society*

John Onyango of the Uganda Coalition for the ICC (UCICC) and Chidi Odinkalu of the Open Society Justice Initiative presented on the experience of civil society engagement with international justice in Africa. Onyango argued that there are two streams to civil society’s response to international justice on the continent. On the one hand, some civil society organisations (CSOs) have played key roles in providing the ICC with evidence during investigations, in educating the public about international justice and in holding governments accountable to their international obligations. The UCICC, for example, has mounted a campaign to encourage the Ugandan government to domesticate the Rome Statute. On the other hand, some CSOs see the ICC as alien and irrelevant, fuelled primarily by distrust of the ICC and international justice in general as emanations of the ‘outside.’ Improved ICC outreach, he suggested, is one action that could assist in creating a better understanding of the work of the Court.

Odinkalu problematised CSOs' response to international justice, arguing that they have often adopted a partisan approach, tending to take a polarised position either supporting, or denouncing, the ICC wholesale, at the expense of articulating and advocating nuanced, multi-dimensional and survivor-oriented conceptions of justice. He argued that justice should be more broadly conceived as a package of measures comprised of the cessation of hostilities, reconstruction, civilian protection and participation in judicial mechanisms and compensation and reparations, and that any effort that suggests that justice is one-dimensional – including only, for example, the prosecution of those “most responsible” for international crimes – delegitimises the concept. He suggested in particular that human security is a useful paradigm that could help to dissolve the false dichotomy between justice and peace.

### ***Key Issues and an Agenda for Action***

The final session was a discussion, chaired by Chidi Odinkalu, which sought to elucidate the territory where further research, monitoring and advocacy were necessary in order to build an informed constituency for international justice on the continent. Key conclusions and related action items that emerged from the final discussion, and indeed throughout the workshop, are highlighted below.

### **Reconceptualising and Redefining Justice**

There was preference for the adoption of a broad, multi-dimensional conception of justice, including elements such as peace, reconstruction and victim protection and participation over the retributive conception of justice, often perceived as favoured by the international community. Re-conceiving the concept of justice in this way renders the juxtaposition of peace and justice a false dichotomy and may also be helpful in conflict prevention programmes. The recognition of the socio-economic and political contexts within which international justice unfolds, and which have given rise to the conflicts that have occasioned the quest for accountability, must be an aspect of this re-conceptualisation.

### **Engaging Victims and Those ‘Living’ with International Justice**

The complexity and depth of victim community concerns and interests in international justice efforts are often not sufficiently taken into account. There is a need for:

- focused and sustained research and advocacy around the following issues: witness protection; outreach to victim groups and communities ensuring exchange of experiences about the impact of international justice processes; supporting capacity building within victim communities to engage with international justice mechanisms (including participation in trials); a renewed focus on restorative elements of justice, including payment of reparations and assistance with the post-conflict reconstruction of victim communities.

### **Building and Strengthening an African Constituency for International Justice**

Outsiders have dominated the discourse on international justice in Africa and the funding for African civil society action. It is important to be aware of the hemispheric divide and to mainstream conceptual/analytic and activist African perspectives on international justice. This should include work to appropriate traditional African approaches and mechanisms within the international justice toolbox. There is a need therefore to:

- develop a clear research and publication agenda reflecting African perspectives on international justice;
- promote and disseminate work by African academics and CSOs through on-line forums and within academic, professional (for example, law societies) and civil society circles;
- enhance the capacity of African victim communities, students, practitioners and civil society activists to engage with and be heard on issues of international justice;
- improve the quality of education on international criminal law, building on initiatives such as the network of east African international law lecturers working towards the incorporation of international criminal law in all law faculties of east Africa and the proposed Open University of Tanzania international criminal law centre in Arusha;
- think creatively about new African sources of funding and act upon any ideas generated;
- ensure more effective and consistent information sharing between institutions and individuals working on international justice on the continent, for example by promoting dialogue and information sharing on-line and at workshops and conferences targeting key actors;
- consider how to foster organised formal and informal networks to respond to key international justice policy developments in Africa.

### **Delivering Justice with National, Sub-Regional and Regional Mechanisms**

International, as opposed to African, institutions such as the ICTR and the ICC have dominated attempts to deliver justice for gross human rights violations and mass crimes on the continent. There is a need to:

- engage the organs of the AU on international justice using legal and political tools;
- develop litigation strategies bolstered by what was described as “daring advocacy” before Africa’s regional and sub-regional judicial institutions;
- promote the appropriate use of universal jurisdiction;
- advocate for the domestication of the Rome Statute so that national jurisdictions can deliver accountability domestically. To the extent that such advocacy is already underway, civil society should engage in coordinated action to bolster existing campaigns.

### **Ensuring Rich Legacies**

Lessons learned by existing international justice mechanisms must be preserved in order to ensure that later institutions benefit from those that came before. For example, the emerging regime in Burundi could benefit from lessons learned in Sierra Leone. There is a need to:

- share information between institutions and individuals working on international justice on the continent. This could be accomplished by promoting dialogue and information sharing on-line and at workshops and conferences targeting key actors;
- ensure that the archives of the *ad hoc* tribunals remain in Africa and are accessible to academics, practitioners and activists on the continent. If the Open University of Tanzania is successful in its campaign for custody of the ICTR archives and library, for example, it should ensure that such records and resources are widely accessible, possibly by making key materials available on-line.

## **Monitoring the Impact of the ICC**

Critical assessment of the ICC's work in Africa is vital for the future of the Court. A framework for monitoring the impact of the cases across a set of core issues could be drawn up and regularly assessed as part of, as one participant termed it, the work of "making the ICC our own in Africa."

### ***Conclusion: The Way Forward***

The objective of the workshop was to elicit a diversity of viewpoints grounded in local expertise on the way forward for international justice in Africa. Consensus was reached broadly around a number of key issues including the need to: adopt a broad conception of justice that is relevant to victims; infuse the peace vs. justice debate with such a conception of justice; understand the socio-economic and political contexts that have given rise to the commission of international crimes on the continent; engage and hold the ICC accountable to victims; create a strong African constituency for international justice; deliver justice using national, sub-regional or regional mechanisms; and ensure that the lessons learned by existing mechanisms of international justice are not lost. These conclusions give rise to a broad and long-term agenda for action, which African civil society, academics and other interested actors must consider how to sustain and carry forward.

## **About the International Refugee Rights Initiative**

The International Refugee Rights Initiative (IRRI) was founded in 2004 to enhance the protection of the rights of the forcibly displaced worldwide. IRRI grounds its advocacy in the rights accorded in international human rights instruments to those who are forced to flee and strives to make these guarantees effective in the communities where the displaced and their hosts live.

A focus of IRRI's work in Africa is understanding and integrating the principles of human rights and international justice into responses to forced displacement as a necessary aspect of moving from conflict to peace. IRRI also acts a bridge between local advocates and the international community, enabling local knowledge to infuse international developments and helping local advocates integrate the implications of global policy in their work at home.

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