DISCUSSION PAPER 2/2014

The ICC and Africa

Between Aspiration and Reality: Making International Justice Work Better for Africa

Terence McNamee

Strengthening Africa's economic performance

The ICC and Africa

Between Aspiration and Reality: Making International Justice Work Better for Africa

Reflections on a High-level Roundtable

18–19 March 2014, Addis Ababa, Ethiopia,
co-hosted by The Brenthurst Foundation and the Africa Center for Strategic Studies

Contents

Executive Summary . . . 3
Introduction . . . 4
Geopolitics and International Justice . . . 5
The Primacy of Politics . . . 9
Building Intra-African Justice Mechanisms . . . 11
Conclusion: The Emerging African Conversation . . . 14
Endnotes . . . 16
Additional Works Consulted for this Discussion Paper . . . 16

About the Author

Dr Terence McNamee is the Deputy Director of the Brenthurst Foundation.

The author would like to thank all the Roundtable participants for their contributions as well as the various comments received on the draft paper, many of which are reflected in this publication though all remain, as per the nature of the Roundtable, unattributed.

Published in May 2014 by:The Brenthurst Foundation

E Oppenheimer & Son (Pty) Ltd
PO Box 61631, Johannesburg 2000, South Africa
Tel +27–(0)11 274–2096 · Fax +27–(0)11 274–2097
www.thebrenthurstfoundation.org

All rights reserved. The material in this publication may not be reproduced, stored, or transmitted without the prior permission of the publisher. Short extracts may be quoted, provided the source is fully acknowledged.

Layout and design by Sheaf Publishing, Benoni.

Executive Summary

This Discussion Paper reflects on the main arguments and perspectives that emerged from the high-level Roundtable, 'The ICC and Africa: Between Aspiration and Reality: Making International Justice Work Better for Africa', held under Chatham House Rules and co-hosted by The Brenthurst Foundation and the Africa Center for Strategic Studies in Addis Ababa, Ethiopia, 18–19 March 2014. The author identifies three key themes that percolated throughout the debate on the ICC's increasingly contested role in Africa, underlined by the absence of indictments outside Africa since the Court's inception in 2002 and the recent prosecutions of African heads of state, especially Kenya's newly-elected President. Firstly, the interaction of geopolitics and international justice, which speaks to issues of history, colonialism and power. It attempts to contextualise the current furore over the ICC's apparent singular focus on African crimes by highlighting the various political influences on the Court, evidenced in its case selection, the referral process and efforts to expand the list of crimes, as well as Africa's own ambiguities and contradictions. The second theme addresses the continuing primacy of politics at the national level. The Paper draws on numerous arguments to illustrate that in tackling the core problem of justice, the rule of law is one component of African solutions to wider economic and political problems, not the other way around. The third overarching theme to emerge from the Roundtable and drawn out in this Paper is perhaps the most consequential one: building intra-African justice mechanisms. Its importance lay in the widely-held view view that such mechanisms are central to the necessary judicial remedies for Africa going forward, whether closely hewn to ICC processes or not. Discussed here of particular importance is the principle of complementarity and how the proposed African Court on Justice and Human Rights might contend more effectively with issues of politicisation and the impunity gap than the ICC. The final section of the Paper delineates some of the key features of the vital intra-African conversation taking shape on the nexus of justice, peace and the exercise of power. This emerging conversation is prompted in large part by the controversy over the Kenyan cases and was powerfully in evidence over the course of the two-day Roundtable.

Introduction

The International Criminal Court (ICC) came into being on 1 July 2002 when the Rome Statute entered into force. The ICC was officially instituted as a permanent tribunal to prosecute individuals for genocide, crimes against humanity and war crimes the following year. Since then, the Court has been ratified by 122 states, the largest continental bloc being Africa's, which boasts 34 members. Although its membership spans all six inhabited continents, the eight countries where the ICC is actively prosecuting suspects are all in Africa and the 36 people publicly indicted by the Court to date have all been African. The absence of ICC cases from elsewhere has reinforced the (erroneous) impression that atrocities happen only in Africa. The controversies raised by the Court's focus on Africa have been significantly amplified by the recent prosecutions of Kenya's President and Deputy President. In October 2013, African states convened an Extraordinary Summit at the African Union (AU) headquarters to discuss the cases. The meeting raised the spectre of an African mass withdrawal from the ICC, arguing that the court had fallen short of its goals to deliver justice fairly.

> All participants accept that there is a gap between 'aspiration' and 'reality' in the work of the ICC, even if explanations for why the gap exists vary sharply

This was the backdrop for the high-level Roundtable, 'The ICC and Africa: Between Aspiration and Reality – Making International Justice Work Better for Africa', held in Addis Ababa, Ethiopia, 18–19 March 2014, co-hosted by The Brenthurst Foundation and the Africa Center for Strategic Studies. The High-Level Roundtable was held under Chatham House Rules in the spirit of a constructive debate that examined how the aspirations of the ICC are reflected in the reality of its work in Africa – underlined by the current Kenyan cases – and the consequences for state building and conflict resolution. In so doing, the participants were asked to look anew at how the ICC and international justice institutions can better serve Africa at this moment in its history. The delegates were also challenged to consider additional ways in which continental organisations like the AU and its Summit, regional organisations, and national governments can better address peace and security challenges when sovereignty is increasingly challenged conceptually, morally and politically.

This Roundtable was principally an African forum comprised of decision makers and influencers drawn mainly from African governments, think tanks and media, though also present were representatives of prominent international NGOs as well as the AU. The largest contingent at the meeting was from Kenya, while other African countries represented were Uganda, Rwanda, Zimbabwe, Nigeria, Ethiopia, South Africa and Sudan. The participants reflected a diversity of views on the increasingly contested role of the ICC, from ardent supporters of an expanded role for the institution to fervent critics who see it as a modern form of colonialism. Not surprisingly, the discussions were characterised by frequent collisions of ideas and arguments.

This Discussion Paper conveys the main arguments and perspectives to emerge from the Roundtable, structured around three key themes: geopolitics and international justice; the primacy of politics; and building intra-African justice. The final concluding section outlines the contours of a vital African conversation on the ICC. In restricting its focus to the issues and concepts which arose during the course of the dialogue, this Paper should be read as a complement to more comprehensive legal, political and/or historical works on the ICC, of which there is an expanding literature. Additional readings consulted for this Paper are listed at the end.

If a common point of departure for the participants could be identified it was reflected in the title of the Roundtable: all participants accept that there is a gap between 'aspiration' and 'reality' in the work of the ICC, even if explanations for why the gap exists vary sharply. There was also broad agreement that within Africa there are countless victims

of grave human rights abuses that have not received adequate justice – whether nationally, regionally or internationally. Beyond that, however, there was no Roundtable-wide consensus on the core issues under discussion, nor any collective recommendations on a way out of the current impasse. Thus, unless otherwise stated, any interpretations or conclusions are the author's own and do not necessarily reflect any particular viewpoint expressed at the Roundtable. Of several concluding points worth highlighting, it was palpably evident from the discussions that the debate fuelled by the Kenyan cases has stirred a newly-assertive *African* conversation on issues of justice and peace with potentially far-reaching consequences.

Geopolitics and International Justice

History provided a natural starting point for the Roundtable discussions. The founding of the International Criminal Court in 2002 reflects a complex interplay of politics, events and evolving norms which, it is generally accepted, date from the aftermath of the Second World War and the Nuremburg trials of Nazi war criminals, through the Cold War rivalry and proxy wars and lastly to the Rwandan genocide in 1994. Rwanda was perhaps the defining experience that gave direct impetus to the establishment of a *permanent* court, rather than the ad-hoc-type tribunals established for post-conflict situations in Yugoslavia, East Timor, Cambodia, Sierra Leone and Rwanda itself. Others, however, trace the ICC's roots much deeper into the history of Western imperialism in the 18th and 19th century, with its emphasis on the protection of 'vulnerable groups' within colonised territories. Whatever its antecedents, a key animating principle for the Court's creation was the need to address the 'impunity gap' whereby heads of states, military commanders and similar top-level authorities responsible for grave human rights violations slip through the legal cracks of national systems and avoid prosecution.

During the 1990s African countries, through adoption of the Southern African Development Community (SADC) Principles and Dakar Declaration, which encapsulated support for a fair and effective ICC, helped shape the Rome Statute and the international criminal justice system. Several participants noted that this was a period of profound disillusionment with politics in Africa. Some of Africa's authoritarian leaders – 'big men' – supported by the major powers, seemed bent on destroying the new political dispensation on the continent. Disillusionment also, conversely, fuelled a sense that the 'big men' could – and must – be challenged. Moreover, with an invigorated global emphasis on good governance after the Cold War, there was a strong desire within Africa to make an *African* contribution to the strengthening 'rule of law' ethos and demonstrate a spirit of cooperation with the emerging new world order, hence the high number of African signatories to various international treaties concluded during this period. The Rome Statute therefore provided an opportunity to not only end the *de facto* immunity enjoyed by senior African leaders and afford justice to their victims, but also loosen the grip of the most powerful states on the mechanisms of international justice and 'balance out' the international system, so heavily weighted in their interests. African governments – which perhaps somewhat paradoxically, drove the SADC and Dakar Principles – NGOs and others were inspired by the idea of an autonomous, *apolitical* international court free to select cases and investigate crimes. Such high hopes played their part in ensuring that two-thirds of African states would ratify the Rome Statute.

A key animating principle for the Court's creation was the need to address the 'impunity gap'

The (unfulfilled) promise of the 1990s haunts the current debate over the ICC. For all its noble intentions, the ICC is a politicised mechanism, no less rooted in the 'double standards' of the international system than other bodies heavily influenced by the Permanent Five (P5) of the United Nations Security Council (UNSC). Although just two – the United Kingdom and France – of the five permanent

members of the UNSC are members, the ICC's first decade in existence has revealed how the interests of the P5 and other major powers (members and non-members) has significantly influenced the Court's work. The ICC is ultimately dependent on the world's leading powers providing the clout and muscle (whether diplomatic, military or financial) necessary for it to function and arrest suspects, yet through direct and indirect means they have routinely marginalised the Court when its work threatened to negatively impact their interests. In practical terms, this has resulted in ICC investigations *not* being pursued in places like Afghanistan, Georgia or Palestine, even though jurisdictionally strong arguments could be made that they should. The ICC's sharpest critics claim that international criminal law does not apply to the powerful, only the weak – hence the focus on Africa, the new court's 'laboratory'. The major powers have become, in essence, both players and referees, formulating the rules of the game but refusing to play by them.

> The ICC's sharpest critics claim that international criminal law does not apply to the powerful, only the weak

This explains, in part, the vehemence with which some Roundtable participants sought to link the ICC with histories of colonialism and global marginalisation experienced by Africa. In their view, the ICC's indictments reflect and reproduce forms of neo-colonial rule under the guise of international 'justice'. The imprisonment of liberation fighters by colonial administrators and even the slave trade, where 'black bodies were seized from the continent', were thus part of the same historical continuum as the ICC. One participant averred that 'judged against the continent's history and interests in a hegemonic global order, the ICC has become the greatest threat to Africa's sovereignty, peace and stability.' This assertion speaks to the view that legal fundamentalism is being pursued as a kind of retributive justice in Africa, particularly in countries such as Kenya and Sudan where heads of state have been indicted. While African governments threatened by ongoing or renewed identity-based conflicts seek to bring them to a closure, notions of international law and the ICC are 'rashly' put forward as the principal means to achieve that end, according to critics. They assert that 'Europe's Court for Africa' or 'Africa's Criminal Court', as the ICC is variously derided, can – and has – exacerbated them.

The most potent manifestation of unequal power relations is, several participants suggested, the ICC's referral process. Citizens of non-State parties to the Rome Statute can still be indicted by the ICC if the UN Security Council decides to 'refer' them to the Court, as is the case with individuals currently indicted in Libya and Sudan. A UNSC referral requires 9 affirmative votes by members (of which there are 15), though critically, any of the P5 can exercise its veto power to prevent a referral. This is one of the most explicit ways powerful states can control the operations of the court, in addition to more subtle and indirect means. For critics, the referral process belies any attempt to equate the 'ICC' with 'international justice'. Growing antagonism in Africa towards the body should not be taken as a revisionist rejection of international justice when, in their minds, that very concept has never been realised; it still remains a vision, held hostage to the play of power. (On the issue of UNSC 'deferral' of cases [i.e. postpone investigations for up to 12 months if the circumstances on the ground so require], in the African Common position adopted by Ministers of justice and endorsed by the Assembly for submission to the Rome Statute Review process in 2010, in Kampala, it was proposed that if the UNSC did not exercise its power to defer within six months, this power should be exercised by the UN General Assembly in accordance with the Uniting for Peace Resolution of the UN General Assembly, Resolution 377 (v) a (1950), 3 November 1950, pertaining to the Korean War, when the UNSC was deadlocked and could not act.)

In stark contrast to portrayals of the ICC as a 'threat' or neo-colonial in nature, other contributors sought to differentiate between the narrative on the ICC promoted by some African leaders, and the one from victims. Though peace and reconciliation processes are critical, the ICC cannot be used as a scapegoat for their repeated failures in many African countries, which long predate the ICC's

establishment. Also highlighted was the fact that half of the ICC's African situations and subsequent cases (4 of 8) were referred to the Court by the States Parties themselves; the abovementioned 'gap' is not one between the Court's initial and subsequent mission but between the Court's aspirations and its actual means to fulfil its mandate, on account of external obstacles. Even accepting that the ICC has been politicised, several participants observed that the ICC is still fundamentally a *judicial* institution that is following its mandate and legal framework created by the Rome Statute. Courts the world over exist to make citizens safe and secure, not to appease governments. The same principle applies to the ICC.

> The controversy over the ICC's referral process cannot be understood in isolation from wider calls for UN reform

African leaders' strong focus on the ICC as an organisation highlighted more fundamental questions about why institutions geared towards promoting international justice exist in the first place – at their heart (at least in intention) being to ensure that justice is served for grave crimes. While these institutions exist, a lot, if not everything, rests on political will and commitment to ensuring that the institutions are not only established, but promoted and sustained. Boasting the largest bloc of member states to the Rome Statute, Africa could leverage its position positively, but thus far it has failed to do so. Both supporters and detractors accept that Africa has not moved in step on this issue, in the same way that Africa has failed to assert itself collectively on most global concerns of our age.[1]

The regularity with which Roundtable participants returned to issues of history, colonialism and power – i.e., who *still* calls the shots internationally – gave shape to the first overarching theme identified in this Paper, 'geopolitics and international justice'. In one form or another, the discussions drew attention to four key questions or areas for further investigation under this rubric:

Political influences and case selection by the ICC

The stipulated management oversight and legislative body of the ICC is the Assembly of States Parties (ASP), which comprises one representative from each state party. But in practice, undue political influences have weighed heavily on the operation of the Court and the selection of cases that progress to prosecution. As a young institution growing into its mandate in the face of (periodic) stiff resistance from major powers, not least (for several years) the United States, an uneasy balance must be struck between legitimacy and effectiveness. While it is unrealistic to assume any such body could ever be strictly apolitical, support for the ICC would be strengthened if genuine efforts to reform political influences and rethink how cases are selected were undertaken. Being extra cautious and accommodative to political realities may be a necessary evil for an organisation still finding its feet, but over time that will need to change for it to survive.

Triggers for ICC referrals

The controversy over the ICC's referral process cannot be understood in isolation from wider calls (not least from Africa) for democratisation of the UN Security Council. Currently it seems unlikely that the referral process will be scrapped; at the same time, it remains an uphill battle convincing the permanent five that the UNSC should abide by the standards laid out in the UN Charter and thus national interest, amongst other things, should *not* be what guides the 15 member states to refer or not to refer, to defer or not to defer. Consequently, areas for reconsideration might include a mechanism to vest greater discretionary powers with the prosecutor, insulating him/her from political influences to a far greater degree, and emboldening the ASP or another oversight body. The controversial tenure of Luis Moreno Ocampo, the first Prosecutor of the ICC (2003–2011), has

evoked critical questions around how much prosecutorial power should be exercised by one individual. Such issues featured in the context of negotiations for the Protocol granting competence to the African Court to deal with international crimes. In the absence of an acceptable option, the final agreement was for prosecutorial power to be vested in the *Office* of the Prosecutor (OTP) and not the prosecutor as such.

Addressing the impunity gap

The past 20 years has witnessed a clear trend towards a rejection of impunity. Normal blanket clearance for heads of state in the form of amnesty is disappearing and with it various shields against serious crimes. Described by some scholars as a 'norm cascade' in international justice, this trend can be found, for example, in the constitutional basis of states like Kenya and Ethiopia where there is no immunity for crimes against humanity. At the same time, within Africa, where politics and state formation processes in many countries are volatile and – by historical standards – still in their infancy, the whole concept of the 'impunity gap' raises as many questions as answers. Assigning criminal responsibility and culpability in the context of African political violence, where outcomes and the passage of time can alter perceptions of heroes and villains, turn adversaries into partners, is not always straightforward. Some criticism was voiced that although the Rome Statute provided for 'changed circumstances' this has never been operationalised. In real world terms, the example of Kenya was highlighted: the Kenya of 2014, in the wake of peaceful elections the previous year, is not the Kenya of 2007–8, imperilled by election-fuelled violence and destined, according to myriad experts and commentators of the time, to become a failed state. While the recent AU resolution calling for immunity for heads of state would turn the clock back in the fight against impunity and create a serious disincentive for African leaders to leave power – worsening an already corrosive trend in African politics – the context in which this call has emerged is important. The 'international community' has been quick to dismiss it as recidivism, a throwback to the Organisation of African Unity (OAU) and the blanket cover for mass atrocities it afforded its member-dictators. Instead, the potential 'step backwards' could prompt salutary reflection on the deeper causes of African violence and the thorny issues of accountability and responsibility.

Expansion of relevant crimes?

In referring to the Rome Statute, several participants suggested that the reach of international justice may need to be expanded. To the three core international crimes of genocide, crimes against humanity and war crimes, the crime of aggression was frequently highlighted as an area that ought to be acted upon by the Court. The negotiations leading to the Rome Statute had gradually weeded out numerous crimes (e.g. piracy and drug trafficking), owing to the unworkable nature of an 'opt-in' provision for each jurisdiction and a generally held desire to limit the Court to previously agreed International Humanitarian Law (war crimes, crimes against humanity and genocide). Although the crime of aggression was included within the Court's jurisdiction at its inception, the ICC has been unable to exercise its jurisdiction as the original Statute failed to define the crime or its jurisdictional boundaries, owing in large part to major powers' objections. African states have been largely supportive of inclusion of the crime of aggression, which was one of the key impetuses behind the Nuremburg tribunal and international criminal law more generally.[2] It is perhaps the most 'political' of international crimes in that it speaks to the motivations for state policy in the way others do not: the 'why' as opposed to the 'how'. Inclusion of the crime of aggression would effect limitations on the use of armed force and thus restrain Western powers from mounting operations such as the

> invasion of Iraq in 2003, for which – many Africans contend – its principal architects (namely former US President George Bush and former UK Prime Minister Tony Blair) have secured immunity for themselves in ways that their African counterparts could not.[3]

The Primacy of Politics

At the outset of the Roundtable, the ICC–AU pushback was compellingly described as

> the playing out of a politics of recognition in which the legitimacy of Africans managing Africa's violence is negotiated in contemporary terms using the tools of contemporary global membership in the twenty-first century. The reality is that in post-colonial Africa, as in other parts of the world, the *judicial* is one of many domains for ordering and performing *power*.

This contribution spoke to the conundrum faced by many African governments in forging a 'middle space' between due recognition of the difficult trade-offs and harsh realities of the continent on the one hand, and their various treaty-based and conventional obligations to create a world in which *all* perpetrators of mass violence can be held accountable. The 'primacy of politics' – the second overarching theme identified in this Paper – suggests that in tackling the core problem of justice, the rule of law is one component of African solutions to wider economic and political problems, not the other way around.

> The reality is that in post-colonial Africa, as in other parts of the world, the *judicial* is one of many domains for ordering and performing *power*

None of the above is to suggest that there is unanimity within Africa on the place of the ICC – or international justice more generally – within particular nation-building contexts. There remains a considerable degree of African cooperation with the Court, despite the current controversy. Moreover, African civil society – which was not well represented at the Roundtable – is generally more supportive of the ICC than recent pronouncements by the AU might suggest. Nevertheless, it seems clear that the ICC and other judicial institutions are increasingly perceived through a political lens.

The role of African civil society organisations stirred considerable debate amongst the Roundtable participants, not least over funding. Scepticism about their position stemmed from their heavy reliance on donor (read Western) funding, which some argued created ambiguities in the positions they adopt towards institutions such as the ICC. Some not only questioned whose agenda civil society in Africa promotes but also railed against what they perceived as the false dichotomy of 'citizens and the state', which in their minds echoed the colonial discourse of 'good and innocent natives ruled by malign leaders'. At the same time, the issue of funding was highlighted as an ineluctable factor affecting African governments and supra-national institutions, too. The AU and most national governments in Africa are similarly reliant on budget support and other forms of assistance from the major powers. Aside from the contentious issue of funding, what can be generally said of civil society organisations in Africa is that they can be broken down into three categories: champions of the ICC, which comprise the majority; those that are supportive of the ICC's role in fighting impunity but critical of the selective exercise of prosecutorial discretion and other shortcomings; and thirdly, staunch opponents of the ICC.

The primacy of politics was underlined by a stark comparison of South Africa's violent transition to democracy in the early 1990s with the current furore over the indictments of President Kenyatta and his Deputy William Ruto. In South Africa, two of the leaders of the main political formations in (frequently violent) conflict over the shape of the new political dispensation would go on to share the Nobel Peace Prize in 1993. It was suggested that, had the ICC been in existence in the early 1990s, Nelson Mandela and F W de Klerk would have

instead felt the spectre of ICC indictments over their heads. Whether far-fetched or not, there was a sense in parts of the continent that the bloody birth of the new South Africa was a harbinger of similarly violent processes of transformation elsewhere, as political systems that were largely authoritarian in nature became more pluralistic and representative. The idea that legal processes would somehow forestall the worst violence took root. History has shown, argued some participants, that this was a dangerously naïve assumption on Africans' part. In this vein *vis-à-vis* Kenya, it was asked provocatively whether the ICC is *helping* Kenyan society move towards a situation where its leaders might win a Nobel Prize or, alternatively, retreat into opposing camps that brings Kenya closer to greater and more intense violence and instability?

> For solutions to be viable they must start with the historical and structural issues that underlie conflicts

Few if any would argue that striking a balance between the search for justice and the transition to political stability is straightforward. The arrest of former Chilean president Augusto Pinochet in 1998, based on an international warrant in connection with numerous allegations of past human rights abuses, prompted one prominent Chilean intellectual who opposed Pinochet to nevertheless despair that his arrest was 'returning [us] to situations of the past, as a result of wounds in our society that have not yet healed'.[4] Similarly, many of the political and philosophical tensions were revealed during discussions of different national experiences, from Rwanda's focus on village-level justice to South Africa's emphasis on truth-telling. State sovereignty is underpinned by the idea that all states must be free to define their political terrain and their national interests. In the case of Rwanda, it was argued that the scale and nature of the crimes meant that decades would pass before anything like 'justice' could be afforded if pursued along Western lines, with its stringent requirements for 'due process'.

Acknowledging the primacy of political solutions and settlements, several participants nonetheless drew attention to the essential, albeit complementary role of international law in processes of transition and reconciliation, which itself is premised on the basis of a legal order. Uganda, for instance, illustrates how the absence of robust judicial mechanisms for victims of inter-tribal revenge or tit-for-tat killings over decades has resulted in highly fragmented, divisive national politics. Societies the world over – notably from Latin America – have shown themselves able to move on only when the quest for justice, truth, reparations and true reconciliation are met as a complementary set of measures. In this sense, it was argued, the imperative to prosecute and ensure real closure is not just a treaty or legal obligation but also one that is inherent in a practical reality, as evidenced by the experience of other countries with contexts not dissimilar to Africa's own experience of conflicts and atrocities.

In considering the 'primacy of politics', three issues which merit closer scrutiny stood out:

Tackling the root causes of conflict

It is generally acknowledged that part of the current controversy over the ICC in Africa is the perception that the 'judicial' is being put in place as *the* solution, when in fact it is only one of many prongs to building peace and justice.[5] For solutions to be viable they must start with the historical and structural issues that underlie conflicts. In some cases, it is the result of a profound and deep-rooted crisis of the legitimacy of the state, its institutions and their political incumbents. In others, the colonial legacy in all its ruinous manifestations – from arbitrary borders to divide-and-rule policies – has proved intractably difficult to overcome. More recently, foreign business interests have often been party to, if not fomented African conflicts. Recognising their often under-examined role is an important step in refining the international criminal justice system, since foreign companies have never been held to account in judicial terms for international crimes. The proposed Draft Statute granting international criminal jurisdiction to the

African Court introduces, *inter alia,* the crime of trafficking in hazardous wastes and illicit exploitation of natural resources. Anticipating that these crimes may be committed by corporate entities, it also introduces 'corporate responsibility', which is new to international criminal tribunals around the world.

African solutions to African problems

Since independence African countries have struggled to cope with various challenges to their sovereignty, often borne of geopolitical rivalries but also internal self-determination movements. Somehow within these two forces states have to negotiate a route of their own, which will require pragmatic and sensitive management of local realities on the ground. 'People' should always be at the heart of nation-building, and insofar as international justice is concerned the issue of 'victims' must be paramount. Yet 'victims' will not always be those who have experienced violence at the hands of venal leaders, where political institutions and processes to allow them to live in peace and tranquillity have failed.

One Roundtable participant described how negotiated political settlements will also produce 'victims' of one kind or another, no less intrinsic to the success of nation-building but for whom international (or domestic) justice mechanisms provide no redress. Africa's solutions need to cater for them, too, by making leaders accountable and ensuring that settlements are 'locally-owned' and do not create the conditions for new cycles of violence.

Developing strong institutions

The development of strong institutions that promote accountability and human rights, including, but not limited to judicial ones, is *sine qua non* to sustainable peace and security. If one considers the regional or African context, the existence of strong institutions would serve as a bulwark against perceived challenges to Africa's sovereignty – such as the ICC's referral process – but to date their development has been stymied by personality-based politics and neo-patrimonialism, which continue to hold sway in many parts of the continent.

Building Intra-African Justice Mechanisms

The third overarching theme to emerge from the Roundtable and drawn out in this Paper is perhaps the most consequential one: building intra-African justice mechanisms. Its importance lay in the widely-held view that such mechanisms are central to the necessary judicial remedies for Africa going forward, whether closely hewn to ICC processes or not.

In principle, the International Criminal Court was established to try only the gravest situations under its jurisdiction, regardless of regional or geographic representation. Hence under the new system of international justice, the Office of the Prosecutor should step in only as a 'last resort', meaning that the Court will only exercise its jurisdiction where the State Party of which the accused is a national, is unable or unwilling to prosecute. The term 'complementarity' speaks to an inherent preference for national justice mechanisms, provided they are able to provide adequate redress for victims. States (African or otherwise) that are party to the Rome Statute (and other human rights treaties, e.g. the Geneva Conventions and the UN Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment) are obligated to prosecute serious crimes and in particular alleged genocide, war crimes and crimes against humanity and to put in place legal, administrative measures to *domesticate* the provisions of the treaty – including the obligation to prosecute but also other measures such as remedies for victims.

Yet the term 'complementarity' evokes contrasting perspectives. Firstly, there is uncertainty over the threshold for reverting to the principle of complementarity, which critics charge is open to manipulation by the major powers and, in its extreme manifestation, represents another form of neo-colonialism,

ordering the world into 'civilised and non-civilised' nations. Kenya is the first example where the ICC prosecutor used powers under Treaty to request cases in Kenya be brought to the Court. Again, the issue of over-politicisation is invoked strongly, especially over timing and targeting of indictments. At the same time, critics point to the fact the indictments were served in 2010, two years before Ruto and Kenyatta joined forces in a political alliance. When local institutions have clearly failed victims of atrocities – as critics suggest is the case with Kenya – who then is to fill the void, if not the ICC? The phrase 'don't be vague, go to the Hague', which entered the political lexicon in Kenya after the 2007/8 election violence, suggested that within Kenya international justice was deemed, at least for a time, preferable to a slow and uncertain Kenyan judicial response.

> The ICC's biggest achievement in the long-term: spreading the responsibility to prosecute and try cases that fall within its jurisdiction to new regional and national mechanisms in Africa

All Roundtable participants emphasised the importance of strengthening national and regional African criminal justice mechanisms and thus improve accountability. And within Africa, numerous examples were cited as evidence of progress towards that objective, including the AU's establishment of a Commission of Inquiry in South Sudan; International Crimes Division of the High Court in Uganda and (soon to be operational) Kenya; the AU High level Panel on Sudan; the mobile gender justice courts in the DRC; and other examples from South Africa and Rwanda where institutions have been established to prosecute international crimes. Still other countries, while not having dedicated domestic mechanisms, have criminalised international crimes and some have gone further to expand on the scope of these crimes and to implement other provisions of the Rome Statute. For example, Burundi has expansive definitions of the core international crimes, particularly the crimes of torture and genocide.

The last point speaks to what, some would argue, would be the ICC's biggest achievement in the long-term: spreading the responsibility to prosecute and try cases that fall within its jurisdiction to new regional and national mechanisms in Africa. The Court's founding debates and submissions are clear that it was always intended to be complementary. The current backlash against the Court may therefore, somewhat paradoxically, further one of its key objectives: improvement of Africa's own judicial systems.

Critical to the discussion on complementarity going forward is the potential role of the expanded jurisdiction of The African Court of Justice and Human Rights. The African Court was established by the Protocol on the Statute of the African Court of Justice and Human Rights (adopted at the AU Summit in 2008). In theory, the Court would have jurisdiction over all cases and disputes submitted to it concerning the interpretation of the African Charter on Human and Peoples' Rights. But this protocol and the Statute annexed to it will not enter into force until 30 days after ratification by 15 Member States. As of February, 2014, less than a third of the required 15 Member States have ratified the Protocol. The proposed court merges the existing African Court on Human and People's Rights (ACHPR), which sits five times a year in Arusha, Tanzania, and whose judges are seconded by their countries' executives, with the African Court of Justice (whose jurisdiction is yet to be activated). In addition to this merger, there is a proposal to expand the new Court's jurisdiction to try not only human rights violations generally but also, the AU hopes, the three core international crimes (genocide, crimes against humanity and war crimes) also found in the Rome Statute of the ICC and a variety of transnational threats. To date, however, the ACHPR has been hamstrung by various constraints and thus, in practice, achieved very little.[6]

The relative weakness of the ACHPR raises numerous questions about the viability of the envisaged African Court on Justice and Human Rights (as it will then be known), not least its relationship with the ICC. On the question of complementarity, currently the ICC provides for such a relationship with only national, not regional mechanisms,

though the Rome Statute could always be amended. Far more critical is whether the Court will prove more balanced than the ICC, indict senior government officials and, more generally, serve the interests of justice, peace *and* democratisation. The outgoing Deputy President of South Africa, Kgalema Motlanthe, recently argued that such a Court is necessary to respond adequately to the yearnings of ordinary Africans for justice whilst being sensitive to the unique nature of the African context, especially the imperative to promote rather than scupper ongoing peace-building efforts throughout the continent. In his mind, the new Court would not be a substitute for the ICC, which would still remain at the pinnacle of international justice efforts; rather, matters would be referred to the ICC only where the new African court experienced innate limitations and/or victims appealed to the ICC where circumstances prevented them from getting satisfactory redress in the African Court.

> The ICC has faced serious financial constraints, especially in the aftermath of the global financial crisis

Within Africa the issue of complementarity was discussed at length at the four validation workshops attended, *inter alia*, by AU organs, independent experts, scholars, judges from African Regional Courts and other actors which started in 2009/10. It was also discussed by government experts and ministers of justice. At that time, unlike now, there was widespread support for the work of the ICC and a generally-held view that the AU and ICC had a shared mandate in fighting impunity and that with all its imperfections, Africa still needed the ICC. The issue was also raised by the ICC and discussed with the AU. The general consensus on complementarity was that (i) Nothing in the Rome Statute or international law prevented a group of states from pooling their sovereignty. (ii) How complementarity will work in practice could be addressed by an agreement between the two courts; trying to deal with it in either Statute would be meaningless as it would not bind the other side. Indeed, the African Court will also have to conclude agreements with African Regional courts.

Even if the envisaged African Court were constituted as such, it would likely face some of the key challenges which have impaired the ICC's operations during the first decade of its existence. Notwithstanding its large staff, the ICC has faced serious financial constraints, especially in the aftermath of the global financial crisis. The issue of funding is critical and is one of the two reasons why the Draft Protocol and Statute has not yet been adopted (the other reason being fine-tuning the definition of the crime of unconstitutional change of government). Currently, the African Court, with 47 staff members and a budget of over US$8 Million, most of it from member states, is better served than other AU organs. The ICC's annual budget is about Euro 130 Million. It is estimated that with international criminal jurisdiction, the court would require a budget of at least US$30 Million, which may not be sustainable from the current system of contributions. Accordingly, the proposed 'alternative financing mechanisms' would be critical for the effectiveness and viability of the Court, since donors do not pay for 'operational expenses'.

The ICC has also encountered myriad challenges over what it perceives as a lack of cooperation by certain states, namely Sudan and Kenya. In the latter, the ICC has faced sharp criticism over what many allege are weak investigative and prosecutorial processes, not least low evidentiary standards. Others, conversely, attribute the ICC cases' shortcomings in Kenya to witness intimidation and interference, various forms of government obstructionism and perceived collusion of other African states in undermining the OTP. Whether intra-African justice mechanisms would prove more effective in overcoming such challenges is an open question.

What seems clear from most of the sentiments expressed at the Roundtable, however, is the centrality of intra-African justice mechanisms to the judicial solutions Africa's victims – and states themselves – so desperately require. In this regard, the key areas for further study can be grouped into three sub-themes.

Complementarity and Cooperation

Complementarity need not relate solely to judgments or thresholds, but instead can be about cooperation on international, regional and national levels. Through its Constitutive Act (specifically Articles 4 (h) and 4 (o)), the AU commits Africa to end impunity for international crimes, just as the Rome Statute enjoins State Parties to do the same. It is notable that the Constitutive Act does not specifically speak to judicial mechanisms to achieve this aim. Antagonism towards the Court within Africa has tended to obscure what should, in theory, be a synergistic relationship. If the ICC has fallen short in clarifying its processes and limitations, it needs to rectify that and ensure its staff abide by its provisions 'as if it were their bible', in the words of Ocampo's successor as ICC Prosecutor, Gambian lawyer Fatou Bensouda. Conversely, if the ICC is living up to its mandate then the AU must acknowledge and respect it as a judicial entity and thus not suggest measures that would effectively over-politicise it, while simultaneously criticising it for meddling in politics.

New 'geographies of justice'

Developing African capacity and aligning African judicial mechanisms and instruments accordingly is essential. The idea of 'new geographies of justice' speaks to renascent African political claims *vis-à-vis* the continent's relationship with the West. The hopes invested in an expanded and emboldened African court reflect a growing desire to respond to historical inequalities and marginalisation in *African* terms. For all the controversy over the Kenyan cases, it has magnified the problem of reworking the new geographies of justice at this moment in history.

Politicisation of the African Court

The proposed African court would need to overcome a formidable list of obstacles before it could fulfil the aspirations envisaged for it. Much has been said by critics of the ICC on the widening gap between what the ICC was established for and what it is evolving into, yet the same risks apply to burgeoning African mechanisms – already routinely scorned as timid and toothless. The existing ACHPR is impaired by serious limitations, including the lack of Article 34 (6) declarations, which allow direct access of individuals and NGOs to the African Court after local remedies have been exhausted – and thus if necessary permit them to bypass the often lengthy processes before the African Commission – by the majority of African states. Should the proposed African Court on Justice and Human Rights have an expanded jurisdiction, its independence should be asserted from the outset. It should not be instrumentalised by Heads of State, but should instead serve to close the impunity gap. Even if an institution far better attuned to Africa's political complexities is developed, sufficient safeguards need to be put into place so it does not find itself adjudicating in African politics, in the same way the ICC is increasingly portrayed.

Conclusion: The Emerging African Conversation

The divergent opinions and positions expressed at the Roundtable did not obscure the overriding impression of a vital African conversation taking shape on the nexus of justice, peace and the exercise of power globally. Key to the potential impact of this emerging conversation is its *intra-African* nature. Arguably too much energy has been expended in juxtaposing the ICC and Africa on opposite sides of the debate, when in fact the most consequential dialogue will occur within Africa.

The legitimacy of the ICC would likely be gravely undermined without the support of its African members, who were so pivotal to its formation. Prior to the Court's establishment, there was

considerable scepticism over the capacity of small and middle-power governments to create a strong new International Organization, yet they succeeded without US and other major power support. Its creation is testament to the latent power of Africa to affirm key aspects of the ICC, revitalise its founding principles and chart a more bolder future for the Court.

Growing recognition of Africa's inherent power to reform institutions is one of the key tenants of the emerging African debate on the ICC

Part of the challenge in doing so relates to how Africa first entered the ICC, through consultations with NGOs and the international community rather than their own people. As such, some argue that the institution was never internalised within their own countries. The challenge also speaks to the reluctance or inability of Africa to speak with one voice; knee-jerk opposition and sweeping generalisations about the Court have not advanced Africa's interests, save those who have already decided the ICC must be abolished. Africa generally has failed to affirm a collective position on seminal issues and conflicts elsewhere in the world, notably Syria. Arguably this has made it easier for the ICC to avoid situations involving the major powers. Yet it is only through such interventions that Africa might help expand the reach of justice beyond the continent and break the double-standards norm that pervades the dominant international organs, not least the UN Security Council, which has directly and indirectly sought to control the Court.

Growing recognition of Africa's inherent – but poorly utilised – power to reform institutions is one of the key tenants of the emerging African debate on the ICC. Another tenant, evident during the Roundtable discussions, is the growing realisation that Africa needs to strengthen its own arguments when confronting inequalities of power and influence globally and *reclaim the justice narrative*. Africa can draw on vast reservoirs of painfully-earned experience in tackling common misconceptions, such as the false 'peace versus justice' divide which can serve to undermine nation-building. The emerging narrative doubtless will also have important things to say about the role of punishment, and whether it is essential for achieving justice; and the potential deterrent effect of a strong international court, which might prevent conflict and help replace the rule of force with the rule of law. And it will also introduce far more complexity into understanding how African populations see new formulations of command responsibility and accountability.

Concerns were voiced that Africa's defiance of the ICC in favour of 'African solutions to African problems' risked being interpreted as 'international law on the cheap', if not framed in accordance with treaties and conventions by which Africa is bound, especially since resolutions to global violence were so desperately needed at this time. Central to this idea is Africa's rejection of impunity and determination to combat it, even where it involves heads of state or governments brought to power by elections, which underpinned its wide support for the Rome Statute.

Africa needs to strengthen its own arguments when confronting inequalities of power and influence globally and *reclaim the justice narrative*

This is likely to remain one of the most intractable issues – which the discussions leading up to Rome anticipated – debated in the emerging African conversation since it goes to the heart of the legitimacy of the ICC, and any parallel or alternative intra-African justice mechanisms. Notwithstanding the AU's recent pronouncements on immunity for heads of state, it is likely that any special accommodations would swiftly lead to charges that the Court (ICC or African) had become politicised, unfair and neglectful, insofar as their principal role, to serve victims. In essence, this is powerfully articulated in the AU's own, yet-to-be completed African Transitional Justice Policy Framework (ATJF) policy, which is an outcome of the Report of the Panel of the Wise

entitled 'Peace, justice and reconciliation in Africa: Opportunities and Challenges in the Fight against Impunity'. The report recommends the development of an ATJF to assist the AU and member states to recognise and undertake their obligations and responsibilities towards ensuring protection from and accountability for violations including providing guidelines on meeting the needs of victims.

As Africa negotiates the new geographies of justice, it will seek to create a level of excellence and impartiality at the national or regional level which does not obtain in the global system. In other words, make the ICC less relevant; perhaps even, one day, irrelevant. The relatively short lifespan of the ICC reveals the manifold challenges in remaining true to original intent. Any future African Court would be well served by studying closely how and why the gap between aspiration and reality in international justice has widened in recent years.

Endnotes

1 One notable exception where Africa has spoken effectively 'as one' was during the Climate Change Negotiations, Copenhagen (2009), and Cancun (2010), structured around an expert negotiating team and a political team composed of five heads of state led by the late Ethiopian Prime Minister, Meles Zenawi. This was perhaps the most successful collective African effort at global negotiations, in terms of the process, the buy-in by African states and the outcomes.

2 The ICC Review Conference in 2010 in Kampala, Uganda eventually agreed, at its 13th plenary session held on 12 June 2010, on a definition of the crime of aggression and on amendments to the Rome Statute. The amendments are to come to force one year after being ratified; however, the amended text provides that only crimes of aggression committed one year or more after the 30th ratification are within the jurisdiction of the Court. Furthermore, a decision is to be taken by the ICC Assembly of States Parties with a two-thirds majority vote after 1 January 2017 to actually exercise jurisdiction.

3 The AU position on the US-led invasion of Iraq in 2003 has consistently maintained that it should have been referred by the UNSC to the ICC and Bush and Blair investigated and prosecuted for war crimes and crimes against humanity. Similarly, the situation in Gaza, where the Richard Goldstone Commission initially found that war crimes and crimes against humanity had been committed, would also, the AU has argued, have been referred to the ICC if the UNSC had been exercising its mandate without political considerations.

4 As quoted in David Bosco, *Rough Justice* (Oxford: Oxford University Press, 2014), p. 61.

5 The argument that courts cannot end wars, finds expression in the recent article by Thabo Mbeki and Mahmoud Mamdani in *The New York Times*, (http://www.nytimes.com/2014/02/06/opinion/courts-cant-end-civil-wars.html?_r=0).

6 The Court holds four ordinary sessions a year for 10 or 15 working days each. However, with increasing work, it has been holding one or two extraordinary session per annum.

Additional Works Consulted for this Discussion Paper

David Bosco, *Rough Justice: The International Criminal Court in a World of Power Politics* (Oxford: Oxford University Press, 2014).

Kamari Clarke, 'Africa and the ICC: In Search of New Geographies of Justice', 2014, unpublished paper.

Kamari Clarke, *Fictions of Justice: The International Criminal Court and the Challenge of Legal Pluralism in Sub-Saharan Africa* (Cambridge: Cambridge University Press, 2009).

Max Du Plessis, Antoinette Louw, Ottilia Maunganidze, 'African Efforts to close the impunity gap: Lessons from complementarity from national and regional actions', *ISS Paper 241* (November 2012).

David Hoile, 'Is the ICC fit for purpose?', *New African*, 2012, available at: http://www.newafricanmagazine.com/special-reports/other-reports/icc-vs-africa.

Human Rights Watch, 'ICC: Africa Should Reject "Free Pass" for Leaders', *Human Rights Watch,* 2013, available at: http://www.hrw.org/news/2013/11/17/icc-africa-should-reject-free-pass-leaders.

Stephen Lamony, 'International justice and the ICC: neither "Europe's court for Africa" nor "Africa's court"', forthcoming.

Kgaleme Motlanthe, 'Human Rights and Democratisation in Africa', Lecture delivered 31 March 2014, University of Pretoria, Tshwane.

Kenneth Roth, 'Africa Attacks the International Criminal Court', *The New York Review of Books,* 2014, available at: http://www.nybooks.com/articles/archives/2014/feb/06/africa-attacks-international-criminal-court/.

Martin Kimani, 'Kenya Can Heal Itself', *The New York Times*, 2013, available at: http://www.nytimes.com/2013/12/05/opinion/kenya-can-heal-itself.html?pagewanted=2.

Mwangi S. Kimenyi, 'Can the International Criminal Court Play Fair in Africa?' *The Brookings Institution*, 2013, available at: http://www.brookings.edu/blogs/africa-in-focus/posts/2013/10/17-africa-international-criminal-court-kimenyi.

Mahmood Mamdani and Thabo Mbeki, (2014) 'Courts Can't End Civil Wars', *The New York Times,* available at: http://www.nytimes.com/2014/02/06/opinion/courts-cant-end-civil-wars.html.

Max du Plessis; Tiyanjana Maluwa, Annie O'Reilly, 'Africa and the International Criminal Court', *Chatham House,* 2013, available at: http://www.chathamhouse.org/sites/default/files/public/Research/International%20Law/0713pp_iccafrica.pdf.

Tim Murithi, 'The African Union and the International Criminal Court: An Embattled Relationship?', 2013, *The Institute for Justice and Reconciliation,* available at: http://www.ijr.org.za/publications/pdfs/IJR%20Policy%20Brief%20No%208%20Tim%20Miruthi.pdf.