



CODESRIA

**COUNCIL FOR THE DEVELOPMENT OF SOCIAL
SCIENCE RESEARCH IN AFRICA**

**CONSEIL POUR LE DEVELOPPEMENT DE LA
RECHERCHE EN SCIENCES SOCIALES EN AFRIQUE**

CODESRIA Policy Briefs

No. 1, March 2015

International Justice, Reconciliation and Peace in Africa

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Summary

I*N* the context of continuing gross human rights abuses and challenges to peace and security in Africa, international criminal justice has become a subject of much debate in terms of its contributions to ending impunity and contributing to more secure and peaceful societies on the continent. The African Union's move to create an African court with criminal jurisdiction at its June 2014 Malabo Summit highlights some of the frustrations that many have had with the International Criminal Court, which has not always lived up to the high hopes many invested in it at its birth. This policy brief captures and builds on deliberations during a three-day conference in Dakar, Senegal in July 2014 that was organized by the Council for the Development of Social Science Research in Africa and the Social Science Research Council. It proffers concrete policy recommendations to the AU, to regional economic communities and to states with the hope of contributing to the fashioning of justice structures and processes that seek to end impunity while contributing to the goals of peace, security and reconciliation in Africa.

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The conference, its origins and goals

In recent years, the work of the International Criminal Court (ICC) has triggered intense debates and controversies surrounding various aspects of the work of the world's first and only permanent international court. The ICC's relationship with its member states, particularly situation countries all of which are in Africa, and how its work impacts peace and security have been subjects of controversy especially at the African Union (AU) level. Questions have been posed, particularly in relation to how and whether the work of the Court undermines or enhances the restoration of peace and perhaps even reconciliation in post conflict and conflict societies including in Uganda, Cote d'Ivoire, Sudan, Kenya and Libya. At the national level, various situations currently before the court have highlighted the challenges of complementarity between the ICC and national jurisdictions, problematic interactions between ICC processes and national politics and states' capacity to meet their obligations relating to cooperation. The ICC's approach to issues relating to victims, as well as the seeming inability or unwillingness of states to take reparative justice seriously continue to be a cause of disillusionment among victims and their communities.

At a global and continental level, the debate has implicated a range of issues. These include how the ICC interacts with bodies such as the United Nations Security Council (UNSC) and the AU. The controversial relationship between the ICC and the AU revolves mainly around the relationship and sequencing of peace and justice and how the ICC fits in the African Union's wider African Peace and Security Architecture and its transitional justice framework. At both levels, the debate has been heavily tinged with politics, including how the Court – which was established in relationship with the United Nations – is said to interact in particular ways with various actors in an unequal geo-political environment. National politics have featured mainly in relation to how the Office of the Prosecutor deploys its prosecutorial policy in various situation countries.

These and other related questions and concerns were the preoccupations of a conference on international justice, peace and security organized by the Council for the Development of Social Science Research in Africa (CODESRIA) and the Social Science Research Council's (SSRC's) African Peace building Network (APN). Focused on the theme '*International Justice, Peace and Reconciliation in Africa: The ICC and Beyond*,' the meeting was held in Dakar, Senegal

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between July 10 and July 12, 2014.¹ The conference focused on the role of the international justice system in advancing Africa's peace, reconciliation and justice agenda. It brought together government officials, academics, civil society actors and representatives of various courts and tribunals.

These included the Office of the Prosecutor of the ICC, the Prosecutor of the International Criminal Tribunal for Rwanda (ICTR), the President of the East African Court of Justice, the Deputy

1. The conference was organized in collaboration with the Raoul Wallenberg Institute of Human Rights and Humanitarian Law and the Center for Democracy and Development in West Africa (CDD West Africa). Major funding came from the Open Society Foundations (OSF) and TrustAfrica.

Co-Prosecutor of the Extraordinary Chambers in the Courts of Cambodia (ECCC), representatives of the African Court of Justice and Human and Peoples' Rights, the Pan African Lawyers Union and the Extraordinary African Chambers for the Trial of Hissène Habré. Delivering the opening keynote was the current Minister of Justice of Senegal, His Excellency Sidiki Kaba, who has since been elected as President of the Assembly of States Parties of the Rome Statute.

Bridging the knowledge-practice divide

As a leading social science research council in Africa, CODESRIA's work on international justice falls within its long history of work on issues of governance, human rights, peace and security in Africa. In organizing the conference, CODESRIA sought to improve and democratize conversations about gross abuses, justice, peace and reconciliation and promote conversations between scholars and practitioners on these important issues. This policy brief seeks to further bring insights from that conference to policy makers with the understanding that even where well-intentioned, the soundness of policymaking and implementation heavily depends on its basis in sound scholarly research. This policy brief and other forms of outreach to practitioners should help build solid links between researchers and practitioners working on issues of gross human rights abuses, justice, peace and reconciliation in Africa that will enrich the next phase of CODESRIA's work on these issues.

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This policy brief details policy recommendations on how existing justice mechanisms, which include the ICC, *ad hoc* tribunals and national courts, can be deployed to meet the needs of justice for gross violations of human rights while advancing peace, reconciliation and security on the continent. The recommendations detailed at the bottom of this brief target three sets of actors: the AU, regional and economic bodies, which play an increasing role in sub-regional and regional peace and security efforts, and African states.

Overview of themes and deliberations of the conference

The conference program covered various themes relating to international justice, with the ICC as the main institutional actor and a point of reference for most of the papers delivered. Among the topics treated included the role of the ICC in international peace and security; the ICC's relationship with various entities such as the UN, AU and states; complementarity; the relationship between justice, peace and reconciliation; specific aspects of the work of the court including prosecutorial policy, the rights of victims and witnesses and; alternative and/or complementary mechanisms of justice including human rights tribunals and traditional justice mechanisms. Several speakers also discussed and drew lessons from other international justice experiments, particularly the ICTR, the Special Court for Sierra Leone (SCSL) and the ECCC.

Among the key themes that framed the debate were international justice, transitional justice and peace and reconciliation. On the relationship between peace and justice, the conference revisited the main arguments on how justice and peace relate in conflict and post conflict settings. On one hand, justice in the sense of criminal justice is said to advance, and is indeed necessary for the reestablishment of peace and reconciliation in the context of or following violent conflict in which gross violations of human rights occur. On the other hand, the pursuit of justice is said to be sometimes inimical to the goals of peace and reconciliation, thus, requiring a choice by policy makers and political actors. Issues of how best to sequence peace and justice were deliberated, in light of the AU's objections raised in the Sudan and Kenyan situations.

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During the conference, as has been the case in other contexts over the last few years, the ICC was the subject of some criticism. In the main, commentators cited several aspects of the Court's work as problematic, including its relationship with the UNSC, which perpetuates selectivity in the selection of situations, alleged politicization of its work and its current focus on Africa as the main source of caseload. At the same time, a strong tone of civil society and academic support was offered in favor of the permanent tribunal. Some of the participants, including representatives of the Office of the Prosecutor at the ICC but also some respected African scholars, insisted that the ICC is only discharging its mandate on behalf of African victims of atrocity crimes because of failures on the part of African countries. These failures by African states include not averting the commission of crimes, and where such international crimes occur, the inability or unwillingness to follow through on their obligations to deliver credible justice by holding the individual perpetrators accountable.

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There was emphasis on the fact that the ICC needs the support of both African states and civil society if it is to succeed in meeting the high expectations placed upon it. Cooperation in the area of enforcement of arrest warrants and other such requests from the Court was seen as critical in this regard.

Other discussions covered the role of truth commissions and traditional justice mechanisms which form part of a broader response to international crimes. Areas of difficulty in the concurrent operation of such mechanisms were highlighted with useful lessons drawn from the Sierra Leone and Rwanda experiences during their own transitions. Participants also considered the role of human rights tribunals and other regional courts, which partly provide avenues for victims to seek redress.

The Malabo Protocol: Building on innovation and surpassing challenges

Another important aspect of the rich three-day conference turned on whether there is a place for regional mechanisms in the enforcement of international criminal law. Participants observed that, under current law and practice, it is the responsibility of states to investigate, prosecute and punish the perpetrators of atrocity crimes. However, where states do not have the capacity to do so or are unwilling, a secondary jurisdiction will then be triggered in the form of an international criminal tribunal – whether ad hoc or permanent. There was hitherto no formal place for regional bodies in the implementation of international criminal law through the creation of ad hoc or permanent regional criminal courts.

In what is a path breaking move, following years of discussion, the AU has become the first region in the world to create a permanent international criminal tribunal in adopting a Protocol on Amendments to the Protocol on the Statute of the African Court of Justice and Human Rights at the Malabo Summit in June 2014. The Protocol, which upon entry into force will extend the jurisdiction of the African Court to include general, human rights and criminal matters was adopted in the shadow of the tension between the African Union and the ICC.

In some quarters, the context in which it was adopted has raised some concerns that it could be used as a mechanism to undermine the continent's long support for the permanent Hague-based court. This need not be the case, especially given the notion of positive complementarity that the ICC itself has advanced.

The Protocol contains a number of important and welcome innovations not just for Africa but potentially for the international community as a whole. These include an expanded jurisdiction to address crimes against humanity, genocide, and war crimes, but also other crimes of particular concern and relevance for African states.

Further, unlike existing international criminal tribunals, which can only determine the criminal responsibility of individuals, the AU court is also empowered to address the responsibility of corporations where they involve themselves with the prohibited criminal conduct. These developments may well prove to be of tremendous significance for the future evolution of accountability for gross human rights violations in Africa and the world at large.

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At the same time, the AU court also contains other aspects that could prove to be problematic both in principle and in practice. For instance, as a matter of principle, it was not entirely clear whether the broad jurisdiction of the future tribunal, which will require considerable financial and human resources was adequately considered. Given the continent's history with the underfunding of African institutions, this raises concerns of its own. Further, one of the most controversial clauses contained in the new protocol provides that "no charges shall be commenced or continued against any sitting AU heads of state or government, or anybody acting or entitled to act in such capacity, or other senior state officials during their tenure of office." While strong confirmatory evidence has often not been adduced by those claiming that African states are acting outside international law by adopting such a provision, this clause is still a matter of concern.

Participants at the meeting were divided in their reaction to this immunity provision, even if they did not object to the idea of a regional court with criminal jurisdiction. There was a large group that saw the clause in the Protocol as a step backward in the fight against impunity in Africa and possibly as contradicting the Constitutive Act of the AU, wherein African states condemned and rejected impunity and undertook to intervene in grave circumstances where atrocity crimes are being perpetrated. They argued that it could even undermine the gains made over the past two decades in that regard. On the other hand, others felt that the clause

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was a compromise which should help ensure better sequencing of justice and peace. They observed that the provision only confers temporary protection, which is lifted when the beneficiary is no longer in office. A retort of critics of the provision is that the temporary nature of the protection might well encourage leaders in danger of prosecution to illegally extend their stay in office, thus endangering democratic progress in Africa.

As part of this discussion of the AU criminal court, it was observed that there was a lack of clarity as to the complementarity and relationship between the ICC, the AU criminal court, courts of Regional Economic Communities (RECs) and national courts with primary jurisdiction. Participants considered that the omission of complementarity vis-à-vis the ICC would have to be addressed for the benefit of the permanent court, African States and societies on the continent.

Finally, as mentioned above, a number of suggestions and recommendations emerged during the three-day conference. We summarize some of these below for consideration principally by the AU, RECs and African states.

Recommendations

To the African Union

1. With the adoption of the Constitutive Act and related protocols and with its African Peace and Security Architecture, the AU has a near-complete legal, policy and institutional framework to facilitate responses to situations of gross human rights violations and international crimes. *It is recommended that aspects of policy, particularly the Draft Transitional Justice Framework should be adopted and relevant institutions operationalized or their capacities strengthened.*
2. Experience shows that the AU's capacity and tools available to intervene in conflict situations have increased over the years. However, its ability to implement measures ranging from preventive diplomacy and peacekeeping to humanitarian intervention and peace building is dependent on various factors and is, with respect to peace and security narrowly circumscribed by international law especially Articles 52, 53, 54 of the United Nations Charter. These provisions subordinate regional organisations to the UNSC in matters of international peace and security, which include international justice in limited circumstances.

It is recommended that the AU and individual members of the union devote efforts and resources to refining existing tools based on learned experience. This includes cultivating and reinforcing partnerships with regional and global actors such as the UN and the EU in relevant areas, including peacemaking and peacekeeping. The AU should also continue to develop and pursue its agenda for reform of the United Nations Security Council including expansion of permanent membership to include African states with veto power.

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3. With respect to the role of states, which is the main site where international justice unfolds, *it is recommended that the AU should urge adherence to global and continental norms, instruments and institutions as well as support state initiatives, including through technical assistance and capacity building.*
4. In relation to the interface between justice and peace and reconciliation, it is acknowledged that there are two main schools pertaining to how they interface. On the one hand, it is argued that justice can advance, and is indeed necessary for the reestablishment of peace and reconciliation following violent conflict. On the other hand, the pursuit of justice is said to be inimical to the goals of peace and reconciliation, and that a choice must be made by policy makers on which should be prioritized. Various case studies were cited to buttress the argument that although they are often in tension, justice and peace and reconciliation are mutually reinforcing and that context specific sequencing, rather than preference for either is the solution. *It is recommended*

that while the sequencing of justice and peace provides the AU with flexibility in its responses to restore peace and security in states affected by conflict, consideration should be given to context, and that each situation should be assessed on its own merits.

5. Restoring peace and security and fostering reconciliation in post conflict societies demands more than prosecuting perpetrators. Interventions must respond to the full range of concerns and needs, including reforming institutions, creating more inclusive societies and restoring victims. *It is recommended that AU interventions should be based on appropriate conceptions of justice, and urge, on the part of state actors an approach that responds comprehensively to the multiplicity of concerns of victims and effects of conflict, which include criminal, economic and political dimensions. The draft AU Transitional Justice Framework, which reviews several past experiences with transitional justice, provides an excellent point of reference for such interventions. It is further recommended that conceptions of justice and alternative justice be developed to take into account the need not just for criminal prosecutions but also reparations for victims with a particular focus on vulnerable communities, women and children.*

6. Considering that ineffective responses to conflicts is partly attributable to the inability of the AU to respond in a timely way, *it is recommended that efforts to strengthen existing continental justice, peace and security institutions should focus on enhancing readiness. With respect to justice, consideration should be given to training and maintaining a roll of investigators, monitors, mediators, legal experts and forensic pathologists who could be deployed to investigate and document atrocities on the continent. In the same vein, the AU should consider rescinding the July 2009 Sirte decision purporting to direct African States not to cooperate with the ICC in the surrender and arrest of certain personalities.*
7. Following several years of discussion, the AU finally adopted a Protocol on Amendments to the Protocol on the Statute of the African Court of Justice and Human Rights at the Malabo Summit in June 2014. *It is recommended that the AU step up efforts to secure the signatures and ratifications necessary with the view to putting in place the regional court that will help in ensuring prosecutions of individuals and corporations for international and other crimes of particular concern to African States and societies.*
8. African States should match their principled commitment to fight against impunity in the protocol with the provision of the high level of funding that is required to give effect to the aims set out in the Malabo Protocol.
9. It is imperative that the AU court be staffed with highly experienced individuals with the competence not just in domestic criminal law but also in international criminal law – a highly technical field requiring specific expertise. Fortunately, there are many Africans

with significant practical skills from the ICTR, the SCSL, the ICC, other international penal tribunals and beyond whose expertise will be particularly relevant to the work of the future court. *It is strongly recommended that, having in mind regional and gender balance, the AU anticipate and put in place transparent and competitive recruitment processes for the principal officials of the court, including the judges that would sit in the international criminal law section, the prosecutor, the principal defender, and the registrar as well as other staff necessary to successfully run such a court.*

10. Clarification should be offered on the complementarity between the new court and the ICC. In this regard, African state parties to the Rome Statute should support Kenya's efforts to secure amendments to the ICC treaty to include complementarity for regional bodies, not just states parties. *By the same token, African States should also study what will be required for complementarity to take place effectively between the future African court and the ICC. This could include a position paper by the AU Office of Legal Counsel setting out how complementarity is envisaged to work between the two institutions, provisions in the future court's rules of procedure and evidence, a relationship agreement between the two institutions and so on.*
11. Sub-regional courts that have a human rights mandate provide an additional layer for the protection of human rights on the continent. Currently, ECOWAS is the only REC court with an express human rights mandate. *The AU and its member states should call for the strengthening of such mechanisms, including the inclusion of human rights jurisdiction and the proper funding and follow-up to give effect to decisions from existing bodies including ECOWAS and the African court and the Commission on Human and People's Rights.*

By the same token, African States should also study what will be required for complementarity to take place effectively between the future African court and the ICC.

To Regional economic communities

African sub-regional organisations increasingly play an important role in preventive diplomacy, peacekeeping, peacemaking and peace building. Indeed, the AU's African Peace and Security Architecture incorporates RECs. The best example of REC activity in peace and security, and by extension international human rights, is that of the Economic Community of West African States (ECOWAS). It is perhaps the most active REC in this regard having fashioned successful interventions that included peace agreements and military intervention in Liberia and Sierra Leone as well as the establishment and expansion of the jurisdiction of the ECOWAS Court of Justice.

The AU practice in recent years has been to ‘delegate’ interventions that fall short of deployment of peacekeeping missions to RECS. Other examples of this include Southern African Development Community in Zimbabwe and Lesotho. The UNSC, which bears primary responsibility for international peace and security has provided support, and invariably assumed overall responsibility following initial intervention by the AU or a REC.

1. *It is recommended that the RECs should strengthen existing responses to conflict, and further seek to clarify their relationship with the AU.*

Even as RECs and the AU reinforce linkages, and strengthen collaboration on rapid response forces they should also collaborate on readiness to respond in non-military ways, including through training of mediators, investigators and observers.

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2. *It is further recommended that RECs should, where these exist, work to build the capacity of human rights protection mechanisms including the establishment of oversight mechanisms and opportunities for individuals to initiate claims against their home states, corporations, etc.*
3. *African States within the RECs should seek to develop innovative funding schemes through, for example, the levy of a region-wide tax on citizens and businesses that carry out cross-border transactions. Such a tax could then be used to fund sub-regional courts.*
4. *RECs, and their institutions including courts, should develop a consistent framework to advance human security. In relation to international justice, careful consideration should be given to the feasibility of creating sub-regional criminal courts to take advantage of the complementarity envisaged in the 2014 Protocol.*
5. *In light of the previous recommendation, the RECs should engage each other and the AU as well as African experts on international criminal law to properly study important legal questions relating to jurisdiction, funding and complementarity with international penal tribunals.*

To African States

Under international and regional law, states bear the primary responsibility to address violations of human rights and prosecute perpetrators of international crimes. This is necessitated in part, by the fact that international tribunals such as the ICC intervene only in exceptional circumstances where states are unwilling or unable to try a limited number of those who bear the greatest responsibility for such crimes. With respect to jurisdiction, it is worth noting that the ICC only intervenes if states are inactive, unwilling or unable to investigate or prosecute.

1. *It is recommended that all African states ratify or accede to the Rome Statute of the International Criminal Court as well as other important international human rights instruments (e.g. the International Covenant on Civil and Political Rights, the International Covenant on Economic, Social and Cultural Rights, the Convention on the Prevention and Punishment of Genocide, the Convention Against Torture and the Convention on the Elimination of All Forms of Discrimination Against Women).*

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2. *African States should also prioritize the ratification of all African human rights instruments developed under the framework of the Organization of African Unity and the African Union.*
3. *African states that are also state parties to the ICC instrument should harbor concerns about possible inconsistencies in their obligations under the Malabo Protocol amending the jurisdiction of the African Court with Article 27 of the ICC Statute (irrelevance of official capacity). They should consider the prospect of entering a reservation to Article 46Abis. Such a reservation should be carefully crafted with the assistance of international criminal law experts.*
4. *States should enact legislation to translate their international and regional obligations into national law. With respect both to the ICC and the AU court, such legislation should provide appropriate jurisdictional bases and regulate all aspects of cooperation with the ICC and the AU court. They should also match that with capacity building and proper funding of African institutions and the enforcement of decisions and follow-up actions at the executive level.*

States should enact legislation to translate their international and regional obligations into national law.
5. *In addition, it is imperative that African States take the lead in creating the institutional structures to build their own capacity to prosecute international crimes at the national level on the basis of both ICC law and customary international law including universal jurisdiction. This addresses Africa's concern about foreign justice in so far as the jurisdiction of international and foreign courts can only be exercised if African states do not show the willingness or ability to do so themselves under complementarity and subsidiarity principles.*
6. *When designing responses to international crimes and human rights violations in general, an appropriate policy framework should consider, among other issues the multiple effects and needs of justice. Consideration should in particular be given to the concerns of and heterogeneity among the community of victims, including gender justice.*

7. *Where traditional African justice mechanisms form part of the overall response, policy makers should take into consideration their strengths and limitations. Some common*

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limitations of traditional justice mechanisms include discriminatory practices that do not conform to human rights norms, failure to provide adequately for defence rights such as funding and representation and their limited capacity to address complex crimes.

8. African States should develop a regional legal framework for mutual assistance in criminal matters. That regime should anticipate what is necessary for African States to provide technical assistance and to collaborate with each other to ensure that investigations and prosecutions of international and trans-national crimes take place in an efficient manner while ensuring the rights of suspects and accused persons. *A feasibility study, drawing on the experiences of other regional bodies, for example the European Union, should be carried out while ensuring that any mechanism developed is fully appropriate for the African context.*
9. It is recommended that African States consider concluding a cooperation agreement between themselves and the AU's proposed regional human rights and criminal court.
10. African States should also conclude cooperation agreements with the ICC, including both for the investigations and prosecution phases but also the sentencing and post sentencing phases. The regime should go further than what is required by Part 9 of the Rome Statute. In this regard, especially in terms of enforcement of sentences, the experience of African States such as Mali, Rwanda and others that have cooperated with prior and current international criminal tribunals will be useful.

Acknowledgements

CODESRIA would like to express its gratitude to the Swedish International Development Cooperation Agency (SIDA), the International Development Research Centre (IDRC), the Ford Foundation, the Carnegie Corporation of New York (CCNY), the Norwegian Agency for Development Cooperation (NORAD), the Danish Agency for International Development (DANIDA), the French Ministry of Cooperation, the United Nations Development Programme (UNDP), the Netherlands Ministry of Foreign Affairs, the Rockefeller Foundation, the Open Society Foundations (OSFs), TrustAfrica, UNESCO, UN Women, the African Capacity Building Foundation (ACBF) and the Government of Senegal for supporting its research, training and publication programmes.