

JUST JUSTICE?

Civil Society,
International Justice
and the Search for
Accountability in Africa

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International
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Introduction

Africa has become a testing ground for international justice and international *criminal* justice in particular. In the last decade and a half, the continent has been the site of numerous efforts to promote criminal accountability, from *ad hoc* courts (the International Criminal Tribunal for Rwanda and the Special Court for Sierra Leone), to efforts to bring the former Chadian leader Hissène Habré to justice on behalf of the peace and security architecture of the African Union (AU), to International Criminal Court (ICC) investigations in seven country situations.¹

This preponderance of international justice activity is not surprising given the prolific nature of conflict in Africa over the past two decades. However, serious questions about the impact and efficacy of international justice endeavours are now being asked. How have international justice activities affected the social, political and economic contexts on the ground? Who has a voice in determining what kind of justice is being delivered and for whom?

One component of answering these questions is the question of who is driving the process. Certainly, the international justice effort in Africa has been part of a broader global endeavour to promote accountability and combat impunity for serious crimes as part of the evolution of the universal human rights movement. The “international justice experiment” on the continent has also been driven, to some extent, by African states themselves and the normative imperatives of the new AU. Vigorous campaigning by civil society organisations (CSOs) determined to “put an end to impunity”, both from within and outside the continent, has also been key.

However, acceptance of international justice as the default position for addressing the high level of impunity for serious crimes which exists

across the continent has also been the subject of significant concern. Some view the intervention of international justice mechanisms in Africa as just another form of neo-colonialism deployed with questionable intent. Others express reservations about the potential detrimental impact on domestic peace and political processes, citing a lack of understanding of local contexts. Others have criticised engagements for failing to effectively address the needs of victim communities and to adequately protect those who assist in this quest for justice.

In some cases those criticising international justice endeavours are those who would be inherently expected to oppose them: those fearful that they themselves may be targets of prosecution in the future. However, concerns are also being increasingly expressed by those who should be considered the natural constituency of international justice – affected communities, local CSOs and other social movements. These actors have attempted to offer critiques of the potential of international accountability mechanisms to deliver on the transformative promise of the international justice project. Unfortunately these voices are often glossed over, ignored or openly undermined, including by being labelled “anti-justice” or “pro-government”. Passionate adherents of international criminal accountability (whether from within or outside of the continent) often have greater access to resources and the “right” language of international relations. They have tended to dominate discussions, reluctant to engage in open critique. In terms of civil society proponents the voices of bigger and stronger – and usually globally-operating non-governmental organisations (NGOs) – are loudest in efforts to promote international criminal justice mechanisms.

It is of course understandable that after the long battle to achieve global consensus on instruments such as the Rome Statute of the

International Criminal Court there would be a desire to hold the line. The acceptance of the idea of international justice certainly constitutes an extraordinary advance in the evolution of international governance. Notwithstanding its normative value, however, it is clear there is a need for a more attentive stocktaking of the impact of international justice *in practice* and, in particular, from the perspective of the communities where it is applied.

How do local actors and groups – defined as much by their heterogeneity as by their similarities – view this international justice activity? Is it seen to resonate with their understandings of the local context and what is needed to achieve sustainable transformation? Or is it discordant? How have these expectations and understandings of international justice changed over time? What voices are driving, or capable of influencing, the course of international justice strategy in response to these insights? What forums are available for discussion and debate? Where concerns exist, how can they be expressed and taken into account?

The International Refugee Rights Initiative (IRRI)'s experience over the last seven years is that in the enthusiasm to embrace the *promise* of international justice there has often been inadequate space for honest reflection on the *practice and reality* of international justice, particularly from the perspective of local advocates and local communities in Africa. This lack of debate has, not least, stunted assessment of how the objectives of international justice might be more effectively pursued.²

In response, IRRI is launching a discussion paper series entitled *Just Justice? Civil society, international justice and the search for accountability in Africa*. The series will reflect local perspectives on international justice as it is being experienced in Africa. It aims to deepen the debate around a series of key

questions and controversies facing the realisation of international justice, anchored in reflections from the ground, including local, national, regional and continental civil society. The target audience includes civil society, policymakers, practitioners and donors across the globe working on issues related to international criminal justice.

Background to the series

In 2008, IRRI undertook a study of international justice, *In the Interests of Justice? Prospects and Challenges for International Justice in Africa*.³ Since that time, the range of engagements by international justice in Africa – in particular, but not exclusively, international criminal justice – has exploded in breadth and complexity:

- New ICC investigations have been opened in three new country situations (Kenya, Libya, and Cote d'Ivoire) and proceedings have moved forward in six cases against 12 accused.⁴
- At the AU level, discussions are well advanced around the conferral of criminal jurisdiction on the evolving African Court of Justice and Human Rights.
- Regional arrangements are increasingly encompassing international justice components in their approaches to peace and security: the extension of the East African Court of Justice's jurisdiction is under discussion and a new Regional Committee for the prevention and punishment of genocide, war crimes and crimes against humanity and all forms of discrimination has just begun work within the context of the International Conference of the Great Lakes Region.
- At the national level, war crimes tribunals with various degrees of international engagement have been set up or are under contemplation in a number of jurisdictions.
- For the second time, the United Nations Security Council (UNSC) has referred a

situation in Africa to the ICC as a tool of enhancing peace and security in the region and internationally.

New challenges

This flurry of activity has thrown up new issues and reshaped old debates in important ways for local actors. Some examples of the kinds of questions which will be explored in the series are set out below.

First, the evolving ICC investigations in Kenya and Sudan and the vehement responses from African governments have increased public awareness of the Court and of international criminal justice more broadly. This, in turn, has raised questions about the expectations which have been generated and the extent to which international justice can deliver. In Kenya, for instance, the fervour with which the Kenyan public has embraced the possibility of fundamental change in political culture as a result of the ICC engagement has attracted the full glare of the media. Adding to the hype, the ICC Prosecutor himself has talked up the role of the Court in ensuring a peaceful electoral contest in 2012.⁵ To what extent can—or should—the Court be asked to live up to its billing?

Second, the political impact of international investigations and proceedings is becoming increasingly felt on the ground. In the Central African Republic (CAR) situation, for example, the detention and trial in the Hague of Jean Pierre Bemba has created considerable publicity, not just in CAR, but also in his native Democratic Republic of Congo (DRC).⁶ As the strongest opposition candidate in the previous 2006 elections, Bemba's absence from the field of presidential candidates in the November 2011 contest critically altered its course.⁷ How can the implications of the unequivocal political role of international justice mechanisms be better understood, not just in terms of the work

of the Court and its choices and those of its constituencies, but by communities on the ground? What opportunities and limitations face the Court and those communities in acknowledging, negotiating and leveraging these implications?

Third, by virtue of its framing in the Rome Statute as a mechanism of intervention in response to threats to “international peace and security”, the ICC has been bestowed with a critical political and security function.⁸ The Libya situation now before the Court highlights many of the challenges associated with the operationalisation of this role—not least for African civil society desirous of preventing conflict and promoting the values and goals of international justice.

Following widespread reports of targeting of civilians by Libyan government forces, the UNSC referred the situation in Libya to the ICC on 26 February.⁹ The Court moved with extraordinary swiftness: within a week of the referral the Prosecutor had decided to open an investigation¹⁰ and Chambers issued an arrest warrant against Colonel Qadhafi and two others just four months later.

Against the background of the subsequent military intervention by the North Atlantic Treaty Organisation (NATO), the rapidity of the ICC investigation and the timing of the warrants contributed to undermining the welcome for the Court's deployment. African heads of state in particular questioned the appropriateness of the use of the ICC as a tool of the UNSC's peace and security mandate. They declared that the warrant for Colonel Qadhafi “seriously complicates the efforts aimed at finding a negotiated political solution to the crisis in Libya, which will also address, in a mutually reinforcing way, issues related to impunity and reconciliation.”¹¹

Debates about accountability are therefore becoming inextricably intertwined with broader

questions around responding to mass atrocity and the role of international intervention, including the content and application of the emerging norm of the responsibility to protect. The violent death of Qadhafi will only intensify the debate. If there is to be an evolution in the effectiveness of international justice the insights of local civil society on its complex interactions with local and regional political, social and security contexts will be vital.

While the AU's voice on Libya has been critical of the use of the ICC as a tool of mass atrocity prevention, it is not the only area where the AU has set itself in opposition to the trajectory of international justice, challenging the normative gains for which many in civil society worked so hard. In both the Sudan and Kenya situations, the AU has asked the UNSC to suspend ICC investigations, invoking Article 16 of the Rome Statute founding the Court. The AU Assembly has also requested member states not to enforce the ICC arrest warrants issued for Sudanese President Omar Al-Bashir and Colonel Qadhafi.¹² What will be the result of this standoff? Will it create an opportunity for local civil society to ensure that African mechanisms take up the mantle of criminal accountability or will it ultimately undermine the norms and practice of international justice at both national and regional level? Against the background of a cacophony of polarised global, regional and local voices—easily manipulated by those intent on undermining the goals of justice and accountability—what role can local civil society and local communities play?

The evolving role of civil society

“Civil society” is convenient shorthand for a wide range of diverse, fragmented and often-at-odds non-governmental groupings, from small, local community-based groups to large NGOs operating at the global level. Some have multimillion dollar annual budgets with direct access to policymakers in powerful capitals and

headquarters, while others are run by volunteers on a shoestring budget and struggle to have their voices heard. The diversity rather than the similarity of CSOs working on international criminal justice issues – in terms of background, worldview, size, capacity, goals, programmes and influence – is striking.

Civil society actors – particularly international NGOs, but not exclusively so – played a critical role in the development of international justice, campaigning actively for the adoption and subsequent ratification of the Rome Statute, following logistical preparations from budgets to premises and inputting to the rules of procedure and evidence. Once the Court began its operations, CSOs became vital resources, including producing credible and detailed reports on human rights violations that have helped to shape investigations. Beyond the ICC, CSOs have helped to ensure the creation of ad hoc tribunals and spurred the establishment of national level mechanisms to tackle international crimes.

Local CSOs have been perhaps the most critical interlocutors for the ICC. They have served as a bridge to affected communities playing an important role, not just in public education and outreach, but also in the day to day operation of the Court. Over the last seven years, local CSOs have partnered with all sections of the Court, engaging in wide variety of tasks – from disseminating information on the Court's operations, to collecting information and evidence, advising on outreach strategy, assisting in moving prospective witnesses to safe locations and helping defence counsel to locate experts.¹³

Until recently, much of this engagement has taken place quietly and with minimal outside recognition. However, the suspension of proceedings against Thomas Lubanga as a result of the refusal of the Office of the Prosecutor to reveal the identity of an “intermediary,” has focused new attention on these relationships

and the duty of care owed by the Court. Staff of local civil society and their families have been harassed, detained, tortured and displaced as a result of their work with the Court. Most publically, in March 2009 the government of Sudan expelled 13 international NGOs¹⁴ and shut down three national human rights organisations in reaction to the issuance of the arrest warrant for President Al Bashir, alleging cooperation between the organisations and the ICC. This has not only had far-reaching humanitarian consequences, but also led to the exile of a core component of Sudan's human rights movement.¹⁵

The role of local CSOs in the debate

While debates rage about the position of African states on the ICC and the alignment of global support for the Court, international criminal justice, and international justice more broadly, the most prominent voices in the debate tend to be those of governments and inter-governmental institutions such as the AU and, to a lesser extent, large international NGOs. As a result of the crisis, African NGOs have been pushed to the forefront of day to day advocacy around shoring up the Rome Statute system. Yet more considered local insights into the complex impact of the Court's operations are often unarticulated, muted or simply ignored—for a variety of reasons. Generating this dialogue is complex: there are many barriers to creating the space for direct and open reflection by local CSOs on the impact of international justice interventions on their own operations, on the contexts in which they work, or, ultimately, on prospects for the achievement of “just justice”. The complexity of power relationships at play *vis a vis* the international justice movement and the very expectations generated by the arrival of the Court, for example, can be among the factors hampering engagement: questions about the

reality of what the Court can or should do may be difficult to ask where hopes are so high.

Local CSOs have thus often struggled to respond to the political and social consequences of the pursuit of international accountability – and to communicate that analysis successfully to the larger debate. In Uganda, for example, the ICC's intervention sparked wide ranging debate about the appropriate role of an international court in pursuing resolution of an ongoing conflict. Many local CSOs argued that the intervention would undermine negotiations and the effectiveness of the Amnesty Act. They found themselves opposed, often quite vociferously, by international NGOs who had argued for the ICC engagement. Adding to this difficulty is the fact that, as noted above, for many CSOs, real or perceived engagement with the ICC has often resulted in attacks and diminished organisational capacities and operations.

Thus the level of engagement and assistance by local CSOs to the ICC and international justice efforts has not always been met with a concomitant desire (whether by international justice institutions, supporters or indeed local CSOs themselves) to examine the impact of the Court's involvement on themselves and their communities and to explore the limitations of respective functions and mandates. To what extent, for example, can and should CSOs demand from the ICC greater awareness and understanding of the local context, a context in which, too often, the demands of justice go far beyond what the Court can deliver?

The series

The series will provide a forum for highlighting and exploring these questions and tensions in partnership with local civil society voices. The first papers in the series will focus on the ICC as a tool of international justice and include: a discussion of the ICC's initial intervention in Uganda from a local CSO perspective; an

examination of the impact of the ICC's first trials on the political and social fabric of communities and civil society in Ituri, DRC; and reflections on the political dimensions—and implications for

local struggles for accountability—of the Court's engagement in the Sudanese situation.

IRRI welcomes ideas and suggestions for future papers and partners and looks forward to sharing analysis and recommendations as they emerge from the debate.

¹ These seven are Central African Republic, Cote d'Ivoire, Democratic Republic of Congo, Kenya, Libya, Sudan and Uganda.

² This dialogue is beginning at the international level. See, for example, Human Rights Watch, "Course Correction: Recommendations to the Prosecutor for a More Effective Approach to Situations Under Analysis," June 2011.

³ In the Agenda for Action developed by IRRI and its partners, two key issues that emerged were the challenge of making international justice accountable to victim communities, and the importance of addressing the social and political context in which international justice unfolds.

⁴ Trials are underway against Germain Katanga and Mathieu Ngudjolo Chui in the Democratic Republic of Congo (DRC) situation and Jean Pierre Bemba in the Central African Republic (CAR) situation; the trial against Abdallah Banda Abakaer Nourain and Saleh Mohammed Jerbo Jamus in the Darfur situation is set to begin; and confirmation of charges hearings against six individuals in the Kenya situation (three have been charged on the government side, Francis Kirimi Muthaura, Uhuru Muigai Kenyatta and Mohammed Hussein Ali and three on the side of the Orange Democratic Movement, William Samoei Ruto, Henry Kiprono Kosgey and Joshua Arap Sang) and against Callixte Mbarushimana in the DRC situation have begun.

⁵ For example, the Prosecutor, in announcing charges in the Kenya case, said: "By breaking the cycle of impunity for massive crimes, victims and their families can have justice. And Kenyans can pave the way to peaceful elections in 2012." ICC Office of the Prosecutor, Kenya's post election violence: ICC Prosecutor presents cases against six individuals for crimes against humanity, 15 December 2010, ICC-OTP-20101215-PR615.

⁶ Olivia Bueno, "Gone But Not Forgotten: Bemba and Congo's 2011 Presidential Elections," LubangaTrial.org, 29 August 2011.

⁷ In the DRC, many see the charges against Bemba as politically motivated and he maintains broad support on the ground. Interview with a Congolese journalist, Bunia, 18 October 2011.

⁸ The inclusion of powers of referral and Article 16 deferral for the Council acting under Chapter VII in the Statute is the most visible evidence of this approach.

⁹ UN Security Council Resolution 1970, UN doc. no. S/RES/1970 (2011), 26 February 2011.

¹⁰ Five days after the Security Council resolution, on 3 March 2011, the Prosecutor announced that he was opening the investigation. See ICC Press Release, "ICC Prosecutor to open an investigation in Libya," 2 March 2011.

¹¹ Decision on the Implementation of the Assembly Decisions on the International Criminal Court, Doc. EX.CL/670 (XIX).

¹² Ibid.

¹³ The Office of the Prosecutor, for example, has acknowledged the critical role of NGOs, stating that "[n]one of the Office of the Prosecutor's objectives could be met without this permanent interaction with NGOs at all stages of its activities: development of policies and practices, crime prevention, promotion of national proceedings, monitoring, preliminary examinations, investigations, prosecutions, cooperation, and efforts to maximise the impact of its work and promote its understanding by victims and affected communities." See Office of the Prosecutor, *Prosecutorial Strategy 2009-2012*, Draft 19 August 2009, at para 53.

¹⁴ The Prosecutor has since sought to emphasise that his office neither solicits nor receives information from humanitarian organisations.

¹⁵ See, for example, the Darfur Consortium, “One Month on in Darfur and Sudan: The Expulsion and Suspension of International and National Humanitarian and Human Rights Organisations,” April 2009.