



# **Policy Brief 5 International Criminal Justice in Africa**

# Promoting Accountability for International Crimes in Africa

## RECOMMENDATIONS

On 10-11 October 2013 a group of more than 20 experts in international and transitional justice and human rights convened in Arusha, Tanzania, hosted by the International Refugee Rights Initiative (IRRI), Kituo Cha Katiba, and the Pan-African Lawyers Union (PALU). The purpose of the meeting was to reflect on the agenda of the Extra-ordinary Summit of the African Union on international justice and the International Criminal Court (ICC), and prepare submissions to contribute a civil society perspective to those deliberations. The meeting built on previous consultations held in Nairobi in June and October 2009. The participants, who were invited and conducted the deliberations in their individual capacities, adopted the following recommendations for the consideration of the African Union (AU), African member states, the ICC and the United Nations Security Council (UNSC).

### General Comments

These recommendations were adopted with the recognition that:

1. The standards and instruments adopted by African states recognise justice as a legitimate aspiration of African peoples and require all AU member states to ensure effective access for their citizens to capable, independent and effective national, regional, continental and international accountability mechanisms.
2. The AU has consistently affirmed its commitment to the fight against impunity in Africa. This is reflected in Article 4(h) of the AU Constitutive Act which authorises the Union to intervene in situations of mass atrocity. This commitment has also been manifested in the following ways:
  - Progress towards the trial of former President Hissène Habré, in the Republic of Senegal, on behalf of the AU;
  - Commencement of cases and decisions emerging from the African Court on Human and Peoples' Rights; which show a commitment to combating impunity and that it will not shy away from handling cases that involve mass atrocities;
  - Progress towards an international crimes jurisdiction for the African Court;
  - Adoption of a Model Law on Universal Jurisdiction; and
  - On 7 July 2012, the ECOWAS Contact Group on Mali called for the referral of the situation in the Republic of Mali to the ICC. Shortly thereafter, the Republic of Mali referred the situation itself.
3. The reasons for which thirty-four African states ratified the Rome Statute remain relevant. Since 2011, two African states have referred situations in their countries to the ICC.
4. The AU and African states must remain cognisant of the fact that there are millions of African people who are victims of international crimes and mass atrocity. Their need for justice must be the primary concern for African states in all conversations about international justice.
5. So far, in the AU discourse on international justice, economic actors and economic crimes have not received sufficient attention.

### Recommendations to the African Union (AU) and African Member States

#### *African Union (AU)*

6. The AU should develop a proactive and comprehensive position on international justice on the continent, which resonates with victims' social, cultural and political environments and extends beyond the current focus on specific country situations.
7. We are concerned that the Progress Report of the Commission on the Implementation of the Decision Assembly/AU/Dec.482 (XXI) on International Jurisdiction, Justice and the International Criminal Court (ICC), under

consideration at this summit, focuses exclusively on Kenya. We urge that the AU Commission in its preparation of reports to the Summit, ensure that they are more inclusive and encapsulate all aspects of previous decisions of the AU Assembly, which would make them broader in their approach to international justice issues on the continent.

8. We note that in its Decision of July 2012, the Assembly directed the African Union Commission (AUC), the African Commission on Human and Peoples' Rights (ACHPR) and the African Court on Human and Peoples' Rights (AfCHPR) to publicise what steps they have taken in cases of international crimes. We recommend the urgent compilation and publication of this report.
9. We note the legitimate concerns of the AU about the role of the UNSC in relation to referral and deferral of situations before the ICC and deplore the selective manner in which the UNSC has dealt with situations of mass atrocity. We urge the AU and its member states to utilise the appropriate mechanisms and processes and ensure co-ordination in order to enhance their impact at the international level, including at the Assembly of States Parties (ASP) and the UNSC. An important opportunity which can be leveraged in terms of the Rome Statute is the fact that African states constitute the largest block in ASP. The AU should, in addition, mainstream their concerns in existing initiatives for UN reform.
10. It is important that the AU maintain channels of communication and exchange with the ICC even during times of difficult relations. The AU decision on the establishment of an AU-ICC Liaison office should be reconsidered and negotiations on the Cooperation Agreement should be recommenced.

#### *African Member States*

11. African member states should promote a comprehensive set of mechanisms at continental, regional and national levels which reflect the contextual realities and needs of individuals and communities, to ensure meaningful justice for them. This comprehensive approach would include, but not be limited to:
  - urgently finalising, adopting and ratifying the Protocol extending the jurisdiction of the African Court to include international crimes;
  - adopting national policies and legislation on reparations emphasising the primary obligation of states to provide reparations and placing victims at the centre of the process;
  - strengthening and safeguarding the independence of regional judicial mechanisms in order to ensure greater protection for, and participation of, victims.
12. Any request relying on Article 16 of the Rome Statute to the UNSC must be based on clearly articulated criteria with the onus of proof on the originator of the request.
13. Non-state actors, including corporate and commercial actors, in Africa have been complicit in mass atrocities. AU member states have a responsibility to promote reform of mechanisms of accountability for mass atrocities to ensure that such entities are held accountable.

#### **Recommendations to the International Community**

##### *International Criminal Court (ICC)*

14. All actors should be conscious of the fact that international justice takes place within a political, socio-economic and cultural context. The effective deployment of international justice requires supportive diplomatic, strategic, and political assets. The ICC should ensure that it pays due attention to the political, socio-economic and cultural exigencies of each situation in which it intervenes.
15. The existence of the ICC has enhanced and deepened the debate on accountability and has encouraged states to respond robustly to addressing impunity at the regional and national levels. However, there are significant challenges in the operation of the court and its constituent parts. Therefore we urge the ICC to acknowledge its own shortcomings and be receptive to constructive criticism.
16. The ICC must improve its channels of communication and exchange with the AU and African member states even in times of difficult relations.
17. The ICC has an obligation to ensure that the dignity and rights of victims and affected communities, witnesses and intermediaries are respected. This obligation includes duties of care, provision of appropriate protection and assistance, accurate and timely information, facilitation of good faith dealings, and diligent discharge of both legal and ethical responsibilities.
18. Members of the Assembly of States Parties (ASP) should ensure that the ICC is adequately resourced in order that it undertakes its functions effectively, particularly with respect to conducting investigations, securing counsel for defence and victims, and outreach programmes to affected communities. This is critical to the credibility of the ICC. Case management and cost saving measures, while laudable, should not compromise due process, and in particular the rights of victims to participate.
19. The role of the prosecutor requires significant exercise of necessary and desirable discretion, subject to judicial

oversight as provided for by the Rome Statute. Mechanisms exist within the Rome Statute for professional, administrative and judicial checks and balances. Chambers have in several decisions demonstrated the capacity to supervise prosecutorial conduct. However, we recommend a more robust application of these mechanisms and the adoption of additional measures, as appropriate.

20. The Office of the Prosecutor should respond seriously to constructive criticism in relation to implementing positive complementarity, strengthening investigations and ensuring the protection of witnesses and intermediaries.

*United Nations Security Council (UNSC)*

21. We call upon China, Russia and the United States of America as permanent members of the UNSC to ratify the Rome Statute. It is impossible for states to effectively call for an end to impunity while attempting to make themselves immune from international justice processes.

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# African Civil Society Stakeholders call for a Global and Inclusive Justice

## Introduction

International criminal justice on the African continent is at a critical juncture: on 26-27 May 2013, at the 21st Session of the African Union, Africa's leaders reaffirmed their concern with 'the misuse of indictments against African leaders', and stressed 'the need for international justice to be conducted in a transparent and fair manner, in order to avoid any perception of double standard, in conformity with the principles of international law'. This was rapidly interpreted by observers as raising further question marks over the degree of political support for that most iconic mechanism of international criminal justice, the International Criminal Court (ICC). When the failure of the ICC to sustain popular support in African countries in which it has sought to operate is coupled with shifts in global power relationships and the declining influence of former colonial powers, it is clear that today, on International Justice Day (July 17), we require a re-think on how best to attain equitable criminal justice.

Notwithstanding the fact that on the occasion of President Obama's recent visit to Africa his itinerary did not bring him to Kenya, and notwithstanding the United States of America's (USA) own withdrawal from the Rome Statute less than a month after its ratification on 11 April 2002, the establishment by the Obama administration in April 2012 of an Atrocities Prevention Board appears to reflect concern by the USA with the intricate relationship between impunity, failings in justice, and the threat of future violence at a societal level. The recent renaming of the Office of War Crimes Issues at the US State Department to the Office for Global Criminal Justice, with the stated intention of advising "**U.S. Government and foreign governments on the appropriate use of a wide range of transitional justice mechanisms, including truth and reconciliation commissions, lustrations, and reparations in addition to judicial processes**", is a further indicator that the Obama administration is strengthening its efforts to define global justice.

As African Civil Society stakeholders with President Obama's visit fresh in our minds, we believe that the time is right for a fresh look at what truly equitable and effective global justice should look like in a world of

newly emerging powers, a renewed concern with the prevention of mass atrocities, and a growing popular unwillingness to accept unequal levels of impunity between states.

We recognize that for too long 'international' criminal justice has been synonymous with a focus on selective prosecutorial justice. Yet ours are societies in which reparations and acknowledgment of wrongs done are often prioritized above prosecutions and prison sentences. Questions must therefore be asked regarding what is being delivered - both in the narrow terms of international criminal trials and in terms of "justice" as understood by the communities which are supposedly its focus.

When the disconnect between popular expectations and the reality of international criminal justice to date is coupled with USA, Union of Soviet Socialist Republics (USSR) and Chinese exceptionalism vis-à-vis the ICC, the failure of the ICC to win popular legitimacy in the very countries where it has sought to build its track record is readily understood. It is evident that challenging some truth to some power in the absence of a consistent, contextualised international relations strategy which acknowledges and addresses much larger inequalities and power relations, is unlikely to bear much fruit.

We note with concern that US-led technological developments – notably the increasingly widespread use of drones to achieve politico-military objectives – are changing not just the parameters of conflict and the management of political tensions, but also are challenging existing models and mechanisms of criminal accountability. Specifically, we are deeply concerned that the United States' and other major powers expanding military engagements in Africa, including through the US Africa Command (AFRICOM), are not matched by a willingness to submit to the very rules of engagement that are demanded of others.

In light of the above, and recognizing that the existing international criminal justice system can only be legitimate when justice applies equally to all, we call upon the major and emerging powers, in particular, the USA, the USSR, and China to ratify the Rome Statute. It is impossible for states to call effectively for an end to



impunity while attempting to make themselves immune from international justice processes. We also call upon the Obama administration to revoke any extant Bilateral Immunity Agreements (BIAs, also known as the Article 98 Agreements) which were established under the Bush administration.

We remind global partners that members of African civil society and local communities—from Sudan to Kenya to Mali—have been on the front lines of embedding and expanding the reach of international justice whether through advancing principles and standard-making or engaging directly with mechanisms such as the ICC. Many have put their lives on the line for their commitment to the transformative promise of equitable global justice. We also celebrate that over the last ten years Africa has been building an impressive tool box for the prevention of and response to international crimes within a multi-disciplinary transitional justice framework. These include;

- the embedding of the right to intervene in situations of grave crimes in the powers accorded regional and sub-regional entities
- the ordering of special mechanisms for the trial of former heads of state
- the enactment of new treaties setting out measures for the prevention of discrimination and the promotion of harmony as strategy for the prevention of mass atrocity
- the creation of cross-border investigative commissions
- the development of binding treaty standards governing the return of property of displaced populations
- undertakings relating to the treatment of perpetrators of sexual and gender-based violence as international crimes and;
- the establishment of the world's first treaty body with an atrocity prevention mandate, namely the Regional Committee for the Prevention and the Punishment of the Crime of Genocide, War crimes, and Crimes against Humanity and All Forms of Discrimination.

Building on Africa's demonstrated record in pioneering normative developments on justice, we urge civil society from across the continent to join us in building ***an African Movement for Global Justice.***

***This movement should not limit itself to democratizing the process of consolidating the ICC; it should also address the need for a global justice model that can address emerging challenges to existing mechanisms and principles, such as the drones, and that can incorporate key non-prosecutorial responses to mass atrocities, such as reparations, truth-telling, and reconciliation.***

As civil society stakeholders in the development of transitional justice on the African continent we call on concerned parties to join us in supporting the development of Africa's own proposed African Court of Justice and Human and Peoples' Rights. This court will have jurisdiction over human and peoples' rights, general affairs and international crimes, and will thus be positioned to tackle a wider range of crimes and issues that respond, in a more complete and substantive manner, to the African context and needs and will complement the work of the ICC. Join us also in supporting the process towards a comprehensive policy framework on transitional justice for the AU.

**This statement is the outcome of extensive joint discussions and drafting by the five sponsoring organisations. For further information, please contact us:**

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