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JUSTICE FOR INTERNATIONAL CRIMES IN AFRICA AND DARFUR: CONFRONTING THE COMPLEMENTARITY CHALLENGE

SUMMARY OF WORKSHOP PROCEEDINGS

JUNE 2009

Introduction

On 6 June 2009, IRRI, on behalf of the Darfur Consortium, hosted a meeting of African experts to discuss African mechanisms of redress for human rights violations. The purpose of the seminar was to explore judicial options for criminal responsibility for international crimes in Africa, interrogating the legal and investigative mechanisms available, or which could be made available, to address impunity. The particular context of the meeting, days before a gathering of African state parties to the Rome Statute of the International Criminal Court (ICC) to review the ICC's work in Africa,[1] provided critical momentum for the discussions.

The meeting brought together 15 participants during a one-day intensive session to present expert perspectives and lead discussions on the key challenges facing current and potential accountability mechanisms in Africa. The discussion benefited from the presence of leading practitioners of international law on the continent who tackled a range of subjects from the current capacity of the African Court on Human and Peoples' Rights and prospects for expansion of jurisdiction to the scope of capacity for exercise of universal jurisdiction on the continent, the work of truth and reconciliation commissions, lessons learned from the experience of the hybrid tribunals and the domestic complementarity challenge in Sudan.

It is clear that the group was energised by the discussion; many expressed openness to continuing the dialogue and a number of immediate and intermediate activities were agreed. Participants at the meeting recognised the following

- International justice processes takes place within a political context;
- the success of such processes is contingent often upon the deployment of strategic contextual assets beyond the legal;
- all stakeholders – victims, host communities, witnesses, the ICC itself and states – need to work together to build confidence in the international justice system;
- there is a need for an African voice on the protection of human rights that is responsive to and reflective of the African context;
- when engaging on international justice issues, the African Union should not conflate the issue of the exercise of universal jurisdiction and the institutions of international criminal justice/ICC
- the question of immunities under the Rome Statute and international customary law should be reviewed in the context of current events;

[1] Decision of the Application by the International Criminal Court (ICC) Prosecutor for the Indictment of the President of the Republic of the Sudan (Assembly/AU/Dec.221 (XII).

- in order for regional mechanisms to be complementary to the ICC, they must be strengthened to be able to effectively address mass atrocities. The effective prosecution of perpetrators of mass abuses is critical also to the Responsibility to Protect doctrine, which is affirmed in both the AU and the Great Lakes Pact's frameworks;
- the establishment of a truth commission should be done through a consultative process;
- a truth commission should be complementary to criminal prosecutions;
- weaknesses in domestic courts can make universal jurisdiction and prosecution of international crimes ineffective;
- there should be focus on the domestication of international statutes of international justice mechanisms in order to address international crimes;
- the culture of non-compliance with judgments needs to be overcome in order to give redress to victims.

Way forward

In terms of immediate steps, a working group of participants was charged with drafting a letter to African states parties to the Rome Statute preparing to meet to reflect on the ICC on 8-9 June in Addis Ababa and communicating the outcome of the deliberations of the meeting. This letter was drafted and approved for signature by all the legal experts present at the meeting and transmitted to state parties, the Chairperson of the African Union Commission and the Peace and Security Secretariat in Addis Ababa by fax and by hand with the assistance of colleagues on the ground (attached).[2]

It was also suggested that a submission be prepared for consideration by the high level panel of experts established by the AU Peace and Security Council to explore "options that reconcile the imperatives of accountability and the fight against impunity, reconciliation and healing in Sudan",[3] chaired by former South African President Thabo Mbeki(the Panel). Further to receipt of a formal invitation to submit from the panel, a draft document on the state of available mechanisms for pursuing accountability (both state and individual criminal responsibility) was prepared, based on the findings of the session and presented in hearing of the Panel in early July.

Next steps for action suggested by the meeting include the following:

- beginning a process of engagement with the organs of the ICC in order to assist in improved operation, in particular with the Office of the Prosecutor and the Registry (outreach and victim participation);
- closer examination of the complementary relationship between regional mechanisms and the Rome Statute;
- examination of the scope and operation of immunities (*ratione personae* and *materiae*) in international law and in relation to the interpretations of Article 98 and Article 27 of the Rome Statute; and
- continuing to engage states parties to the Rome Statute in Africa both at the Ministerial and technical staff level.

IRRI will prepare a series of activities to reflect these suggestions and continue engagement with the group over the next year. We hope to find support to reconvene the meeting in late 2009.

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[2] The discussion at state level paralleled in many ways the key concerns and preoccupations expressed at the IRRI meeting and indeed the report of the meeting includes language from the letter with respect to certain key points. See Report of the Meeting of African States Parties to the Rome Statute of the International Criminal Court, 8 -9 June, Addis Ababa, Ethiopia, MINICC/Rpr.

[3] See Peace and Security Council, Communiqué of the 142nd meeting of the Peace and Security Council, PSC/MIN/Comm (CXLII), 21 July 2008.

Summary of discussion

International Criminal Justice and Africa – An Overview of Current Context, Challenges and Opportunities

It is clear that support for the International Criminal Court (ICC) in Africa is being eroded. This is partly to the failure of the ICC to engage effectively with constituencies in Africa. They have strong linkages with NGOs in the North, who then try to pitch its message to Africans. The debate has become polarised with, for example, those who question the Prosecutor or the Court sometimes being labelled as supporters of President Bashir. Too often, the views of affected communities are insufficiently addressed. There is a need to give stronger voice to a point of view that emphasises protection of human rights and the fight against impunity, but at the same time is sensitive to the real challenges and operational difficulties facing the Court.

There are many factors undermining support for the ICC in Africa. Views around the potential impact of and impetus for the issue of the arrest warrant against President Bashir are the latest, but not necessarily the most influential development. Other recent factors include:

- The arrest of Rwandan Rose Kabuye in Europe;
- The arrest of Congolese Jean Pierre Bemba in Belgium;
- The near-release of Thomas Lubanga as a result of evidentiary requirements has undermined confidence in the competence of the ICC; and
- Questions surrounding the impact of the work of the court on intermediaries, victims and witnesses

In response, it was suggested that it was important to separate the debate on the issue of international justice institutions from the use of universal jurisdiction in both Europe and Africa. In the context of the excellent AU-EU report on universal jurisdiction, the huge practical impediments to its exercise were noted, including the lack of awareness among many of the scope of legal provisions in Africa providing legislative bases for the exercise of universal jurisdiction.

With respect to the Bashir case, it was acknowledged that the African Union had requested deferral of the case and constituted the high level panel to consider a way forward which would address both the need for accountability and for a peaceful resolution to the conflict in Darfur. In reality, it would not be possible for a sitting head of state to appear in the Hague. By the time they do, they would no longer be a sitting head of state. One participant asserted that a reading of Article 27 and 98 together suggests that the ICC was never intended to prosecute sitting heads of state. It was suggested that a stronger international advocacy constituency should recognise and organise responses around the following key issues:

- international justice processes take place within a political context.
- the success of such processes absolutely requires the deployment of strategic contextual assets beyond the legal.
- all stakeholders – victims, host communities, witnesses, the ICC itself and states – need to work together to build confidence in the international justice system.
- there is a need for an African voice on the protection of human rights that is responsive to and reflective of the African context.
- when engaging on international justice issues, the AU should not conflate the issue of the exercise of universal jurisdiction and the institutions of international criminal justice/ICC – these are separate issues.
- The question of immunities under the Rome Statute and international customary law should be reviewed in the context of current events.

The Response of African Institutions to Mass Atrocities

Over the past 20 years, Africa has been the site of numerous conflicts, some accompanied by large-scale human rights violations and international crimes. There has, however, been growing regional investment in responding to those conflict as can be seen by the role of the Economic Community of West African States (ECOWAS) in intervening in Liberia and Sierra Leone and the African Union's response in Darfur.

The African Commission on Human and Peoples' Rights (African Commission) addresses massive human rights violations through its protective work and fact-finding missions. It hears cases related to mass violations, and has determined that in such cases the rule requiring the exhaustion of local remedies shall be relaxed. The implementation of recommendations is a weakness, however, in the African Commission's effectiveness, as states often do not comply with the Commission's decisions. Despite this, a question to be considered is whether the African Commission should be playing a role in international criminal justice given its human rights mandate. It was noted that the Commission could also support international justice through fact-finding and through encouraging the ratification of the Rome Statute. Further, the creation of the African Court of Justice and Human Rights will open up new opportunities.

In reviewing developments related to the history of mass atrocities on the continent, it was noted that there was a trend away from a focus on sovereignty and non-intervention to recognition of collective responsibility and engagement with the need for accountability. However, articulation of this normative position, particularly in the AU Constitutive Act, has not been followed up by practical implementation measures. That is the challenge which we now face. The suggestion to expand the jurisdiction of the African Court on Human and Peoples Rights is part of that discussion. It should be borne in mind, however, that serious questions remained about the effectiveness of African institutions in terms of compliance and selectivity.

Co-operation and Complementarity between Regional Courts and Tribunals in Africa and International Justice - Panel Discussion

There was a discussion on opportunities for criminal jurisdiction at the regional and sub-regional court levels. The effectiveness and efficiency of the regional courts are affected by limited access, poor enforcement of judgments and lack of political support. In particular, the current framework does not make provisions for the exercise of criminal jurisdiction unless amendments are made to enabling legislation. Also, these courts in their current form may not necessarily be suited to consider widespread abuses.

The East African Court of Justice: The Treaty for the Establishment of the East African Community (EACT) provides for broad-based co-operation, including in political matters, regional peace and security (Chapter 23), legal and judicial affairs (Chapter 24), the private sector and civil society (Chapter 25). The EAC's judicial organ examines human rights questions. The question of extension of jurisdiction to encompass criminal cases has been raised there. So far, the East African Court of Justice has decided 8 cases. Only the *Katabazi* decision was not enforced. That case is also currently before the African Commission on Human and Peoples' Rights. With regard to enforcement, it was noted that this was as much a political as a legal question, and it was suggested that coalitions for enforcement needed to be created.

In terms of promoting international justice, the East African Law Society is working with the Open University of Tanzania to establish an International Criminal Law Centre (ICLC) in Arusha, Tanzania. They are also planning a regional colloquium on "understanding the emerging human rights, peace and security architecture of the EAC".

The Court of the Economic Community of West African States: The Economic Community of West African States came into being in 1975. A revised ECOWAS treaty adopted in 1993 tries to make ECOWAS more human rights-friendly. The ECOWAS Court was established by a 1991 Protocol, although it was not actually

constituted until 2001 and only started hearing cases in 2005. A protocol to the revised ECOWAS Treaty of 1993 agreed in 2004 to give the court human rights jurisdiction. The court does not examine individual criminal responsibility and can only consider state responsibility.

The Southern African Development Community (SADC) Tribunal: The SADC Tribunal was established by SADC Treaty and Protocol in 1992, but it was operationalised only in 2005. It issued its first decision in 2008. The tribunal has jurisdiction over human rights issues, but this has been undermined by lack of state compliance.

The African Court on Human and Peoples' Rights: The protocol entered into force in 2004 and judges were elected and a seat was decided in 2006. The mandate of the court is to enforce the African Charter on Human and Peoples' Rights and its Protocols. Limitations on the exercise of jurisdiction by the African Court include issues relating to standing and the exhaustion of local remedies, but the most significant will be the recognition and enforcement of decisions. A number of serious operational issues have impeded the operation of the court to date. These include issues relating to staff deployment, use of funding and development of the necessary relationship with the Commission. There was a need for an external audit of the Court focused on ensuring accountability.

The International Conference on the Great Lakes Region: The Great Lakes Pact, a sub-regional instrument, provides a useful framework for the prosecution of international crimes, including genocide and crimes against humanity, from the perspective of substantive law and obligation. In terms of enforcement, the Pact does not set up new judicial mechanisms. However, members of the Pact are enjoined to ratify the Rome Statute. In addition, the protocols could become a reference point for African and regional courts. In addition, two sub-regional mechanisms are identified: a Joint Commission of Inquiry and a Regional Mechanism for the Prevention of Genocide, War Crimes.

Conclusion

In order for regional mechanisms to be complementary to the ICC, they must be strengthened to be able to address mass atrocities effectively. The effective prosecution of perpetrators of mass abuses is critical also to the Responsibility to Protect doctrine, which is affirmed in both the AU and Great Lakes Pact's frameworks.

In order to maintain perspective, it is important to remember that the European Court for Human Rights was created in the 1950s, became operational in the 1970s, but by the early 1980s had only heard 17 cases. Legal enforcement is necessary, but should be a dialogue over time. Countries in Africa have not had a strong compliance culture. Colonial governments established laws for discretionary application. Our independence-era governments inherited and perpetuated this. We need, therefore, to build a culture of compliance from the bottom-up. Transnational tort litigation can also be considered part of wider public policy dialogue. Decisions on the Alien Tort Claims Act in the United States are still some of the most influential decisions.

Hybrid and National Mechanisms: Domestic Courts and Other Transitional Justice

The South African Truth and Reconciliation Commission: In the South African context, there was a reluctance to prosecute, even when perpetrators were identifiable. The transition put into place new laws and mechanisms, but the players did not change. For example, many judges were held over from the aparthied era. As a result, judicial systems remain un-transformed or marginally transformed.

The Special Court for Sierra Leone: The Special Court for Sierra Leone was highly visible and expensive. Some victims were resentful of the "4-wheel drive culture" which the court brought with it and would have

preferred for the money to have been spent in development or reparations. With the wind-down of the court by 2010, there will need to be a residual mechanism, covering:

- *ad hoc* functions, such as new indictments;
- continuing functions such as detention facilities for convicts;
- the protection of witnesses; and
- detention facilities for new indictments.

The Hissene Habre Case

The role of the AU in the Habre case shows AU commitment to implement the new Constitutive Act, but also illustrates the challenges that exist. It could, and indeed has, served to motivate the development of a mechanism at the AU level. This has focused on the extension of the mandate of the African Court of Justice and Human Rights, but the extent to which this offers a truly workable mechanism needs to be questioned. The case is also an example of the role that politics – and economics – can play in supporting or impeding international justice. There have been numerous delays to allow for amendment of the Senegalese constitution and the appointment of the prosecutor. Some suggest that the case is still facing challenges because of the support for Habre coming from President Abdoulaye Wade and sections of the Senegalese Muslim community. Despite a political endorsement, the AU offered no practical support – including financial – to back up this process. Belgian intervention in the matter exemplifies the reason why universal jurisdiction is one of the most politicised aspects of international justice. Finally, the case is an example of the critical and catalytic role civil society can play.

Conclusions

There are a number of key issues that must be considered in examining the appropriate character of a mechanism or range of mechanisms to respond to the challenge of impunity in a post-conflict situation or countries in transition:

- the establishment of a truth commission should be done through a consultative process;
- a truth commission should be complementary to criminal prosecutions;
- truth commissions may operate positively in cooperation with hybrid courts, but the relationship between the mechanisms must be carefully considered;
- truth commissions can be useful in situations of widespread abuses as criminal courts are not always the best fora to uncover the extent of the harms perpetrated;
- the success of these processes hinges on support from within;
- proximity of these processes to victims and communities are critical to their success; and
- transitional justice mechanisms are only effective where there is a real threat of prosecution and remedy of reparations.

With respect to using domestic courts to pursue accountability some critical issues are:

- weaknesses in domestic courts can make universal jurisdiction and prosecution of international crimes ineffective;
- there should be focus on the domestication of international statutes in international justice mechanisms in order to address international crimes;
- the culture of non-compliance with judgments needs to be overcome in order to give redress to victims.

The ICC and Africa – Confrontation, Co-operation or Opt-Out

Africa is the site of a disproportionate number of the conflicts going on at the moment. International institutions have deficiencies; some of their shortcomings make it difficult for them to address our issues as Africans. The ICC generally lacks understanding of the countries in which it is operating. It fails to take country context into account while applying international laws at the investigation, prosecution and witness protection levels. ICC staff are disproportionately European, and therefore lack language, geographic and local knowledge.

One of the key criticisms of the ICC has been the selective application of international law. No one is arguing that Bashir is innocent, but they are asking why the court has focused exclusively on Africa. Some contended that the ICC had been careless in this regard. It should have taken a more global perspective and spread its focus geographically.

In addition, there has been concern about the nature of charges that have been filed at the level of the ICC. In general, the ICC has pursued a narrow range of charges, which, although easier to prosecute, are less successful in capturing the narrative of the atrocities in their totality. For example, in the Lubanga case, the ICC focused on the use of child soldiers. This strategy makes it easier for the prosecutor and the ICC generally, but is unresponsive to the needs of victims. In addition, the ICC has chosen not to have tracking teams responsible for the search for fugitives as used by the ICTR and SCSL. This limits the capacity to apprehend suspects, and if the ICC issues charges that do not result in convictions, the credibility of the ICC will be adversely affected.

Another critique of the court has focused on its failure to live up to its responsibilities to victims, witnesses and intermediaries. A number have been forced to flee and have been left without assistance in exile. This cannot help the cause of international justice.

Finally, the ICC lacks diplomatic and political savvy. This has been shown in a number of ways, from sharing a platform with Ugandan President Yoweri Museveni, thereby alienating northern Ugandans. The Lubanga debacle, and his near-release, strengthened his supporters and endangered those who had engaged with the ICC. Luis Moreno-Ocampo has not built relations with local players to develop buy-in. Another participant pointed to the prosecutor himself as a problem stated that he had not engaged appropriately. Another suggested that he be removed from his position.

There needs to be a critical assessment of the work of the ICC. It was also suggested that the ICC should be pushed to be more transparent in its decision-making.

Africa was active in the ICC becoming operational, and African civil society could play a better role in strengthening the work of the ICC by being knowledgeable on its work and engaging with it. Too often, however, civil society coalition-building has been initiated by the ICC or other outside players, and it has lacked local buy-in and knowledge. An effective African coalition for international justice cannot be uncritical of the court. It must also acknowledge that the ICC is not the only available remedy, nor will its intervention solve conflicts. Effective advocacy for accountability will involve confrontation with states and at times with the ICC and the Office of the Prosecutor. It was noted that there should additionally be engagement with the outreach organs of the ICC, who are currently under-resourced and lack strong links with civil society.

There must be detailed consideration before engaging in cooperation with the ICC. Many activists have paid a high cost for engagement. Activists may consider advocating for opting out of the ICC system on a case-by-case basis. Use of an international criminal law division of the African Court of Justice & Human Rights (ACJHR) would be one way in which to pursue such a strategy. Another participant questioned the extent to which AU commitments could be taken seriously, particularly in the context of the failure to provide practical

support for the requested prosecution of Habre. The legitimacy of opting out in some circumstances was also questioned. The weaknesses of regional mechanisms were also recognised.

At the same time, advocates must be careful not to create a diversion which may ultimately help African leaders to escape accountability. We need to have a dialogue about what strategic resources might be applied in order to more fully address conflicts which give rise to international crimes and to support the implementation of decisions in particular cases.

In this context, the need for continuing dialogue around the issue of complementarity was identified. Even in the best of circumstances, it was noted, the ICC would still be a very limited tool. However, regional and national mechanisms are often weak, often operate in poisoned contexts and national systems often lack the knowledge and capacity to undertake their obligations. It was noted that extending international criminal jurisdiction to the ACJHR would take a minimum of four years. There is, therefore, a dissonance between theory and practice in relation to complementarity.

In the case of Sudan specifically, the engagement of the ICC must be examined from the perspective that domestic courts are inadequate to address accountability for mass atrocities. An international system such as the ICC provides a forum for accountability, but it must be buttressed by other responses – the security context, for example, requires more effective support from a properly capacitated hybrid UN and AU force (UNAMID).

Specific recommendations for action were made by the participants as noted in the introduction.

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