INTERNATIONAL CRIMINAL JUSTICE REGIONAL ADVOCACY CONFERENCE REPORT

Civil Society in Action: Pursuing Domestic Accountability for International Crimes

SOUTHERN AFRICA LITIGATION CENTRE

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The Southern Africa Litigation Centre (SALC) promotes human rights and the rule of law through litigation support and training. SALC monitors international justice and its development in Southern Africa. SALC's objective is to ensure that Southern African states are fully aware of their legal obligations. Through litigation and advocacy SALC encourages Southern African states to give effect to these obligations.

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List of Abbreviations

ABA	American Bar Association
ASP	Assembly of State Parties to the Rome Statute
AU	African Union
CAR	Central African Republic
CDVR	Dialogue, Truth and Reconciliation Commission
CICC	Coalition for the International Criminal Court
COVAW	Coalition on Violence against Women
CSO	Civil Society Organisation
DRC	Democratic Republic of Congo
ECOWAS	Economic Community of West African States
EU	European Union
ICC	International Criminal Court
ICD	International Crimes Division
ICJ-Kenya	International Commission of Jurists, Kenya
ICTR	International Criminal Tribunal for Rwanda
IDP	Internally Displaced Person
KHRC	Kenyan Human Rights Commission
KPTJ	Kenyans for Peace with Truth and Justice
KTJN	Kenyan Transitional Justice Network
LRA	Lord's Resistance Army
MDC	Movement for Democratic Change

NCICC	Nigerian Coalition for the International Criminal Court
NGO	Non-Governmental Organisation
NIDPN-K	National Internally Displaced Persons Network in Kenya
NPA	National Prosecuting Authority
OAU	Organisation of African Unity
ODPP	Office of the Director of Public Prosecutions
ODM	Orange Democratic Movement
OTP	Office of the Prosecutor
PAHRDN	Pan African Human Rights Defenders Network
PGA	Parliamentarians for Global Action
PNU	Party for National Unity
SADC	Southern African Development Community
SALC	Southern Africa Litigation Centre
SAPS	South African Police Service
SCA	Supreme Court of Appeal
SGBV	Sexual and gender based violence
SWAPO	South-West Africa People's Organisation
TJRC	Truth, Justice and Reconciliation Commission
TRC	Truth and Reconciliation Commission
UN	United Nations
UNSC	United Nations Security Council

CHAPTER ONE: INTRODUCTION

Ending impunity and ensuring accountability for the most serious crimes has always been a priority for the international community. This shared concern for the extensive perpetration of crimes against humanity, war crimes, and genocide resulted in the creation of the International Criminal Court (ICC) in 2002. This was the first permanent court equipped to try egregious crimes.

The ICC is a relatively young institution faced with many challenges, but also with great potential for success. Be that as it may, it cannot be expected to fight impunity on its own, and so it falls to domestic systems to assist by signing, ratifying and domesticating ICC legislation and litigating core crimes in a domestic context.

Ensuring there is justice beyond the bounds of The Hague involves the realisation and actualisation of the principle of complementarity. This principle, as enshrined in the Rome Statute of the International Criminal Court, allows the ICC to be a court of last resort, giving domestic systems primary jurisdiction. Complementarity is one of the founding principles of the Rome Statute and the vision of the drafters at the Rome Conference was a comprehensive system of international justice, where states take it upon themselves to investigate and prosecute international crimes. As a court of last resort, the ICC acts when a state is unwilling or unable to carry out its responsibilities. For complementarity to work, states are required to sign, ratify, and domesticate the Rome Statute, effectively giving them the legislative framework to address crimes that shock the conscience of humanity.

The ongoing perpetration of crimes against humanity and war crimes – coupled with the accusation that the ICC is targeting Africa (which has resulted in a serious backlash from certain African countries, including threats of withdrawal from the ICC and acts of non-cooperation) – has made the application of justice at a domestic level vital, now more so than ever. Justice and accountability are the main objectives and they must be pursued from a domestic and international perspective.

In Africa, to date, only South Africa, Kenya, Uganda, Burkina Faso, and Senegal have amended their laws to allow for the prosecution of core international crimes.

Given the above-mentioned situation, SALC convened a meeting, held on 10-11 June 2014, in Johannesburg, South Africa, of civil society actors throughout Africa. The objective was to discuss ways in which civil society can ensure accountability for international crimes through the use of local courts and to advocate strategies that civil society can use to push for the domestication of ICC legislation.

Understanding that civil society can be the strongest driving force behind efforts to promote accountability for international crimes in a domestic context, SALC used this meeting as an opportunity to display the pivotal part played by these actors.

The meeting brought together different minds united in the fight to keep the African international criminal justice project alive. As such, it included discussions on lessons learned thus far, best practices for ensuring accountability for international crimes at the domestic level, and key advocacy strategies for civil society.

This report reflects the deliberations and substantive content of the meeting and shows that litigation and advocacy at the domestic level can provide substantive and practical content that can shape jurisprudence on the continent and help foster a culture of accountability.

The information in this report is based on the presentations made by selected speakers at the conference. Presenters are indicated as the authors of sections within the chapters that follow. However, each chapter is a synthesis of the presentations made at the meeting and is not a verbatim record.

CHAPTER TWO: CURRENT INTERNATIONAL CRIMINAL JUSTICE LANDSCAPE

Stephen Lamony[1]

The existing international criminal justice landscape is characterised by international mechanisms, regional mechanisms, and local mechanisms.

The ICC

The ICC is the first ever permanent, treaty-based, international criminal tribunal established to investigate and try individuals for the most serious crimes: genocide, crimes against humanity, and war crimes. Founded on the principle of complementarity, the ICC assumes its role in situations when national jurisdictions are unwilling or unable to prosecute crimes perpetrated in their country, but only if the ICC has the requisite jurisdiction.

Currently, African civil society organisations are heavily engaged in several activities – ranging from advocacy to strategic litigation. Whilst these initiatives are both noble and necessary, they have presented both challenges and opportunities.

African countries have been heavily involved in the ICC since initial negotiations over 20 years ago. As far back as 1993, delegations from African states (Lesotho, Malawi, Swaziland, Tanzania, and South Africa) participated in discussions when the International Law Commission presented a draft statute to the United Nations General Assembly. Of the 47 African states present for the drafting of the Rome Statute, most voted in favour of its adoption and the subsequent establishment of the ICC. To date, and despite the tension between some members of the AU and the ICC, none of the 34 African states parties have withdrawn from the treaty. Over 70 percent of ICC requests for cooperation are met with

1 Senior Adviser to the United Nations (UN), African Union (AU) and Africa Situations at the Coalition for the International Criminal Court (CICC).

a positive response.

The ICC currently has ongoing investigations in eight countries, all of which are in Africa: the Central African Republic (CAR) I, CAR II, Cote d'Ivoire, Sudan, Democratic Republic of Congo (DRC), Kenya, Libya, Mali, and Uganda. The ICC also has ten situations under preliminary examination by the ICC's Office of the Prosecutor (OTP): Afghanistan, Colombia, Georgia, Guinea, Iraq, Honduras, Nigeria, Republic of Korea, Ukraine, and the situation regarding registered vessels of the Union of Comoros.

Nevertheless, the ICC continues to come under attack, and has been accused of targeting Africa, of inefficiency, untenable delays in the administration of justice, and flawed procedural and substantive decisions. This criticism has led civil society to push for domestic accountability, not at the expense of supporting the ICC, but more to complement the Court and to reach the united objective which is justice for the victims and accountability for crimes committed.

The ICC is not in the fight alone, as there are also regional instruments designed to secure accountability. For example, there is the African Charter on Human and Peoples' Rights (1981)[2] (Banjul Charter). When the charter was adopted, a strategic decision was made to establish a commission rather than a court. However, this decision was later revised in 1998 when the Organisation of African Unity (OAU) adopted a protocol to the charter establishing the African Court on Human and Peoples' Rights.

The African Court of Justice and Human Rights

The African Court on Human and Peoples' Rights is a continental court established by African countries by virtue of article 1 of the Protocol to the African Charter on Human and Peoples' Rights on the Establishment of the African Court on Human and Peoples' Rights (2004)[3] (Protocol). The Protocol came into force on 25 January 2004, after ratification by more than fifteen countries. The Court complements and reinforces the functions of the African Commission on Human and Peoples' Rights, and has jurisdiction over all cases and disputes submitted to it concerning the interpretation and application of the Banjul Charter, the Protocol, and any other relevant human rights instruments ratified by the states concerned. To date, only 26 states have ratified the Protocol.[4]

The Court is staffed by eleven judges, who are nationals of member states of the AU. The Court's operations officially began in Addis Ababa, Ethiopia, in November 2006, but in August 2007 the Court moved to Arusha in the United Republic of Tanzania. Between 2006 and 2008, the Court dealt principally with operational and administrative issues,

2 Available at http://www.achpr.org/files/instruments/achpr/banjul_charter.pdf.

3 Available at http://www.achpr.org/instruments/court-establishment/

4 Algeria, Burkina Faso, Burundi, Cote d'Ivoire, Comoros, Congo, Gabon, Gambia, Ghana, Kenya, Libya, Lesotho, Mali, Malawi, Mozambique, Mauritania, Mauritius, Nigeria, Niger, Rwanda, South Africa, Senegal, Tanzania, Togo, Tunisia, and Uganda.

and delivered its first judgment in 2009 after an application dated 11 August 2008. As of September 2013, the Court has received 28 applications. It has already finalised 23 cases and has five pending cases – including one request for an advisory opinion.

The African Court of Justice is another initiative. It was originally intended to be the "principal judicial organ of the Union",[5] with authority to rule on disputes over interpretation of AU treaties. It was, however, superseded by a protocol creating the African Court of Justice and Human Rights.

The African Court of Justice and the African Court on Human and Peoples' Rights were merged into a single court and established as "The African Court of Justice and Human Rights" as established by the Protocol on the Statute of the African Court of Justice and Human Rights[6](2008) (Merger Protocol). The Merger Protocol was adopted at the AU Summit in Sharma El-Sheikh, Egypt, on 1 July 2008. The Merger Protocol and the Statute annexed to it will enter into force 30 days after fifteen member states deposit the instruments of ratification. By February 2014, only five of the required fifteen member states had ratified the Protocol.[7]

In response to a 2009 AU decision on the matter, the AU Commission began a process in February 2010 to amend the Merger Protocol to expand the court's jurisdiction to include international and transnational crimes. The year of 2009 saw an increase in the momentum to expand the jurisdiction of the Court, although discussions around this had already begun in 2006. The resultant Draft Protocol on Amendments to the Protocol on the Statute of the African Court of Justice and Human Rights[8] (Draft Protocol) adds criminal jurisdiction over the international crimes of genocide, war crimes, and crimes against humanity – as well as several other crimes like terrorism, piracy, and corruption.

In 2014, there was a renewed push by senior government officials to amend article 46A *bis* of the Draft Protocol to secure temporary immunity for senior government officials. In addition to encouraging impunity, the provision also begs the question as to how a "senior government official" is defined. It remains to be seen what the outcome will be. Nonetheless, the Draft Protocol was adopted by the AU in Malabo, Equatorial Guinea, in June 2014, but at the time of writing there were no ratifications.

East African Court of Justice

The East African Court of Justice is a regional integration organisation (comprised of Kenya, Uganda, Tanzania, Rwanda, and Burundi), which is tasked with resolving disputes

5 Article 2.2 Protocol of the Court of Justice of the African Union AU Doc. Assembly/AU/Dec.25 (II) (2003).

6 Available at http://www.au.int/en/content/protocol-statute-african-court-justice-and-human-rights.

7 Benin, Burkina Faso, Congo, Libya, and Mali.

8 (2014) STC/Legal/Min/7(I) Rev. 1. Available at http://www.iccnow.org/documents/African_Court_Protocol_-_July_2014.pdf.

between member states of the East African Community. It was established by article 9 of the Treaty for the Establishment of the East African Community[9], and is charged with interpreting and enforcing the treaty, which came into force on 7 July 2000. The Court is not mandated to hear individual complaints of alleged human rights violations. The extension of the Court's jurisdiction was the focus of the June 2012 meeting of the East African Community Council of Ministers (Council).

Court of Justice of the Economic Community of West African States (ECOWAS)

Moving to the west of the continent, the Court of Justice of the Economic Community of West African States (ECOWAS) was created in 1975 to replace the Customs Union of West African States, which was originally created in 1959 to redistribute customs duties collected by the coastal states of west Africa. The Treaty on the Economic Community of West African States[10] was revised at the Cotonou Summit in July 1993, and replaced the tribunal originally envisioned but inexistent, with the Community Court of Justice. The revised treaty[11] entered into force in 1995, but the judges of the Community Court of Justice were not appointed until 30 January 2001. In addition, the operationalised Court had a narrow field of access, which limited the impact it could have in the community. Only the Authority of Heads of State and Government (the executive of the community comprised all member states) and the member states acting individually were allowed to bring contentious cases before the Court. The effect of this limited standing in the Court resulted in it being idle until 2003. It only received its first case in 2004 *(Olajide Afolabi v Federal Republic of Nigeria)*.12 In January 2005, the community adopted the Additional Protocol to permit persons to bring suits against member states. In addition to this important change, the Council took the opportunity to revise the jurisdiction of the Court to include review of violations of human rights in all member states. This Court is in a much better position than its southern African counterpart.

South African Development Community (SADC) Tribunal

The South African Development Community (SADC) Tribunal was established in 1992 by article 9 of the SADC Treaty (1992)[13]. It envisions being a world class international court in an integrated SADC region that promotes and protects human rights, democracy, and the rule of law. The Tribunal's jurisdiction includes Angola, Botswana, the DRC, Madagascar, Malawi, Mauritius, Mozambique, Namibia, South Africa, Swaziland, Seychelles, Tanzania,

9 (1999) 2144 UNTS 255. Available at http://www.wipo.int/wipolex/en/regeco_treaties/details.jsp?group_id=24&treaty_id=219.

10 (1975) 1010 UNTS 14843. Available at http://www.comm.ecowas.int/sec/?id=treaty&lang=en.

11 Revised Treaty of the Economic Community of West African States, 2373 UNTS 233 (1993). Available at http://www.refworld.org/docid/492182d92.html.

12 ECW/CCJ/JUD/01/04. Available at http://caselaw.ihrda.org/doc/ecw.ccj.jud.01.04/view/.

13 (1992) 32 ILM 116 Available at http://www.chr.up.ac.za/undp/subregional/docs/sadc8.pdf.

Zambia, and Zimbabwe. The first dispute was lodged with the Tribunal on 27 August 2007, by a Malawian citizen. Unfortunately, the Court became defunct after passing judgment in the controversial case involving President Robert Mugabe and Zimbabwe's land redistribution programme.

International Criminal Tribunal for Rwanda

Africa also has special ad-hoc courts designed for particular conflicts, with very specific mandates. The International Criminal Tribunal for Rwanda (ICTR) is one such tribunal. It was created by United Nations Security Council Resolution 955 of 8 November 1994.[14] The ICTR was established for the prosecution of persons responsible for genocide and other serious violations of international humanitarian law committed in the territory of Rwanda between 1 January 1994, and 31 December 1994. Currently, the number of completed cases is 75 which includes twelve acquittals and eleven pending appeals.

Special Court for Sierra Leone

Other ad-hoc courts include the Special Court for Sierra Leone, which was set up jointly by the Government of Sierra Leone and the United Nations. It is mandated to try those who bear the greatest responsibility for serious violations of international humanitarian law and domestic law committed in Sierra Leone since 30 November 1996. Thirteen indictments were issued by the prosecutor in 2003. Two of those indictments were subsequently withdrawn in December 2003 due to the deaths of the accused. The trials of three former leaders of the Armed Forces Revolutionary Council, two members of the Civil Defence Forces, and three former leaders of the Revolutionary United Front have been completed, including appeals. The trial of former Liberian President Charles Taylor was completed and he was found guilty in April 2012 and was sentenced to 50 years in prison. On appeal, the sentence and the conviction were upheld and he is currently serving his sentence.

Other Examples of Criminal Justice Mechanisms

Uganda's International Crimes Division is a special division of the High Court of Uganda, which was established in July 2008. Its establishment was a way of fulfilling the government of Uganda's commitment to the actualisation of the Agreement on Accountability and Reconciliation[15]. The Division is intended to deal with those who have committed serious crimes: war crimes; crimes against humanity; genocide; terrorism; human trafficking; piracy; and other international crimes.

In addition, the International Crimes Division has come to be viewed as a court of

14 UN SC Resolution 955 UN Doc S/RES/955 (2004) Available at http://www.unictr.org/Portals/0/English%5CLegal%5CResolutions%5CEnglish%5C955e.pdf.

15 (2007), Available at http://www.amicc.org/docs/Agreement_on_Accountability_and_Reconciliation.pdf.

"complementarity" with respect to the ICC, thus fulfilling the principle of complementarity stipulated in the preamble and article 1 of the Rome Statute.

Other examples of important criminal justice mechanisms in Africa include the DRC's Military Penal Code Law 024-2602 and South Kivu's mobile gender courts.[16]

Seeing how civil society has, and can continue to encourage accountability is vital. Currently, African civil society organisations are heavily engaged in several activities – ranging from advocacy to strategic litigation. Whilst these initiatives are both noble and necessary, they have presented both challenges and opportunities.

16 For example, on 21 February 2011, Lieutenant Colonel Mutuare Kibibi became the most senior commander in the Congolese army to be found guilty of crimes against humanity for ordering the mass rape of at least 49 women in the town of Fizi on New Year's Day in 2011.

CHAPTER THREE: ACCOUNTABILITY EFFORTS IN UGANDA, THE DEMOCRATIC REPUBLIC OF CONGO, AND NIGERIA

SECURING ACCOUNTABILITY FOR LRA CRIMES IN UGANDA

Joyce Freda Apio[17]

Background

Since independence, Uganda has experienced various episodes of violent conflict and human rights abuses across different political regimes. The most protracted and brutal of these conflicts was the two-decade conflict in northern Uganda between the LRA and government forces, during which time gross human rights violations and serious violations of international humanitarian law were perpetrated against civilians. Examples of human rights violations committed included: abduction and enforced disappearance; killing; torture; cruel, inhuman, or degrading treatment; forced recruitment; slavery and forced marriage; mutilation and war injuries; sexual violence; psychological harm; looting; and destruction of property. To deal with crimes of this magnitude, a dual approach

There has been a chequered record in commitment at the highest political level to an impartial and fair justice system, albeit with sustained civil society efforts complementing national processes. There is, nevertheless, hope for progress in achieving accountability for atrocious crimes.

17 Joyce Freda Apio is a representative of Parliamentarians for Global Action.

encompassing international and domestic accountability mechanisms was adopted.

Accountability Efforts for Gross Human Rights Violations in Uganda – A Dual Approach

Accountability efforts to address these human rights violations have been made at both international and domestic levels. These include the referrals to the International Criminal Court (ICC) in 2003, the establishment of the International Crimes Division (ICD) in 2008, and other related developments including a Transitional Justice Policy which is yet to be adopted by the government. These efforts have faced numerous challenges including the non-execution of the ICC arrest warrants and legal barriers in domestic prosecutions, especially due to the amnesty law.[18]

The ICC Intervention

In December 2003, the Ugandan government referred the situation in northern Uganda to the ICC, citing its inability to arrest LRA leaders. The ICC prosecutor opened a formal investigation in 2004 and, in 2005, the ICC's Pre-Trial Chamber II approved warrants of arrest for Joseph Kony and four other LRA senior commanders on charges of war crimes and crimes against humanity. Two of the suspects have since died, but Kony, Okot Odhiambo, and Dominic Ongwen remain at large and the LRA remains active in the Democratic Republic of Congo (DRC) and the Central African Republic (CAR).

The greatest challenge with the ICC intervention has been the non-execution of arrest warrants. To date, none of those indictees have been apprehended. Regional military forces with the support of the US government continue to hunt down the remnants of the LRA in the CAR and DRC.

Domestic Accountability Efforts

Domestic accountability efforts included the Juba peace negotiation between the government of Uganda and the LRA which forms the basis on which domestic prosecutions for atrocious crimes in Uganda are founded. Although the final peace agreement was not signed between the parties, an "Agreement on Accountability and Reconciliation" and an annexure thereto, were signed in June 2007 and February 2008 respectively, to establish a domestic criminal mechanism for legitimate investigation and prosecution of crimes in northern Uganda. Consequently, the government created an International Crimes Division in Uganda's High Court in 2008, and established departments for investigations and prosecution within the Uganda Police Force and Directorate of Public Prosecutions. However, to date, only the case of Thomas Kwoyelo, a middle-ranking LRA rebel, has come before the International Crimes Division.

18 Amnesty Act of 2000 (as amended), Cap. 294 of the Laws of Uganda.

The Director of Public Prosecutions and Uganda Police Force have also been engaged in investigating the case of Caesar Acellam, another senior commander of the LRA (at the rank of Major General) following his capture by government forces in the CAR in May 2012. Since then, Acellam has been in the custody of the Ugandan People's Defence Force in Gulu barracks with very restricted movements and access. The investigation team completed their work in late 2013 and his file for prosecution was sanctioned and a criminal summons issued.

The Ugandan People's Defence Force has, however, refused to release Acellam to face prosecution, and has instead granted him immunity and integrated him into the national army. It is uncertain whether the situation will change. Civil society organisations believe that the army's approach fundamentally ravages accountability efforts and poses a serious question about Uganda's commitment to the Agreement on Accountability and Reconciliation, and to complementarity as a whole. The grant of immunities by the army to former combatants puts to waste prosecutorial efforts.

Legal and Policy Framework: Hurdles and Prospects

Uganda's legal and policy framework itself presents an apparent challenge, although many opportunities exist. The greatest hurdles to realising accountability in Uganda are arguably founded in the legislative framework.

First, Uganda's International Criminal Court Act 2010[19] (ICC Act), which domesticated into Ugandan law, the crimes enumerated in the Rome Statute of the International Criminal Court 1998 (Rome Statute), is prospective from 25 June 2010 and thus cannot be applied to the period of conflict in greater northern Uganda. Nevertheless, the case against Kwoyelo before the International Crimes Division is based on the Geneva Conventions Act 1964[20] and the Penal Code Act 1950.[21] There is also the possibility of using customary international law, since these crimes were already crimes under international law.

Second, the Amnesty Act of 2000[22] (as amended) allows any former combatant to be eligible for amnesty unless expressly exempted by the Minister of Internal Affairs. To date, a number of exemptions have been made. This has been the biggest practical legal challenge to the prosecution of Kwoyelo. In 2011, the defence team successfully challenged the prosecution of Kwoyelo on the basis that denying him amnesty was discriminatory, as other combatants were granted amnesty by the Constitutional Court. The Court ordered his immediate release. The decision was appealed and the hearing was conducted in March 2014. At the time of writing, judgment has yet to be handed down, and Kwoyelo remains in detention in Luzira Prison. Kwoyelo's lawyers have not given up and instead have

19 Act 11 of 2010.
20 Cap. 363 of the Laws of Uganda.
21 Cap. 120 of the Laws of Uganda.
22 Cap. 294 of the Laws of Uganda.

approached the African Commission on Human and Peoples' Rights (the Commission) alleging that their client is being illegally detained. The Commission has deemed the case to be admissible and the outcome is pending.

Third, in 2011, the government started developing a National Transitional Justice Policy. The policy framework presents a multitude of opportunities, which, if implemented, would address a number of current challenges, close the legal gaps, and define a clear path towards attaining meaningful justice. This would provide redress to victims who have suffered harm during past conflicts and periods of repression. The policy framework proposals include the following: harmonising the legal framework; establishing a Truth and Reconciliation Commission; granting conditional amnesty; promulgating legislation for witness protection (a bill already exists); establishing a reparations programme; and establishing a Transitional Justice Commission and Transitional Justice Fund.

Further opportunities include nurturing a proactive judiciary that appreciates the international practice, even in the absence of clearly defined frameworks. This may involve benchmarking and other forms of capacity-building provided by different stakeholders. The application of customary international law in the prosecution of perpetrators alongside other laws, such as the Geneva Conventions Act could also be a good way to counter the challenge posed by the non-retrospective application of the 2010 ICC Act. Cooperation and strong partnerships between the judiciary and civil society are complementary to the national accountability processes.

Parliamentarians for Global Action (PGA) has also launched interventions with specific regard to building political support for domestic prosecutions. PGA has been involved in Uganda since June 2000 in the process that led Uganda to ratify the Rome Statute, to refer the situation in the north to the ICC, and to domesticate the Rome Statute in terms of the 2010 ICC Act. PGA remains interested and committed to developments that affect the prosecution of international crimes committed with impunity and its approach aims at building political support for accountability. As a result, PGA has been involved in a number of initiatives, which include providing technical advice to members of parliament to inform debates on critical issues related to prosecution of atrocity crimes. It also conducts research, legal analysis, and commentaries on the various developments.

PGA expects a petition to be filed in June 2014 in the Constitutional Court. The petition calls on parliament to seek ministerial explanations on the status of legal and policy formulation processes, and on certain executive actions which have a bearing on the pursuit of accountability for atrocious crimes. The petition also calls for political support of cooperation in the arrest and surrender of the LRA fugitives through dialogue and media engagement. It also demands the creation of forums for political interface with technocrats and other partners involved in the pursuit of justice.

Conclusion

There has been a chequered record in commitment at the highest political level to an impartial and fair justice system, albeit with sustained civil society efforts complementing national processes. There is, nevertheless, hope for progress in achieving accountability for atrocious crimes.

MOBILE GENDER COURTS IN THE DEMOCRATIC REPUBLIC OF CONGO

Richard Malengule[23]

Background

The DRC has been the scene of grave human rights violations, including mass rape. The ongoing, fragile, post-conflict context has allowed armed groups and civilians to perpetrate violence against women and children, with almost no prospect of accountability. Particularly in eastern DRC, rape and sexual violence continue to occur at alarmingly high rates. A comprehensive study on the prevalence of rape in the DRC by the American Journal of Public Health[24] estimated that 1.8 million Congolese women have been raped in their lifetimes, with women being victimised at a rate of nearly one per minute. The lack of accountability for these crimes creates a culture of impunity that poses serious challenges to the re-establishment of the rule of law in the country.

The lack of accountability for crimes creates a culture of impunity that poses serious challenges to the re-establishment of the rule of law in the country.

The underlying causes are multifaceted and complex, ranging from armed conflict and the corresponding breakdown of communities, to the normalisation of sexual violence, the disempowerment of women, and the ongoing difficulty in accessing justice. The DRC government has implemented national and international laws against sexual violence and has made important advances to address sexual and gender-based violence (SGBV) related issues. However, the culture of impunity persists.

One reason for the reign of impunity is the lack of resources for the justice sector to

23 Project Director of the American Bar Association, Rule of Law Initiative, Democratic Republic of Congo.

24 A Peterman, T Palermo & C Bredenkamp"Estimates and Determinants of Sexual Violence against Women in the Democratic Republic of Congo" (2011). Available at http://ajph.aphapublications.org/doi/abs/10.2105/AJPH.2010.300070.

investigate, prosecute, and adjudicate SGBV cases, particularly those arising in remote areas outside the cities. In addition, financial costs and the emotional toll that survivors endure while seeking legal recourse is high, and may discourage other survivors from seeking justice. Furthermore, a lack of protection for victims and witnesses promotes impunity, as witnesses and victims are often reluctant to engage in formal prosecutions for fear of reprisals by their perpetrators.

Rolling out the Mobile Courts

Since 2009 (and with the support of various donors), the ABA has been implementing the Mobile Gender Courts Program to fight impunity and promote access to justice for SGBV victims through a gendered justice approach and a close partnership with the members of the DRC justice sector.

Setting up a mobile gender court requires a series of preliminary activities that have to be carefully planned, including the provision of pro bono legal assistance and psychological counselling to SGBV victims.

Early Warning System

Preliminary activities included the establishment of an Early Warning System. The Early Warning System is a platform that utilises communications technology to increase civilian protection and enhance the investigation and prosecution of SGBV cases in remote areas. The Early Warning System: increases the capacity of civilians and police to alert authorities and other service providers when potential threats occur; increases the capacity of rural police to obtain legal evidence of rape; and increases coordination between rural police and prosecutors to investigate and prosecute SGBV cases.

Legal Aid Clinics

The ABA runs legal aid clinics staffed entirely by local Congolese lawyers and psychologists. They serve as the central hub for securing legal services for SGBV victims and other victims of human rights abuses in remotes areas in North and South Kivu, Maniema, and part of the Province Orientale in the eastern part of the DRC. The staff at the legal aid clinics can also provide medical assistance, in conjunction with local partners and hospitals. They are also able to provide psychological services required to initiate and sustain the legal proceedings. Since 2008, twenty clinics are fully operational and 16,646 survivors have received counselling.

Other Vital Components

Protocols have been established to determine the roles of each stakeholder involved in the organisation of the court. Mobile investigation teams are also deployed prior to the court's sessions. Community awareness campaigns are organised to educate community members in the areas where the mobile court is in session in order to garner community

support for the process.

During the trials, legal and psychological assistance is provided to survivors. Protection mechanisms for both victims and witnesses are discussed in order to encourage disclosure. The mobile courts have shown their effectiveness in meeting the challenges of trying international crimes, as in the *Fizi* and *Minova* cases.

The *Fizi* Case

The *Fizi* case received widespread international and local attention given the seriousness of the crimes and the swift manner in which the eleven high-level military officers were charged with crimes against humanity under both international and Congolese legal standards. Daily court proceedings were observed by approximately 700 villagers, most of whom had never witnessed local justice being meted out. Rape victims' testimonies were given in closed sessions, to ensure their privacy and security. Following the eleven-day trial, four of the ten defendants received twenty year sentences, and five other soldiers received sentences ranging between ten and fifteen years.

Conclusion

So far, the ABA has supported up to 79 mobile courts in North and South Kivu provinces, including Maniema. These courts have heard 1,124 cases. The mobile courts help people see justice in action. Mobile courts create a "positive fear" in communities where they are held, and hence have a deterrent effect on potential offenders. The mobile courts are an effective strategy to fight impunity.

CHASING BASHIR AND ENFORCING INTERNATIONAL JUSTICE THROUGH DOMESTIC COURTS – THE NIGERIAN EXPERIENCE

Chino Edmund Obiagwu[25]

The Nigerian Coalition for the International Criminal Court (NCICC) has been working to secure accountability for the crimes perpetrated in Darfur in relation to the arrest and transfer of Sudanese President Omar al-Bashir.

The work of the NCICC shows how civil society can make use of regional and domestic courts to secure accountability.

Background

The NCICC's accountability efforts are particularly interesting, as there is no domestic legislation to incorporate the Rome Statute into Nigerian law. Thus, legal activists have used the courts to enforce the treaty obligations under the Statute, relying on case law that allows the primary application of international legal norms where there is no national law on the issue[26]. For example, in some cases the Genocide Convention Act has been used to enforce international criminal justice norms.[27] There are three pertinent cases in which the NCICC has been involved during the last year to enforce international criminal law in the country.

The first was *NCICC & Others v Federal Republic of Nigeria*, in which the plaintiffs sought court orders to issue a domestic arrest warrant against Bashir, when he visited Nigeria in July 2013. The second case, *NCICC v Federal Republic of Nigeria No. 2*, which is closely linked to the first case, came into being after Bashir fled Nigeria as the NCICC sought to secure a standing arrest warrant against him, which could be executed at any time, should he set foot on Nigerian territory.

The third case *(In the Matter of a Request for an Advisory Opinion Made by the Nigerian Coalition for the International Criminal Court*[28]*)* is before the African Court on Human

25 Chairperson of the Nigerian Coalition for the International Criminal Court (NCICC). The NCICC comprises NGOs and activists working to fight impunity and to promote international justice in Nigeria.

26 See *Ogugu v State* 1995 (1) NWLR (Pt 303) 1.

27 For example, in 2004 the NCICC initiated a suit to compel the Nigerian government to prosecute Mr Charles Taylor, former President of Liberia, for international crimes committed in Liberia and Sierra Leone against Nigerian citizens resident there, relying on the Genocide Convention Act LFN 1990. Another case was also initiated by NCICC for Taylor's arrest and surrender to the ICC after he had been indicted by the trial chamber of the Special Court for Sierra Leone.

28 *In the Matter of a Request for an Advisory Opinion Made By Coalition on the International Criminal Court LTD/GTE (CICC), Legal Defence & Assistance Project LTD/GTE (LEDAP), Civil Resource Development & Documentation Center (CIRDDOC), Women Advocates Documentation Center LTD/GTE (WARDC)* (Request for Advisory Opinion) 001 of 2014. Available at http://www.african-court.org/en/images/documents/case/Summary_of_ADVISORY_OPINION_No.pdf.

and Peoples' Rights and seeks the opinion of the African Court to determine whether the treaty obligation of Nigeria, as state party to the Rome Statute, overrides its obligation to comply with resolutions of the AU requesting African state parties not to cooperate with the ICC in respect of the arrest and surrender of Bashir, or any sitting head of state.

Nigeria and the Rome Statute

Nigeria ratified the Rome Statute in September 2001, but has not incorporated the Statute's provisions into its domestic laws in accordance with section 12 of the 1999 Constitution of Nigeria. This provides that "[n]o treaty between the Federation and any other country shall have the force of law to the extent to which any such treaty has been enacted into law by the National Assembly".[29]

Despite the non-domestication of the Rome Statute, Nigeria has been a prominent and active African state party, as it played a positive role during the establishment of the ICC and has continued to positively engage[30] with the Court. In July 2013, Bashir visited Abuja, Nigeria to attend a conference organised by the AU Commission on HIV and Malaria. The Nigerian government was publicly criticised, and, as a result of such criticism and in response to a request by the Office of the Prosecutor (OTP) at the ICC to arrest and surrender Bashir while in the country, the Nigerian government sent a *Note Verbale* to the ICC to exculpate Nigeria with regard to the visit. The government claimed that their permission had not been sought by the AU before they invited Bashir to the conference. It was in the context of that visit that the first case to secure and execute the ICC arrest warrant for Bashir was filed.

NCICC & Others v Federal Republic of Nigeria

In this case concerning the execution of the ICC arrest warrant against Bashir, the NCICC posed three questions for determination by the Federal High Court:

1. Whether Nigeria has a legal obligation under article 89 of the Rome Statute and article 26 of the Vienna Convention on the Laws of Treaties to arrest any person indicted by the Trial Chambers of the ICC who enters its national territory, and to surrender such person to the Court;
2. If so, whether the government of Nigeria is legally obligated to arrest and surrender Bashir to the ICC if or when he enters Nigeria; and

29 A bill for the domestication of the Rome Statute was passed by the National Assembly in 2007, but the then-President Obasanjo declined to assent to it. A similar bill is currently pending at the National Assembly and will hopefully be passed before the end of the legislative tenure in May 2015. However, the Genocide Convention and the African Charter on Human and Peoples' Rights are two key treaties on international justice which are domesticated in the country.

30 The ICC currently has a number of Nigeria's nationals on staff, including one sitting judge. At a visit to the ICC in November 2013, Nigerian President, Mr Goodluck Jonathan, said Nigeria pays great attention to its obligations under the Rome Statute and would continue to implement Nigeria's treaty commitments – including full cooperation with the ICC for the arrest and surrender of persons indicted by the Court.

3. Whether the Nigerian court could issue an arrest warrant against Bashir on the basis of the ICC arrest warrant and indictment.

The NCICC sought an order compelling the President of Nigeria to arrest Bashir immediately upon his arrival in Nigeria and to surrender him to the ICC, as well as an order issuing a provisional warrant of arrest against Bashir, to be executed upon his arrival, pursuant to the ICC arrest warrants.

The summons were filed on the morning of the AU conference (Monday 15 July 2013), but Bashir had already arrived in the country (unannounced) on Sunday 14 July 2013. The NCICC had received information about the visit through media reports in Sudan and prepared the casework the weekend before his arrival. The NCICC had unsuccessfully made written and oral requests to the Attorney General of Nigeria for the arrest of Bashir on his arrival on 14 July. Nevertheless, the case was then filed to seek judicial orders and was immediately served on the Attorney General. Despite the courts being on vacation, the administrative judge assigned the case that morning and all arrangements for a chamber hearing were made for 15 July. However, midway into the opening session of the conference on 14 July, it was reported that Bashir had left the country and the proceedings were aborted. However, in order to secure a standing provisional warrant that could be executed at any time without further court order, the NCICC filed a revised summons to that effect.

NCICC & Others v Federal Republic of Nigeria No. 2

The second case was based on similar questions for determination and grounds as the first case. In this case, the NCICC sought an order issuing a provisional arrest warrant against Bashir in compliance with Nigeria's treaty obligations in terms of the Rome Statute, and an order compelling the President of Nigeria to arrest Bashir anytime he is within Nigeria's national territory and to surrender him to the ICC.

This summons was listed for hearing on 12 December 2013. The Attorney General filed a preliminary objection, raising questions about the *locus standi* of the plaintiffs, and concerns about the AU's resolution on the cooperation of African state parties with the ICC in respect of the arrest and surrender of Bashir or any sitting head of state in Africa to the ICC. The summons has been rescheduled thrice between January and 29 July 2014. At the time of writing it had not yet been heard in court.

If successful, the case will provide a veritable precedent for judicial orders on the implementation of treaty obligations of the country under the Rome Statute irrespective of the fact that the Statute has not yet been incorporated into its domestic laws.

In the Matter of a Request for an Advisory Opinion Made by the Nigerian Coalition for the International Criminal Court Ltd/Gte (NCICC) & Others at the African Court on Human and Peoples' Rights

In this case the NCICC is seeking the opinion of the African Court pursuant to its jurisdiction to grant advisory opinions at the request of an African government or African organisation under article 4 of the Protocol to the African Charter on Human and Peoples' Rights for the Establishment of the African Court on Human and Peoples' Rights and under Rule 68 of the Rules of the African Court on Human and Peoples' Rights. The African Court's advisory opinion is sought on the following issues:

1. Is the treaty obligation of an African state party to the Rome Statute of the ICC, to cooperate with the Court, superior to the obligation of that state to comply with the AU resolution calling for non-cooperation of its members with the ICC?
2. If so, do all African state parties to the ICC have an overriding legal obligation above all other legal or diplomatic obligations arising from resolutions or decisions of the AU to arrest and surrender Bashir any time he enters into the territory of any of the African state parties to ICC?

A number of grounds were relied upon in seeking the opinion:

First, the ICC is the first permanent, treaty-based, international criminal court that has been established to help end impunity for the most serious crimes of concern to the international community, namely genocide, crimes against humanity, and war crimes.

Second, Nigeria ratified the Rome Statute on 21 September 2001 and has played an active role in setting up the ICC and its continued functioning. Many of Nigeria's citizens are staff of the ICC, including a sitting judge, and the Nigerian government has participated in all meetings of the Assembly of State Parties, as well as the first review meeting of the Rome Statute held in Kampala, Uganda.

Third, Nigeria is a prominent member of the AU and has always complied with the Resolutions of the Union.

Fourth, in its various summits of Heads of State and Government of the AU between 2011 and 2013, the AU adopted various resolutions calling on its members not to cooperate with the Office of the Prosecutor of the ICC in respect of the arrest and surrender of Bashir.

Finally, since 2009 when Bashir was indicted by the ICC and international warrants for his arrest were issued and forwarded to the Nigerian government, he has entered the territory of Nigeria twice, in 2009 and in 2013. On both occasions, the Nigerian government had obligations under the Rome Statute to arrest and surrender him to the ICC. At the same

time, the Nigerian government was faced with various resolutions of the AU demanding that it refrain from cooperating with the ICC in that respect. The NCICC and civil society organizations working to tackle impunity, including demanding the arrest and surrender of persons indicted by the ICC, demanded that the Nigerian government arrest and surrender Bashir on both occasions.

The superiority of an African state party's obligation to the Rome Statute and to the Resolution of the AU must be settled so that civil society will be guided when engaging the Nigerian government and other governments in west Africa, on demanding that they comply with their obligations under the Rome Statute. To make their case they relied on the Rome Statute, the Vienna Convention on the Law of Treaties 1969, and the Constitutive Act of the AU.

The advisory opinion request is still pending before the African Court. If successful, it could be a persuasive guide for the Nigerian courts in determining the suit for the provisional arrest warrant, as the treaty obligations of Nigeria to arrest and surrender Bashir would be a guaranteed legal duty above other legal and diplomatic obligations.

Impact of the International Justice Casework in Nigerian Courts

The cases litigated around Bashir's arrest warrant are part of the NCICC's commitment to improve the domestic framework for the implementation of international justice norms in the country despite that fact that Nigeria has not domesticated the Rome Statute. This also increases the demand for the commitment of the Nigerian government to its international justice obligations, including reducing its diplomatic support for the AU resolutions calling for non-cooperation of its members with the ICC. The cases have also increased public awareness through the widespread media reports and among justice sector operators on international justice norms relating to the ICC. The African Court advisory opinion, if admitted for consideration, also stands to be precedent that the African Court could have jurisdiction over a state party to the protocol even though that state party has not made the article 35(6) declaration to allow for individual cases against it by its nationals. The case will also clarify who qualifies as an "African organisation" in order to seek the audience of the African Court, since the NCICC and other plaintiffs in the case are civil society organisations with only observer status with the African Commission on Human and Peoples' Rights.

The work of the NCICC shows how civil society can make use of regional and domestic courts to secure accountability.

CHAPTER FOUR: KENYAN POST-ELECTION VIOLENCE AND ACCOUNTABILITY

EFFORTS TO STOP THE VIOLENCE

Njonjo Mue[31]

Kenyans for Peace with Truth and Justice (KPTJ)[32] has been active in advocating for justice around the 2007 elections and post-election violence in Kenya.

Background

On 27 December 2007, Kenya held its most closely-contested election since independence. The then-President Mwai Kibaki representing the Party for National Unity (PNU), was running against Raila Odinga of the Orange Democratic Movement (ODM). The voting process was relatively peaceful, but the situation took a turn for the worse after the Electoral Commission of Kenya declared that Mwai Kibaki had narrowly defeated the challenger, Raila Odinga, despite early returns showing the latter to have an unassailable lead. The ODM rejected the results and maintained that their victory had been stolen. They refused to contest the results in the courts, alleging that the courts were not impartial.

There is a need to coordinate peace and development efforts with truth and justice efforts to avoid playing one against the other. It is vital to ensure that peace and justice are not presented as opposites, but rather as complementary to each other.

31 Program Advisor for Kenyans for Peace with Truth and Justice.

32 KPTJ is a coalition of over 30 Kenyan and East African legal, human rights, and governance organisations, together with ordinary Kenyans and friends of Kenya, convened in the immediate aftermath of the disputed 2007 presidential election in Kenya. Its aim is to seek truth, justice, and accountability for the failed elections and widespread violence that followed, in order to contribute to lasting peace in the country.

Instead, they called for mass action to protest what they deemed to be fraudulent results.

Widespread violence ensued. This dark period of the country's history, now commonly referred to as the post-election violence, resulted in the deaths of 1,133 Kenyans, the displacement of over 350 000 people, sexual violence, arson, maiming, looting and the destruction of property worth millions of shillings.[33]

It was at this point that civil society began to play a key role in the prevention of full-scale civil war by campaigning for a just resolution to the crisis. The role looked not only to the immediate causes of the violence, but to the deeper structural failures that led Kenya to the brink. As part of the response to the violence, two clear strands of civil society response emerged.[34]

First, there were organisations that called for peace and a return to calm. They were led by former diplomatic and military leaders who had been involved in mediation processes in the sub-region and sought to apply their experience to peace-making in Kenya. They mounted a media campaign encouraging peace. This group of civil society actors seemed to regard peace as an end in itself, and did not seem to regard it as important to address the root causes of the violence. They were content to take the election results as a given and to see the status quo maintained for the sake of maintaining peace.

The second group of civil society organisations (CSOs) called for peace, but maintained that there could be no sustainable peace without justice, and insisted that Kenya not only needed to get to the bottom of the botched elections, but also demanded justice and accountability for the violence that followed. In addition, this group insisted that Kenya also address its history of gross human rights violations, historical injustices, and developmental inequalities which had contributed to pushing the country to the brink of civil war. KPTJ was a part of this particular group.

KPTJ's Role in Ending the Violence

Monitoring, Analysis, and Documentation of the Violence

Many of the organisations that eventually became KPTJ members were spread across the country monitoring the elections when the violence broke out. They therefore also embarked on monitoring and mapping the violence in its early stages. Unlike the international media that characterised the violence as generalised ethnic violence, KPTJ made it clear that the violence was political and provided careful analysis and evidence-

33 "Report of the Commission of Inquiry into Post-Election Violence" *Committee of Inquiry into Post-Election Violence* (2008). Available at http://reliefweb.int/sites/reliefweb.int/files/resources/15A00F569813F4D549257607001F459D-Full_Report.pdf. The report of CIPEV is commonly referred to as the "Waki Report", after appellate court Judge Philip Waki, who chaired the Commission.

34 K Kanyinga "Stopping a Conflagration: The Response of Kenyan Civil Society to Post-2007 Election Violence" Institute of Development Studies, University of Nairobi (2011).Available at http://www.gcro.ac.za/sites/default/files/News_items/Xeno_reports_July2010/synthesis/10_Kenya.pdf.

based research to indicate that there were four distinct types of violence.[35]

Firstly, there was spontaneous violence that broke out in poor neighbourhoods in the towns and villages where the opposition, ODM, had strong support. It was attributed to youths protesting the announcement that Mwai Kibaki had won the election. Secondly, there was organised violence by supporters of ODM against perceived supporters of PNU especially in the North Rift. Thirdly, there was retaliatory violence organised by supporters of PNU against perceived supporters of ODM. This third type of violence was concentrated in parts of the South Rift, but also in other PNU strongholds in Central Province. Finally, there was excessive violence by the police who shot many unarmed demonstrators in the back. In all these types of violence, women were targeted and sexual and gender based violence was prevalent. Some men were also sexually violated through forced circumcision and mutilation.

Analysis of the Election Results

KPTJ generated vital analysis, backed by verified data, of the election results showing glaring discrepancies between the presidential election results and those of parliament and local authorities. These discrepancies raised key questions as to the reliability of the results that were finally announced by the Electoral Commission, and made the point that the opposition's claim that the results had been manipulated was not an idle case of being sore losers and needed to be seriously investigated.

Leading the Call for Truth and Justice

KPTJ led the call for truth and justice on both the elections and the violence that followed. This was the only basis for lasting peace and stability in the country.

Making the Case Domestically for a Political Settlement

KPTJ made the case for a political settlement by providing relevant data and analysis domestically for the mediator, the AU, the UN, and their individual member states, including local representatives of the diplomatic community, to leverage its call for a political settlement. It also provided information to the public through the media and held regular briefings with the diplomatic corps, the Forum of Former African Heads of State and Government, and the Panel of Eminent African Personalities.[36]

Regional and International Advocacy for a Political Settlement

As the PNU sought to minimise the crisis and characterise it as an internal affair which it was competently dealing with, KPTJ engaged in robust advocacy to focus the attention of

35 See LM Wanyeki "Kenyan Civil Society and the 2007/8 Political Crisis: Towards and Following the Kenya National Dialogue and Reconciliation (KNDR)" in *Civil Society in Kenya After 2002: Reflections of the Leaders* Nairobi: African Research and Resource Forum (2010). Paper based on a presentation made to the review meeting of the Kenya National Dialogue and Reconciliation (KNDR), called by the Kofi Annan Foundation in Geneva, Switzerland, in March 2009.

36 See *id*.

the international community on Kenya and to make it clear that Kenya was on the brink and needed urgent international intervention.

As a result of its international advocacy, KPTJ debunked the PNU's initial official position on the elections which sought to characterise the crisis as a minor one and to maintain the status quo. The advocacy also resulted in the changing of the uniform global media coverage of purely "ethnic" violence, to political violence of an ethnic nature because of the deliberate ethnicisation of Kenya's politics. This in addition to evidence-based research justified the call for a political settlement and informed the content of that settlement.[37]

Post-Mediation

Following the mediation and the signing of the National Accord, KPTJ monitored the implementation of the mediation agreement including disarmament of militia, resettlement of internally displaced persons (IDPs), and the overall performance of the coalition government. It also provided technical support for policy and legislative initiatives necessary to implement the agreement, including constitutional and institutional reforms. KPTJ made an *amicus curiae* appearance at the Waki Commission and the Independent Review of Elections Commission, and also provided technical support to the Truth Justice and Reconciliation Commission.

Following the release of the Waki Commission report, KPTJ pushed for accountability through the Special Tribunal for Kenya that had been recommended by the Waki Commission, and when members of parliament refused to have such a tribunal, KPTJ supported the International Criminal Court (ICC) process. This was done through regular analysis, witness registration and support, and outreach activities to explain the importance of the Court in accountability efforts, all in the face of increasing politicisation of the ICC intervention.

Engagement in advocacy for international criminal justice and the defence of the ICC process to counter the sustained attack of African governments through the AU was necessary. This included writing letters to the Court, the AU, and the UN Security Council in order to articulate victims' perspectives and sending a delegation to the 12th Meeting of the Assembly of State Parties to the Rome Statue in November 2013 to counter the AU's and Kenya's efforts to push amendments to the Rules of Evidence and Procedure38. These amendments were designed to exempt Uhuru Kenyatta and William Ruto from continual presence in court during their trial.

Other post-mediation efforts included engaging in capacity-building for journalists reporting on international criminal justice issues. This was done through training and sponsored trips for local journalists to key events such as the ASP meeting and the AU

37 See *id.*

38 Available at http://www.icc-cpi.int/en_menus/icc/legal%20texts%20and%20tools/official%20journal/Documents/RulesProcedureEvidenceEng.pdf

Summit, as well as by holding regular media briefings to explain key milestones in the ICC process.

Key Lessons Learned

Firstly, there is a need to coordinate peace and development efforts with truth and justice efforts to avoid playing one against the other. It is vital to ensure that peace and justice are not presented as opposites, but rather as complementary to each other.

Secondly, there is a need to be mindful of the polarised environment in which organisations operate. Those demanding truth and justice are likely to be labelled as being partisan. In the case of Kenya, the opposition party which felt cheated of their victory pushed for truth and justice and this coincided with KPTJ's goals. It was therefore easy for detractors to say that KPTJ was merely pushing the opposition's agenda. This was, however, not the case as shown by the fact that KPTJ continued with its search for truth and justice, long after the opposition had joined the coalition government.

Thirdly, there were some CSO leaders who had political interests, indeed some who had contested and lost elections, and then re-joined the human rights movement. This led to questions being asked about impartiality and dented the credibility of the movement. In a polarised environment, CSOs need to be cautious in order to ensure that they minimise the possibility of being seen as partisan.

Fourthly, civil society should be prepared for the long haul and for shifting goal posts. In Kenya, the ICC's popularity is seen to be ebbing and flowing with the political fortunes of the accused persons, and the issues are no longer as clear-cut as they once were. Civil society should also be prepared to be attacked for standing steadfast on the side of truth and justice and refusing to give in to political expediency when it comes to the search for accountability.

Fifthly, every country is unique, and there are certain realities that applied to Kenya that will not apply elsewhere. These differences should be taken into account.

THE PLIGHT OF VICTIMS AND STRATEGIC LITIGATION SURROUNDING THE POST-ELECTION VIOLENCE

Esther Waweru[39]

Advocacy initiatives surrounding the post-election violence have been geared towards ensuring accountability. Strategies used include litigation, advocacy for policy and legislative change, research and documentation, as well as victims' engagement.

As the anchor of fundamental rights and freedoms and the key avenue for transitional justice in Kenya, there remains an increasing and ever-present need to safeguard the Constitution and inculcate a culture of constitutionalism in Kenya.

After the disputed results of the general election, various processes were put in place towards addressing the plight of the victims and ensuring accountability for the violations suffered. These were captured in the Kenya National Dialogue and Reconciliation process that identified the four agenda items in this regard. Part of the recommendations included the establishment of a commission of inquiry (the CIPEV) which recommended the establishment of a local tribunal to prosecute the perpetrators of the crimes committed during the violence in 2007-2008.

Domestic Accountability Processes

Institutional Reforms as Part of the Transitional Agenda in Kenya

While judicial reforms have progressed at a commendable rate, the reforms of other sectors along the justice chain, are either totally lacking or have lagged considerably behind. More recently, there have been attempts by parliament to interfere with the independence of the judiciary.

Reforms within crucial processes such as investigations and prosecutions are taking place at a very slow pace. For example, the Witness Protection Agency is, according to its own documents, unable to take on the protection of any new witnesses due to lack of funding.

The Truth, Justice and Reconciliation Process

The Truth, Justice and Reconciliation Commission (TJRC), finally released its report[40] in May 2013. The Kenyan Transitional Justice Network ((KTJN) a network of Kenyan CSOs) had acknowledged the release of the report, but took issue with its delayed official

39 Esther Waweru is a Programme Officer at the Kenyan Human Rights Commission.

40 "Report of the Truth, Justice and Reconciliation Commission" *Truth, Justice and Reconciliation Commission* (2013). Available at www.kenyamoja.com/tjrc-report/.

submission to the President and the fact that the second volume of the report was not endorsed by all commissioners, specifically the international commissioners. This was followed by serial correspondence sent to the office of the Attorney General. It demanded an explanation for the flagrant violation of the law insofar as release and dissemination of the report was concerned. KTJN members analysed and critiqued the findings and recommendations of the TJRC report and produced both a summary of the report and a critique of the findings and recommendations of the report on a thematic basis. KTJN has also published policy briefs, an abridged version of the TJRC report, and other publications.

The Kenyan government and, in particular, the office of the Attorney General have remained ambivalent about implementing the TJRC report and are largely non-responsive with regard to queries about the delayed dissemination of the report to the public. Legal action with regard to the challenges in accessing copies of the report is also under consideration. The Kenyan Human Rights Commission (KHRC) alongside other KTJN members will continue to host a series of regional forums around the country to disseminate the findings and recommendations of the report.

Protection of Internally Displaced Persons

Various initiatives have been explored by CSOs in Kenya around the issue of enhancing protection to internally displaced persons (IDPs), who constitute the largest group of victims of the post-election violence. This entails engagement with the Draft IDP Policy, Incidents, Impact and Redress Assessment tool, and IDP Monitoring. CSOs continue to seek the operationalisation of the Prevention, Protection and Assistance of Internally Displaced Persons and Affected Communities Act of 2012 (IDP Act)[41]. In this regard, there have been a series of petitions to the Ministry of Devolution and Planning, urging them to constitute the National Coordination Consultative Committee, which is the operational framework for the IDP Act. The Ministry of Devolution and Planning, and, by extension, the government, remains non-responsive to multiple calls by stakeholders to constitute the National Coordination Consultative Committee.

The KHRC, in partnership with the National IDPs Network and Mazingira Institute, have designed an Incidents, Impact and Redress Assessment tool, and have completed the phase of mapping various displacement incidences. The KHRC undertook periodic assessments of the situation of IDPs in select camps across Kenya, especially in 22 locations, where the government has offered some form of protection and assistance, and even resettled quite a number of IDPs and carried out minimal assistance and protection interventions. In each area, the KHRC interacted with duty bearers and selected leaders of the IDPs.

Despite the existing legislative framework assigning duties and obligations to the offices held by relevant duty bearers, they are non-responsive on IDP protection and assistance

41 Act No. 56 of 2012.

issues. The IDPs remain unaware of available remedies to their problems.

Criminal Accountability

Domestic Prosecutions

Kenya committed to establish an independent investigative authority to effectively investigate the violence related to the 2007 elections but has made minimal steps towards establishing a credible and effective investigation and prosecution process. The investigation and prosecution of perpetrators, other than those with whom the ICC is dealing, has been far from satisfactory.

For the past six years there have been unsuccessful attempts at establishing local accountability mechanisms in Kenya. Bills for the establishment of a local tribunal have not been debated in parliament on two occasions due to the lack of a quorum. The Judicial Service Commission has embarked on a process of establishing the International Crimes Division within the High Court. The Penal Code and the Sexual Offences Act[42] are sufficient to prosecute the crimes committed, but very few prosecutions have been successful. There have, however, been few prosecutions of mid-level perpetrators, most of which have ended in acquittals due to lack of evidence to sustain prosecutions.

There has been a deliberate obfuscation of relevant facts in order to avoid accountability. A multi-agency task force (which was established to review, re-evaluate and re-examine all pending investigations, pending trials, and concluded cases) reported that out of 6,081 cases reviewed, only 24 post-election violence suspects had been convicted. Inconsistent information issued by the Office of the Director of Public Prosecutions (ODPP) on the actual prosecution of post-election violence does not strengthen public confidence on the commitment to pursuing accountability.

In October 2012, the Judicial Service Commission of Kenya recommended the establishment of an International Crimes Division within the High Court of Kenya to deal with crimes committed during the 2007-2008 violence under the International Crimes Act of 2008[43]. The proposed International Crimes Division would also have jurisdiction over other transnational crimes. In August 2013, both chambers of the Kenyan Parliament passed a motion for Kenya to withdraw from the Rome Statute system and intimated a further motion calling for the repeal of the International Crimes Act. During a stakeholder consultation workshop on the International Crimes Division in February 2014, the Director of Public Prosecutions declared that it was impossible to prosecute any of the over 4,000 cases that had been reviewed by a taskforce. Under these circumstances, coupled with the clear lack of political will for accountability, the establishment of the

42 Act No. 3 of 2006.

43 Cap. 60 of the Laws of Kenya.

International Crimes Division remains questionable.

International Prosecutions at the International Criminal Court

In January 2012, the ICC confirmed charges of crimes against humanity against President Uhuru Muigai Kenyatta, Deputy President William Samoei Ruto, and journalist Joshua Arap Sang. Following this, the government set up a 10-person panel to advise the government on how best to cooperate with the ICC. The report of this panel has never been made public.

The ICC cases against the three Kenyans have been characterised by various adjournments of the trials, allegations of witness bribery, intimidation, harassment, and retraction of witnesses. The government of Kenya and the accused persons have innovatively exploited judicial processes to subvert or undermine the ICC process. As a result of this and other factors, the government's commitments to cooperate with the ICC to ensure accountability for the gross human rights violations, have been questioned by victims, CSOs and the Chief Prosecutor of the ICC. For instance, the government has not honoured pending requests by the Prosecutor to interview senior members of the national security agencies, as there was a court order to block these interviews.

The government has engaged in shuttle diplomacy at different regional and international fora to secure a deferral or referral of the Kenyan cases. In October 2013, 39 African states made individual requests to the UN Security Council to defer the ICC cases citing security concerns in Kenya. This denial was followed by a call for amendments to the Rome Statute to provide for immunity for sitting heads of states and governments at the 12th Assembly of State Parties to the Rome Statute in November 2013.

A significant portion of the Kenyan population supports the ICC trials. However, the government has run a highly successful campaign which portrays the prosecution of the Kenyan cases before the ICC as lacking public support. This campaign has been achieved partly through skewed media coverage of the ICC cases. Significant media outlets in Kenya are owned, or otherwise controlled, by politicians, including the President and the Deputy President. An independent opinion poll conducted in November 2013 to gauge public attitudes towards the ICC cases shows that 42% of those polled support the trial of the cases before the ICC, as opposed to 30% who prefer the cases to be dropped. Also in the same poll, 67% of those polled want the President and his Deputy to attend their trials before the ICC.

Litigation as an Advocacy Strategy

The Internally Displaced Persons Litigation Project

In 2011, the KHRC, the Federation of Women Lawyers (FIDA Kenya), the Kenyan Section of the International Commission of Jurists, and the National Internally Displaced Persons

Network in Kenya (NIDPN-K)[44], filed a case[45] in the High Court of Kenya in Nairobi. This case was filed as a representative suit on behalf of IDPs throughout the country. The Petition was filed by these four organisations and 25 individual IDPs identified as victims, themselves, and as representatives of various victim groups.

The petition was informed by the growing concerns about the lack of accountability and redress for the gross human rights violations suffered by the victims. Furthermore, reports from the KHRC's programmatic work indicated that displacement was a recurrent issue in multi-party electoral cycles.

The IDP case, while primarily identifying the common feature of the victims as IDPs, appreciates that within this group of victims there are those that suffered various other violations. In this respect, the petition is premised upon four thematic clusters or classifications of violations: SGBV, loss of property, murder and loss of life, and grievous bodily harm.

The case was filed on 26 November 2011 under a certificate of urgency in the Constitutional and Human Rights Division of the High Court. Various non-governmental organisations, such as Kituo Cha Sheria, Article 19, the Centre for Rights Education, and Awareness and the Coalition on Violence Against Women, have been enjoined in the case as interested parties. The Kenya National Commission on Human Rights has been admitted as *amicus curiae* in the case. This has had the effect of strengthening the petition through the various submissions before the Court. The case has been heard in part and since 2012 eight witnesses have testified with two testifying on each of the four thematic clusters. The petitioners intend to call two expert witnesses during future hearings.

During the period of this litigation project, the petitioners have had a series of regular briefing and strategy meetings and have also carried out research and documentation towards strengthening the evidence base of the case. In the next phases of the case, the partners will embark on a process of assessing the nature of compensation that would be adequate and which will form the basis of the second phase of the litigation project. The initial stage of the case focuses on obtaining orders from the Court declaring that the petitioners suffered the violations pleaded in the case and establishing a finding of liability on the part of the state for failure to protect. The petitioners have also made a request for specific information under the right of access to information espoused under article 35 of the 2010 Constitution. The petition also seeks orders for participation of the petitioners in all resettlement and compensation programmes by the government.

The Leadership and Integrity Case

Chapter six of the 2010 Kenyan Constitution makes specific provisions for leadership and

44 The NIDPN-K is a national victims' organisation which brings together IDPs from across Kenya.

45 Petition No. 273 of 2011.

integrity. Article 73 stipulates general principles of leadership including good governance, transparency, and accountability. These principles are further echoed in the national values and principles of governance under article 10. These provisions – as read with the Public Officers and Ethics Act – form the core provisions that define the form of leadership aspired to by the people of Kenya when they overwhelmingly voted in favour of the Constitution.

Further, article 145(1)(b) provides that the president may be impeached where there are serious reasons to believe that he or she has committed a crime under national or international law. In the run up to the 2013 general election, President Uhuru Kenyatta and Deputy President William Ruto, against whom the ICC had confirmed charges of crimes against humanity, sought to vie for the presidency under the Jubilee Coalition. The KHRC and International Commission of Jurists Kenya commenced proceedings in the High Court of Kenya seeking a declaration that Kenyatta and Ruto were unsuitable to vie for the presidency in accordance with the Constitution. The argument before a five judge bench was that the two did not meet the principles of leadership set out under chapter six of the Constitution and that their election would pose a potential case for impeachment under article 145 as it was clear that they were facing trial for international crimes.

The case[46] was heard and determined by a five-judge bench whose unanimous judgment ruled that the High Court had no jurisdiction to deal with the issues before it, which touched on presidential elections that were within the ambit of the Supreme Court. The Court further held that the petition was merely speculative, as there was no guarantee that the ICC cases would result in a conviction. The Court ordered the petitioners to pay the costs of the case, despite having held that it had no jurisdiction to decide on the issues before it. Furthermore, the Court did not consider precedents that had been set by judicial and quasi-judicial organs on leadership and integrity. Precedent referred to includes the fact that the High Court previously determined that Mumo Matemu was unsuitable to serve as the head of the Ethics and Anti-Corruption Commission, and that the Judicial Service Commission had similarly petitioned the president to set up a tribunal for the removal of Nancy Baraza as the Deputy Chief Justice, after finding that she was guilty of conduct that was contrary to the Leadership and Integrity Act and the Constitution.

The International Commission of Jurists Kenya, the KHRC, and International Centre for Policy and Conflict[47] were dissatisfied with the decision of the Court to condemn the parties to pay costs in the absence of any clear finding being made on the issues presented before the Court. Further, the Court in their view, erred in making orders for costs in a case over which it clearly decided it had no jurisdiction. As such, the two applicants filed an appeal over the order for costs in the Court of Appeal. However, the typed proceedings

46 *ICJ Kenya and KHRC v the Attorney General and Four Others*, High Court Petition No. 552 of 2012, as consolidated with 573 and 579 of 2012 ICPC.

47 The International Centre for Policy and Conflict is an NGO working on transitional justice in Kenya.

that are necessary to file the record of appeal, are yet to be availed to the parties.

The Freedom of Information Case

A case brought by the defence counsel in the ICC case against President Uhuru Kenyatta in the High Court, ostensibly seeking to get information from some of the leading mobile phone service providers in order to strengthen the defence's case. This case was filed under seal as an urgent application to the Court. Attempts by civil society to get details of the case and the pleadings were unsuccessful. This resulted in the filing of an application under article 35 of the Constitution on freedom of information, seeking to obtain details of the case, and a further order requesting that organisations that work with victims be allowed to participate as interested parties in the proceedings. So far, this application by civil society has twice been unsuccessfully scheduled for hearing. Further, there have been no fruitful developments with respect to getting information about the nature of the request made by the president's defence team.

Information on this case is largely lacking as it was filed under seal. CSO attempts to get information relating to the case such as the case number and, the prayers being sought, have been unsuccessful.

Judicial Inquests into Unlawful Deaths

CSOs have been exploring the possibilities of pursuing judicial inquests as a form of justice for the families that lost their kin during the violence. The International Centre for Transitional Justice's Kenya office is currently compiling documentation and conducting research.

Documentation and Research-Based Advocacy

One of the key strategies that has proven to be very useful in the work of CSOs in Kenya is the use of evidence-based research to inform advocacy around policy and legislative reform as well as accountability and justice for human rights violations. In this regard, with respect to the post-election violence, various organisations have published their research findings and made recommendations towards securing justice for victims. Some of the notable publications include: S*ecuring Justice, Elusive Justice16*, and *Out in the Cold*.

Engaging with Victims

Over the years, CSOs in Kenya working on accountability have designed programmes that would ensure regular and consistent engagements with their key constituents – the victims. These initiatives include dialogue forums with victims and victims' groups across the country. These forums offer an opportunity for the victims to air their concerns, propose measures that they feel would be adequate to address these concerns and also to offer up-to-date information on the status of victims on the ground. These forums have been extremely useful in terms of shaping the work of most CSOs who work with victims. Their concerns have formed the core of the advocacy agenda in the national, regional and

international arenas.

CSOs have also stepped in to offer outreach to victims especially with respect to the ICC process in Kenya. More importantly, CSOs have been able to encourage victims to participate in these processes by highlighting the importance of making applications to participate in the proceedings at The Hague. Some organisations have also stepped in to offer psychosocial services to some of the victims as this is identified as one of the key gaps in the government initiatives and as one of the immediate needs of victims who have had traumatic experiences. Specifically, KHRC and the International Commission of Jurists Kenya have endeavoured to offer psychosocial services to the victims in the IDP case during the hearings. The Coalition on Violence Against Women has also offered the same services to victims of SGBV.

CSOs also offer strategic partnerships with victims' groups as a way of capacity-building the groups. For example the KHRC was instrumental in the formalisation of the National IDP Network and the formation of regional coordinators within the network. The KHRC also encouraged the network to establish democratic structures which would see regular elections held for various officials in the network. In addition to this, CSOs have offered training to victims' groups on diverse issues, for instance, on advocacy and security for human rights defenders.

Media Advocacy

CSOs in Kenya have continuously identified and engaged the media as a key partner and actor in the quest for justice. On a regular basis, CSOs have held media briefings, conferences and interviews accompanied by the publication of regular and consistent opinion pieces in leading print media outlets to highlight the plight of victims and the need for accountability and reparations.

Conclusion

Generally, there have been some commendable steps and progress in the advocacy for justice for victims by CSOs in Kenya. However, there have been several challenges. The current political environment in the country is extremely hostile to civil society. In the recent past there have been attempts by government to clamp down on civil liberties and the operations of NGOs. This has been done through violent disruption of peaceful protests, as well as attempts to introduce prohibitive amendments to the Public Benefits Organizations Act,[48] with the effect of cutting down on CSO funding from foreign donors. The calls for accountability are increasingly stifled under the leadership of the President and Deputy President who are both accused persons before an international criminal court, and who have been mentioned adversely in the Truth Justice and Reconciliation Commission report, whose implementation, they are expected to spearhead.

48 Act No. 18 of 2013.

While Kenya has one of the most progressive constitutions, the 2010 Constitution has been continually abused in a clear attempt by the political elite to undermine the rule of law and constitutionalism in Kenya. As the anchor of fundamental rights and freedoms and the key avenue for transitional justice in Kenya, there remains an increasing and ever-present need to safeguard the Constitution and inculcate a culture of constitutionalism in Kenya.

ACCOUNTABILITY FOR VICTIMS OF SEXUAL AND GENDER-BASED VIOLENCE PERPETRATED DURING THE POST-ELECTION VIOLENCE

Lydia Munyiva Muthiani[49]

Another example of civil society using strategic litigation in Kenyan courts is displayed by the work of the Coalition on Violence Against Women (COVAW).

Following the post-election violence in Kenya, over 3,000 women were reported to have been raped and numerous men forcibly circumcised.

Following the post-election violence in Kenya, over 3,000 women were reported to have been raped and numerous men forcibly circumcised. It became evident to COVAW that certain action needed to be taken owing to the continued inaction by government agencies to investigate and prosecute the acts of SGBV (sexual and gender based violence), as well as their failure to offer medical, psychosocial and legal support to the victims and survivors. In response to this crisis, COVAW took action and launched legal proceedings.

The case launched by COVAW – *Coalition on Violence against Women & 11 Others v The Attorney General of the Republic of Kenya & Five others.*[50] On 20 February 2013, COVAW, six female and two male survivors of SGBV experienced during the 2007-2008 post-election violence, together with three other CSOs (International Commission of Jurists Kenya; Physicians for Human Rights, Kenya; and the Independent Medico-Legal Units) filed a case against the government of Kenya. The petitioners are taking the Attorney General, the Director of Public Prosecutions, the Independent Policing Oversight Authority, the Inspector General of the National Police Service, the Minister for Medical Services, and the Minister for Public Health and Sanitation to the Constitutional and Human Rights Division of the High Court of Kenya for failing to train and prepare the police to properly protect civilians from sexual violence.Other lawyers working on the case include Timothy

49 Lydia Munyiva Muthiani is the Deputy Executive Director of the Coalition on Violence against Women.

50 Constitutional Petition No. 122 of 2013.

Bryant and Kethi Kilonzo.

In the aftermath of the post-election violence, the police are accused of refusing and/or neglecting to document and investigate claims of SGBV, which has led to the obstruction and miscarriage of justice. Furthermore, the government is accused of denying emergency medical services to victims of SGBV during this period and of having since failed to provide necessary care and compensation to address their suffering. Ultimately, the petitioners want the government to: publicly acknowledge and apologise to the victims for their failure to protect the rights of Kenyans; to provide appropriate compensation, including psychosocial, medical, and legal assistance to the victims; to investigate the sexual violence and prosecute those who are responsible; and to establish a special team within the Department of Public Prosecutions to ensure that these investigations and prosecutions are credible and independent. The eight victim-petitioners who form part of this case are a representative constituent of the larger SGBV victim community violated during the 2007-2008 post-election violence.

Legal Arguments

Liability for SGBV Committed by State Actors

First, the petitioners are arguing that the Attorney General and the Inspector General of the National Police Service failed to train the police in lawful methods of law enforcement that would prevent the commission of crimes by police, including SGBV. It is further argued that they failed to implement adequate security measures to plan and prepare law enforcement operations conducted during the post-election violence, to protect victims of SGBV. The petitioners also argue that the above-mentioned officials failed to supervise the police and to hold them to account for the crimes they committed.

Liability for SGBV Committed by Non-State Actors

The petitioners seek to hold the Attorney General, the Inspector General of the National Police Service and the Ministers for Medical Services and Public Health and Sanitation liable for SGBV committed by non-state actors. They argue that the government of Kenya was obligated to protect the rights of SGBV victims by taking all necessary measures to safeguard them from violations committed by third parties. They should have had adequate security measures that would have included training in crisis intervention and sufficient deployment of police personnel. Furthermore, and/or in the alternative, the petitioners argue that SGBV committed against the victim-petitioners was contributed to by actions of police who were not prepared, trained, disciplined, or supervised to conduct law enforcement activities appropriately during civil unrest.

The petitioners are arguing that the police failed to intervene to protect victims of SGBV when they were aware of the commission or threats of acts of violence including SGBV against the victims. Emergency medical services were not provided, which in turn

imperilled the life and health of the victims. Furthermore, they argue that the harm of this unlawful conduct was aggravated when victims who alleged that the perpetrator was a government official, such as a police officer, were denied emergency medical attention. The police are also accused of failing to document claims of SGBV, which constitutes an obstruction of justice.

Liability for Failure to Investigate and Prosecute

The third set of arguments made by the petitioners relate to the failure of the Attorney General, the Inspector General, the Prosecution, and the Independent Policing Oversight Authority, to investigate and prosecute SGBV. Investigations have generally not been conducted and where they have been, they have not been prompt, independent, impartial, effective, subject to public scrutiny, or capable of leading to prosecutions of the material and intellectual operators. Information on SGBV committed during the post-election violence was disseminated to government institutions through various reports and despite that dissemination, meaningful steps have not been taken towards ensuring the redress of gross human rights violations.

The petitioners argue that the Director of Public Prosecutions failed to direct the Inspector General of Police independently to investigate information or allegations of criminal conduct by members of the police. The failure of the Independent Policing and Oversight Authority to exercise its powers and to independently investigate information or allegations of criminal conduct by members of the police and to make recommendations for disciplinary action and the institution of criminal proceedings against police suspected of involvement in the commission of SGBV is also being challenged.

Similarly, the Attorney General and the Director of Public Prosecutions are argued to have failed to effectively exercise their powers to direct the Commissioner of Police and/or the Inspector-General of the National Police Service to investigate information or allegations of SGBV committed by persons other than the police.

It is argued that all of these failures are in part caused by systemic failures, including: deficiencies in the training of relevant subordinates of the respondents; the policies and practices of recording acts of SGBV; the collection of evidence of SGBV; and the provision of technical, forensic and medical analysis of evidence of SGBV. The Petitioners contend that the SGBV in question amounted to crimes against humanity, which the government of Kenya was obligated to investigate and to prosecute in terms of the Constitution read together with the Rome Statute and other international law.

Liability for Failure to Provide Reparations

The fourth category of legal arguments in the case is the respondents' failure to provide reparations. The victims of SGBV have not been provided with resources for rehabilitation, which should include: restitution and compensation for general damages; medical and

psychosocial care; legal and social services; access to the relevant information concerning the violations and reparation mechanisms; and a public apology that acknowledges SGBV committed by the police.

Remedies

First, the petitioners seek declaratory orders to the effect that the respondents' failures amount to infringements of the rights and freedoms of the victims. They seek, in addition, a conservatory order for the preservation of all relevant documentation in the possession of various government offices relating to the SGBV. An order is also sought for the production of a full report on SGBV during the post-election violence, and, to the extent relevant, accounting for the SGBV committed by the police. A further order is sought to compel the Task Force on the post-election violence to produce the results of its categorisation of post-election violence crimes with a view to further investigations and possible prosecution. Finally, an order is sought to compel the establishment of an international Special Division within the Prosecution for the investigation and prosecution of SGBV committed during the post-election violence, including considering them as crimes against humanity.

In addition, the petitioners are seeking an order to compel the respondents to collaborate on the creation of a database of all victims of SGBV committed during the post-election violence and to ensure that those victims are provided appropriate, on-going medical and psychosocial care, and legal and social services. They seek further that the court order the establishment of an independent body responsible for monitoring the provision of reparations to the victims and, for analysing and reporting on systemic deficiencies in the provision of effective remedies for the victims.

Various forms of damages are sought: punitive, general, and exemplary damages. The petitioners also seek an order to protect the identities of the victim-petitioners and for all documents provided and/or executed by the victim-petitioners to be sealed.

Finally, to ensure enforcement, an order is sought to compel the Attorney General to report periodically to the Court on the implementation of its judgment until its full implementation.

Building the Case

Victim Mapping Strategy

In order to conduct an *'ad hoc'* and initial victims' mapping, COVAW relied on a number of resources[51] including government reports, reports of local and international CSOs, ICC

51 "Report of the Commission of Inquiry into Post-Election Violence" *Committee of Inquiry into Post-Election Violence* (2008). Available at http://reliefweb.int/sites/reliefweb.int/files/resources/15A00F569813F4D549257607001F459D-Full_Report.pdf; "Women Paid the Price!!! Sexual and Gender-Based Violence in the 2007 Post-Election Conflict in Kenya"

reports, filings and briefs, media articles, and existing COVAW programme data.

COVAW identified five possible locations or hotspots of violence during the 2007-2008 post-election violence: Nairobi, Nakuru, Kisumu, Kericho and Eldoret. On-site one-on-one interviews were conducted at secure venues. A Client Data Collection Form was specifically designed to elicit all relevant information prior to the filing of the case and to avoid re-interviewing of the victims once information had been collected. The initial number of victims interviewed was 38.

Identification of Victim-Petitioners

The process of identifying the victim-petitioners, in order to secure the best evidence, required choosing which of the interviewed victims would be able to serve as victim-petitioners, and which would be willing to provide testimony in the case. The selection criteria employed included a "Screening Table – Scoring Sheet." This included checking: that the person witnessed a violation; whether the person knew the identity of any or all of the perpetrators; if any documentary evidence was available; whether a first-report was available from a Police Station, Health Care Facility, Chief (or other member of the local administration) or relative/friend; and whether a report was made in the preferred time frame (reports made within 30 days scored highest).

Those victims who scored the highest, after consolidating the points awarded, were those deemed to have the best evidence available, and hence they are the victim-petitioners in the case.

Victim Interview Process

The preparation of Client Data Collection Forms was imperative towards ensuring that all relevant information was collected during the first client interviews. This was especially important due to time constraints and to avoid re-traumatisation of victims which is often an effect of repeated victim interviews.

It was important to use trained interviewers as the exposure of victims and survivors of SGBV to untrained interviewers is not a good practice. The persons who conducted initial victim interviews were both trained interviewers in sensitive handling of victims of SGBV and in investigations of gross human rights violations.

Center for Rights, Education and Awareness (CREAW) (2008); "Report from OHCHR Fact-Finding Mission to Kenya, 6-28 February 2008" *United Nations High Commission for Human Rights (OHCHR)* (2008) available at http://www.ohchr.org/documents/press/ohchrkenyareport.pdf; "Ballots to Bullets: Organized Political Violence and Kenya's Crisis of Governance" *Human Rights Watch (HRW)* (March 2008). Available at http://www.hrw.org/sites/default/files/reports/kenya0308web.pdf; "Turning Pebbles: Evading Accountability for Post-Election Violence in Kenya" *Human Rights Watch (HRW)* (December 2011) .Available at http://www.hrw.org/sites/default/files/reports/kenya1211webwcover_0.pdf; and "On the Brink of the Precipice: A Human Rights Account of Kenya's Post-2007 Election Violence" *Kenya National Commission on Human Rights (KNCHR)* (August 2008). Available at http://www.knchr.org/Portals/0/Reports/KNCHR_REPORT_ON_THE_BRINK_OF_THE_PRECIPE.pdf.

On-site interviews were important in order to ensure that the victims and survivors were not intimidated. Interviews were conducted close to the home locations of the victims, however, interviews were not conducted where the violations actually took place.

Legal Process

Firstly, the legal process eventually agreed upon was public-interest litigation *vis-à-vis* constitutional petition. This was inspired by the successful referendum on the new Constitution of Kenya which presented an opportunity for progressive human rights litigation.

Secondly, they chose to use a summary affidavit. The use of a summary affidavit was preferred as opposed to filing individual affidavits or statutory declarations in the victim-petitioners' names. This strategy was preferred with a view to ensuring the security of the petitioners. The summary affidavit outlines the body of all the victim-petitioners' evidence and was filed in the name of one of the COVAW members of staff. Nevertheless, oral evidence which can be more emotive will be provided by each of the victim-petitioners. The Court recently made an order to the effect that all witness statements will need to be prepared and served to the respondents, therefore, the security situation of the victim-petitioners is a question which will need to be reconsidered.

Thirdly, an order to seal victim-petitioners' names and records has been sought and granted. However, as part of civil procedure, the names of the victim-petitioners were disclosed to the respondents in order to enable them to file responses to the petition.

Fourthly, expert witnesses have been preferred in order to sensitise the Court on matters considered to be crucial to human rights litigation. For instance: defining SGBV; SGBV during conflict; the nature of the state's duties; how the state failed in practice; proper investigations and prosecutions of SGBV crimes; and reparations etc. As far as possible, Kenyan experts have been selected. This is intended to avoid a situation where international experts are largely preferred, hence raising the bar to a level where any follow up cases, such as a class-action suit, among other suits, cannot attain.

Fifthly, there was reliance on both the old and the new Constitution. In addition to that, the consortium is striving to use Pan-African case law as much as possible, for example, on the issue of reparations and comprehensive justice for victims of SGBV. This strategy is aimed at avoiding or by-passing some of the criticism levelled at the ICC for heavy reliance on what is perceived as being "westernised" international laws and analysis of case situations.

Sixthly, the consortium has relied substantially on the state's records, such as the Waki Commission Report and the Truth, Justice and Reconciliation Commission Report, so that its position cannot be discredited and will be considered to be "home-grown".

Other strategic decisions included conducting stakeholders' forums during which information has been shared with other like-minded human rights institutions. This exercise has been geared towards identifying possible interested parties and stakeholders who are willing to join as *amici curiae* in the case. There are currently three interested parties who have been granted leave to join the case. Contributions made by these institutions include information on: historic and similar human rights abuses; and reparations.

Advocacy

The consortium has recently involved itself in the creation of comprehensive short-term and long-term advocacy plans. These plans include fact sheets and frequently asked questions (FAQs) with relevant information that is shared regularly with stakeholders who have an interest in the case, especially the media.

More recently, a change of strategy was used. It involves "telling the story from the survivor's perspective". This move has evoked empathy and concern from the public, raising the publicity of the case. The campaign has been conducted on Twitter on the hash tags #SGBVJusticeKE and #SincerelySurvivor.

The case canvasses a myriad of issues. However, since it is a public interest litigation case requiring public participation in order to motion a positive outcome, there was a need to identify(at most) four priority issues on which to capitalise engagement. These were identified as: (1) the law reform process; (2) the right to access of information; (3) the proper response to sexual violence in conflict and peace settings; and (4) police reform processes. The identification of these thematic areas has improved the communication strategy amongst all partners who now put out synergised and organised messaging.

A variety of effective communication tools have been used including international and local broadcast and print media. Social media and blogs have also provided an additional horizontal plane for communication with the public, with respective duty bearers, and with partner organisations. This has been assisted by the fact that it is real-time communication and most institutions and individuals currently hold social media accounts. The advocacy team within the consortium formulated standard messaging for all spaces using the hash tags #SGBVJusticeKE and #SincerelySurvivor. These have worked to identify conversations on the case from all over the world. Twitter and Facebook have been the main tools used to engage with a large section of the population. The consortium also shot a short documentary that has since been uploaded and shared on YouTube. This documentary has complemented the campaign because it narrates the experiences of the survivors.

For the first round of campaign messaging, the consortium's advocacy team utilised an online tool called a Thunderclap. This is a tool used to send out a message simultaneously from different Twitter accounts targeted at a specific account and with a common message. Thunderclap was a success, drawing more attention to the case, and it is believed that a

Thunderclap sent out to the Attorney General of the Republic of Kenya and the Director of Public Prosecutions on 21 January 2014, led to the Prosecution and Police filing their responses to the Petition on 22 January 2014.

Regional and international advocacy spaces were also used for advocacy. Examples of such fora are the AU Summit and other related meetings, the ASP annual meetings, the African Commission on Human and Peoples' Rights, and symposiums and conferences on addressing sexual violence in conflict and post-conflict settings.

The Road Ahead

Working within a consortium of organisations is not an easy task. There are several challenges with regards to coordinating strategies, and building consensus on the way forward. Therefore, in order to resolve such issues, the consortium is in the process of executing a Memorandum of Understanding, as well as formulating another memorandum which will comprehensively detail issues. The members of the consortium are hopeful that these documents will provide the necessary direction to ensure optimal partnership.

A strategy has also been put in place to ensure that the victim-petitioners are always kept informed about developments in the case, and to provide support as part of the preparation for their presentation of evidence in court.

Further investigations will need to be done to strengthen corroborating evidence for each of the victim-petitioners. This is, however, a double-edged sword. The consortium is weary of arguing a case where corroborating/additional evidence is imperative to ensure the success of similar SGBV cases.

Advocacy

A number of advocacy opportunities that still need to be utilised include, university lectures. Debates and moot court competitions have also been scheduled for later in the year to allow law students to learn about the case. This is in order to invite a wider audience to debate the issues in the case and, to appeal to the younger generation.

From the onset of this case, the partners had an agreement that it would be about domestic accountability and in no way related to the ICC process with which Kenya is involved. Unfortunately, this has been a disadvantage for the advocacy team since the ICC process is a popular issue with the Kenyan media and citizenry. It is also viewed as somewhat synonymous with everything related to post-election violence. This being so, the team has found it hard to sell the messaging to broadcast and print media who are more inclined towards political angles within the case rather than the core message. The team has, however, formed media allies who are willing to run stories excluding the ICC aspect. Such separation is also important for ensuring safety for the petitioners: both victims and institutions.

There is a need to secure additional funding for advocacy initiatives. This funding is specifically for buying media space in broadcast, print and outdoor media. The consortium envisions erecting billboards around the city highlighting this case.

Filming documentaries and getting national icons and celebrities to spread a positive message were other strategies identified by the consortium. The consortium intends to capitalise on the strategic use of these voices, as well as relevant international days in order to get their message across.

The Situation of Victims – Then and Now

After the 2007-2008 post-election violence, victims of SGBV suffered numerous medical and psychological difficulties and, unfortunately, urgent medical support and assistance could not be accessed during the conflict period. This support has now been provided by privately funded institutions but there are still a large number of victims who require medical and psychosocial care.

The restoration of livelihoods amongst the victims is also critical, especially as most of the victims were self-sufficient prior to the violence. Resettlement for those who do not want to return to their places of residence (prior to displacement), as well as providing quality education for their children is a priority.

INTERNATIONAL AND REGIONAL ADVOCACY EFFORTS – SUSTAINING THE PRESSURE FOR ACCOUNTABILITY

Stella Ndirangu[52]

Local and regional advocacy can help sustain the pressure for accountability and the varied approaches of Kenyan civil society advocacy have assisted in sustaining this pressure with regard to the serious crimes committed in Kenya and in the region.

All in all, an overall scan of the successes in the cross-continental advocacy is encouraging, and Kenyan CSOs intend to continue with this approach.

The first approach has been to work in partnership, or to collaborate with other like-minded organisations. One key benefit of this approach has been to assist in spreading the risks associated with advocacy for international justice. Advocacy on international criminal justice in Africa is becoming more perilous by the day. This is because the suspected perpetrators are often the leaders of the nations, as seen in Kenya. What this

52 Stella Ndirangu is with the International Commission of Jurists, Kenya.

portends is a great risk for any supporter of the ICC process, and the perception that such individuals are traitors. Working in concert with other organisations has helped reduce the profiling of particular individuals or institutions as being the only trouble makers.

The second approach has been to focus the advocacy and pressure not only at the national level but also at strategic international institutions and fora. This has ensured that the government not only experiences pressure to do the right thing locally, but also from its peers and other international institutions.

The third approach has been to extend the reach of our advocacy beyond Kenya's borders and with the same zeal, advocate for other governments who are subject to international criminal justice processes to uphold their obligations. This approach has helped Kenyan CSOs to appreciate other situations currently undergoing international criminal justice adjudication and the need to synergise efforts to expand the reach of international criminal justice.

Key advocacy initiatives were undertaken by Kenyan CSOs at regional and international levels.

Cooperation with the ICC

After the initiation of the ICC cases, CSO support and cooperation with the Court had different dimensions. In some instances, the focus has been to build support domestically. In other instances, the advocacy was escalated to engage the Court directly through various mediums. These included *amicus* applications, letters to the Court, participating in NGO roundtables, and engagement with the annual meetings of the Assembly of State Parties.

The participation of *amici curiae* (friends of the court) is increasingly important in the ICC. Kenyan CSOs have used this forum to provide information to the Court on particular applications before it. To date, three *amicus* applications have been filed at the ICC by civil society organisations working in Kenya. These applications were filed in an effort to provide clarity and additional information to the Court on filings made by the main parties to the proceedings.

ICJ-Kenya's Amicus Application

On 31 March 2011, the ICC received the "Application on behalf of the government of the Republic of Kenya Pursuant to Article 19 of the ICC Statute" requesting the ICC to determine that the case against the suspects in the Kenyan cases was inadmissible. The government's application contained numerous factual errors on the government's progress in addressing the post-election violations that were under consideration by the Court. Kenyan civil society thought that it was important for the Court to be provided with alternative information on the real situation in the country regarding the investigation

and prosecution of crimes committed during the post-election violence. ICJ-Kenya filed a request to be allowed to submit as *amicus curiae* in the admissibility proceedings. In its application, ICJ-Kenya submitted that, should it be granted leave to submit observations, it would provide the Court with contextual and factual information on: the Kenyan government's track record in investigating and prosecuting crimes; the effectiveness of efforts made to establish a local justice mechanism to deal with post-election violence cases; the actual progress in implementing both judicial and legislative reforms at the national level; and the existence of political will in pursuing accountability for post-election crimes.

While filing the request, ICJ-Kenya was aware that time for the Court to determine the issues was a huge limitation. This was because the Court had given other parties a very limited period within which to file their responses to the application by the Kenyan government. Therefore, in ICJ-Kenya's assessment, the possibility of the *amicus* request being granted was reduced. Thus, the decision was made to include all the observations in the *amicus* request and to indicate that the parties would not be prejudiced if the application was granted since the request was complete and included the submissions that ICJ-Kenya intended to make in Court. The argument was that if the request was granted, no fresh documents would be filed.

There were three main intentions behind this approach. First, was to demonstrate the prudence on ICJ-Kenya's part as a CSO, and to show that the intention was not to delay the proceedings. Second, was to ensure that even if the request to join the proceedings as *amicus curiae* was not granted, the Court would still have the necessary information, and even if the Court did not refer to it in the decision, perhaps some of it would influence the Court's thinking around the issues under consideration. Third, since the documents were public, the government's narrative on how it had handled accountability for the violations committed during the post-election period was countered publicly.

The presiding judge was of the view that receiving observations from ICJ-Kenya on the matters proposed in the request was not desirable for the proper determination of the case at that particular stage of the proceedings. Members of their network feel that the purpose of the application had, in any case, been achieved despite not being formally admitted, as accurate information had been availed to the court and the public on the government's conduct.

Kituo cha Sheria's[53] *Amicus Application*

On 5 and 26 August 2011, in the two Kenyan cases, the ICC issued decisions setting out the modalities of the participation of victims in the proceedings before the Court at the confirmation of charges hearing. In its decisions, the Court utilised the Common

53 Kituo cha Sheria, is a non-governmental organisation in Kenya that has been working closely with victims and with ICJ-Kenya

Legal Representation System for the victims, and gave these representatives authority to participate in the pre-trial proceedings of each case. The Court also endorsed the Registry's proposal and ruled that the legal team assisting the legal representative should consist of a legal assistant, a case manager, and two field assistants. On 30 October 2012, Kituo cha Sheria filed an application for leave to submit observations as an *amicus curiae*.

The issue of victim's participation at the Court had not been spelt out clearly. CSOs realised that there was an opportunity to shape how the proposed model of victim participation would be most effective in the Kenyan situation. The *amicus* application by Kituo cha Sheria was therefore meant to provide a unique perspective on victims' needs and to contribute to the realisation of a system of victims' representation and participation which would be as meaningful as possible, as opposed to being purely symbolic. Kituo Cha Sheria was accepted to make their submission with regard to the victims' Common Legal Representation (in particular: importance of consultation with the victims; security considerations to be considered in the implementation of the Common Legal Representation System; support provided to the Common Legal Representatives; and coordination between the office of the public council for victims and the Common Legal Representative). They were also permitted to make submissions on the victim participation system (avoiding "categories of victims"; the role of the Common Legal Representative *vis-à-vis* the role of the victims' participation and reparations section; and bi-monthly reports to the Chamber).

Kenya Human Rights Commission Amicus Application

As the prosecution of the Kenya trials progresses, one of the main challenges that the ICC continues to face is the intimidation of witnesses and victims. This has led to several witnesses withdrawing their cooperation with the prosecution and to some recanting statements they previously provided to the prosecution. It is against this backdrop, that on 8 January 2013, the KHRC filed a confidential request for leave to present a brief in the capacity of *amicus curiae*. KHRC requested the Court to accept its application so that it could assist it in dealing with challenges facing witnesses, including alleged threats and intimidation.

In the request, KHRC proposed to give the Court its views on the disclosure of the identity of witnesses, the effects that disclosure could have on the witnesses concerned, and the law relating to the protection of witnesses before the Court. The Court ruled that it was well aware of the general risks that witnesses in an international criminal trial may face, and of the law related to witness protection. The Court also opined that the appropriate bodies to inform the Court were the OTP and the Victims and Witnesses Unit – which had done so already or had been ordered to do so. Therefore, the Court found that the submissions that the KHRC wished to make would not provide any information beyond that which it had already received, or which it could obtain.

Letters Written to the ICC

Kenyan CSOs have also strategically provided information to the different organs of the Court through letters. The KPTJ members have, on different occasions during the regular strategy meetings, sanctioned the writing of letters to the Court to inform the officials of particular issues or developments in the proceedings that are of concern not only to CSOs, but to society more broadly.

One such instance, was an open letter written to the President of the ICC after the trial chamber handling the *Ruto* case[54] had issued a decision allowing blanket excusal from attending trial, and had referred to the Presidency for determination of whether the seat of the Court could be moved to Kenya or Tanzania, as requested by the Defence. Through KPTJ, CSOs met to strategise on how the concerns they had could be communicated effectively to the Court. Having considered the existing constraints of approaching the Court, KPTJ agreed to write an open letter to the President of the Court before the judges convened the plenary session. In the end, when the judges voted, the decision was that the seat of the cases would remain in The Hague – a result that was most desirable to KPTJ.

The response to the letter was mixed. Some of the judges were happy to receive alternative information other than that provided by the parties to the case. Others thought civil society had overstepped its mandate. The presiding judge in the *Ruto* case went as far as documenting his displeasure with the letter in his dissenting opinion, indicating that CSOs were politicising the Court process. He said:

> Take for example, an 'Open Letter' to the President of the Court by one Gladwell Otieno purportedly written 'For Kenyans for Peace with Truth and Justice' – just two days ahead of the Plenary. It contained adverse commentary against a decision of Trial Chamber that granted the accused excusal from continuous presence at trial; and, (b) the recommendation of Trial Chamber that the case be commenced in Kenya. The author of the letter severely criticized the excusal decision and urged the rejection of the recommendation, arguing among other things, that holding any part of the trial in Nairobi carries a risk of politicisation. The paradox in all of that is, of course, that the author of the 'Open Letter' was precisely engaged in the act of 'politicisation' of the case, by writing an open letter to the authorities of the court in an ongoing case and in a decision pending before the court.[55]

In the end the CSOs partly attribute the success of the voting by the judges leaning in favour of Hague-based trials and the Presidency's subsequent decision overturning the blanket excusal from trial decision as being influenced by this particular letter.

54 *The Prosecutor v William Samoei Ruto and Joshua Arap Sang* (Judgment in Trial Chamber V(A)) ICC-01/09-01/11-777 (18 June 2013).

55 *The Prosecutor v William Samoei Ruto and Joshua Arap Sang* (Decision of the Plenary of Judges on the Joint Defence Application for a Change of Place where the Court Shall Sit for Trial) ICC-01/09-01/11-875-Anx 26-08-2013 (26 August 2013) at para 34. Available at http://www.icc-cpi.int/iccdocs/doc/doc1636031.pdf.

Consistent Participation at the OTP's annual NGO Roundtable

CSO participation in the NGO roundtable is useful as a means of direct engagement with the ICC. The NGO Roundtable is an annual meeting organised by the Court where CSOs are invited from situation countries to update the Court on its progress. The forum is also used by the Court officials to receive feedback from the CSOs on the impact of their involvement in their countries. CSOs have therefore, over the years, used the platform to communicate to the different Court organs on what they think was working in their country situations and what they think is not working.

At the last NGO Roundtable, held in 2013, Kenyan CSOs strategically organised to have a larger representation than usual and specific concerns were raised. Immediately after the Roundtable there was a marked difference in the way particular organs of the Court organised their work in Kenya, including the organisation of an outreach mission to Kenya by senior Court officials – something that had not happened for months.

Participation at the Annual Meeting of Assembly of State Parties (ASP)

The final aspect of direct engagement with the ICC was the participation of CSOs at the Assembly of State Parties to the Rome Statute (ASP). This platform also provides an opportunity for CSOs to address state parties, updating or informing them on the Court interventions and on the political undertones in the situation countries. The ASP, being the political organ of the Court, provides a forum to challenge governments to demonstrate real support for the work of the Court and to uphold their obligations under the Rome Statute.

Over the last three years, the involvement of the ICC in Kenya has increasingly become politicised. In 2013, the highest levels of politicisation was seen mainly because the stakes were high for the accused persons, as they were candidates in Kenya's presidential elections. The ICC was used as a campaign tool to convince the electorate that the accused were unfairly targeted. In many instances clear rules of engagement set out by the Court were disregarded during the campaign period and in the lead up to the elections. In 2013, the government also stepped up its efforts to halt the ICC cases both before the accused persons assumed power and immediately after. The government of Kenya pursued support from other governments in Africa and beyond to halt the cases. The ASP was also drawn into this charade and the battle was also taken to this forum to request amendments to the Rome Statute and the rules of procedure to allow for immunity for senior government officials and to excuse accused persons from continuous attendance of trials.

The Kenya government had a large delegation of almost 30 people attending the Assembly. These officials strategically lobbied other States to support their proposals. However, this strategic lobbying started before the Assembly because in the lead up to the meeting, the government lobbied the AU to hold an extraordinary session in October 2013, where a resolution was agreed on that the Kenyan cases should be terminated. A roadmap on

how this would be approached was set out in the resolution and included, amongst other things, approaching the United Nations Security Council (UNSC) with a deferral request. This was pursued and when the Security Council met in October to vote, the request was unsuccessful. The battle was then taken to the ASP in November 2013.

Kenyan CSOs under the KPTJ network anticipated the government's approach and held several strategic meetings before the ASP. The strategy to counter the government's actions involved six aspects.

Firstly, simple messages were developed that communicated the desirable situation was for the Statute and the rules of procedure not to be amended. Some messages were from pre-published information in local dailies, for instance newspapers that had carried the results of an opinion poll indicating that support by Kenyans for the ICC cases was still significant (53%). Such messages were photocopied and presented to the delegates and used to counter the narrative by the government that the Kenyan populace had rejected the ICC process by voting the accused persons into power and thus wanted the cases terminated.

Secondly, detailed briefs were prepared on the actual situation in the country with regard to government accountability initiatives for the post-election violence.

Thirdly, a large representation from a cross-section of Kenyan CSOs participated in the meeting. The CSO representatives strategically reached out to government officials and other CSOs at the meeting, and lobbied them not to support the amendment proposals.

Fourthly, CSOs from Africa were supported to attend the meeting and assist in the advocacy. This helped ensure that the advocacy had a continental face as opposed to the view that it was a Kenyan issue.

Fifthly, statements were prepared to address key concerns, especially in relation to government representations and documents that were not representative of the real situation. These statements were strategically presented at the Assembly during the Plenary Sessions.

Finally, CSOs participated at key side events where the CSO representatives countered the government narrative that Kenya was capable of handling the post-election cases and that progress had been made domestically in addressing the post-election violence. These meetings often ended in two conflicting statements on Kenya from the CSOs and the government representatives but, in the end, many participants appreciated the possibility of hearing from both sides and understanding that the government representations were not necessarily accurate.

Participation at the ASP annual meeting was one of the most successful engagements that Kenyan CSOs have jointly undertaken so far. The state parties were cognisant of the

messages developed by CSOs, and, in some instances, quoted them during the Assembly sessions. The Kenyan media were also awash with information on what was transpiring at The Hague in the meeting.

Engagement with the United Nations

Kenyan civil society engaged the United Nations (UN) in an effort to ensure accountability for the post-election violence.

There were several requests for deferral of the Kenyan cases, accompanied by immense political pressure at the AU and at the UNSC. The requests by the government have also been based on information that was inaccurate and were calculated to provide a picture that the government was dealing with justice and accountability for the post-election violence in a responsible manner, while the reality was quite different. CSO interventions have been through letter and memoranda and by holding meetings.

Letters and Memoranda

Kenyan CSOs have collectively written to the UNSC. This was either in the form of letters or memoranda providing information that countered the inaccurate assertions by either the AU or the Kenyan government. As mentioned earlier, in October 2013, a deferral request for the Kenyan cases was filed with the Security Council in line with an earlier resolution by the AU. Upon receiving the request, the Security Council decided formally to consider it. This was the first time the Council was allocating time to have a formal consideration of a deferral request.

Having assessed the information on which the Kenyan government had based its request for a deferral, Kenyan CSOs decided to prepare a memorandum for the UNSC[56] detailing reasons why they thought the requisite factors for granting a deferral had not been met in the Kenyan situation. The memorandum was circulated to all the permanent representatives in New York, as well as to other government contacts. The strategy was to equip them with information that could help those who were not in support of the deferral to prepare their arguments and for those who were uncertain. In the end, when the request was subjected to a vote it did not get the requisite votes to be approved and therefore failed.

In 2011, when a similar deferral request for the Kenyan cases was proposed to the Security Council, CSOs issued a letter to the Council, and also issued statements rejecting the condonation of impunity as proposed by the AU and the Kenyan government. In the end, the Kenyan government was never granted a formal hearing and the request seems to have died a natural death.

56 "Why the UN Security Council Should Reject the Application for a Deferral of the Kenyan Cases before the International Criminal Court" *Kenyan Civil Society Organisations* (23 October 2013) .Available at http://www.iccnow.org/documents/Kenyan_Civil_Society_Memorandum_to_UNSC_against_Deferral_of_Kenya_cases_before_the_ICC.pdf.

Meetings

In some instances, face-to-face bilateral meetings with members of the UNSC were necessary. In 2011, when the Kenyan government mobilised over 30 AU member states to support a deferral of the Kenyan cases by the Security Council, CSOs strategically decided to complement their documented advocacy efforts with an advocacy mission to New York to meet permanent representatives to the Security Council. Leading human rights activists in the KPTJ network then travelled and undertook bilateral meetings with some of the officials in a bid to disseminate factual information on the Kenyan situation, and to communicate concerns about the approach adopted by the Kenyan government with respect to cooperating with the ICC in the Kenyan cases.

Human Rights Council

CSOs engaged the UN Human Rights Council through Kenya's Universal Periodic Review report. In 2007, it was Kenya's turn to present its report to the Council. Kenyan CSOs organised themselves in advance and over several months jointly prepared a Shadow Report on the human rights situation in the country. In the Shadow Report, the situation on accountability and justice for the post-election violence was well detailed. The Council, in its final recommendations to the Kenyan government, included recommendations that, if implemented, would ensure greater commitment to bringing accountability for the crimes committed during the post-election violence.

African Union & African Commission

Kenyan CSOs' engagement at the regional level took place through letters, bilateral meetings, panel discussions, and lobbying.

Letters

CSOs were able to express their positions on some of the decisions taken by the AU through letters written to the AU organs and officials. The timing of the letters was in anticipation of the time when the AU would be convening to deliberate on issues including international criminal justice related issues and the high likelihood that such discussions would take an angle that promotes impunity or works to defeat justice and accountability efforts. In such circumstances, the letters focused on providing accurate information to the targeted officials and also urged them to make decisions that are backed by the law. Letters were also sent after AU meetings and decisions which, in the view of CSOs encouraged impunity for serious crimes. The content of the letters in those cases was focused on expressing disagreement with the decisions and on recommending the right approach for the AU to take.

In the case of the AU, the strategy has been to write the letters together with other CSOs in the international justice network. The responsibility of writing the letters has been taken up by the different individuals in the network, with input from the rest of the group, after

which members of the networks indicate if they are willing to sign on to the letter.

This strategy had a measure of success. Some of the contents of the letters were quoted during the meetings, which, to the international justice network, has been evidence of impact. In other circumstances, the letters have chagrined officials. A case in point was the letter of concern written in anticipation of a meeting of AU justice ministers to endorse recommendations on amending the draft African Court Protocol that extends the Court's jurisdiction to cover international crimes to include immunity for Heads of State and senior government officials. Feedback received after the letter was circulated and it indicated that some of the AU officials were unhappy that the information about their pending meeting and the subject matter thereof had become known to CSOs ahead of the meeting. One of the challenges faced has been that some of the AU decisions have been impromptu – thus making it impossible to anticipate and respond to the developments ahead of the decisions and resolutions being issued.

Bilateral Meetings

The use of bilateral meetings with AU officials at the regional level, is another strategy used by CSOs. The meetings are opportunities to apprise officials of the accountability-related developments on the Kenyan cases and of other situations generally. During the post-election violence, a delegation of leading Kenyan civil society personalities was dispatched on a mission to Addis Ababa to request the AU to intervene in the Kenyan situation. This mission proved to have been very useful because it was apparent that the reality and gravity of the violence was being down-played by government officials, who also had access to AU officials in Addis Ababa. The visit by the delegation assisted in presenting the real picture of what was happening in Kenya.

This intervention has been built on over the years with similar missions being undertaken intermittently by KPTJ members. More recently, the advocacy missions to the AU have taken a more continental focus, with the composition of individuals representing the CSOs being drawn from different members of the international justice network. During the last AU Summit, ICJ-Kenya supported eight members of the African network on International Criminal Justice drawn from eight countries in the continent, to undertake a joint advocacy mission at the Summit.

Over the years the politicisation of the work of the ICC has acquired not only an AU-face, but, in some circumstances, a national face with the Kenyan government seen as leading the onslaught against the ICC. This has put Kenyan CSOs on the receiving end, where they are seen as constantly fighting the government. It was therefore strategic to give the advocacy a continental face, to deal with the perception that concerns raised were a Kenyan issue. The approach of having representation of CSOs from different regions in the continent is also tactical, as the different network members can reach out to their governments and other governments close to their regions.

The main challenge has been the issue of access to the AU headquarters, especially when the Summit is underway. To circumvent this challenge, meetings have been held a few weeks in advance targeting the AU officials and government missions based in Addis Ababa.

Panel Discussions

CSOs have also organised panel discussions at the AU Summit to discuss developments related to international criminal justice on the continent and beyond. During the 54th Session of the African Commission on Human and Peoples' Rights (African Commission), ICJ-Kenya, KHRC, the International Federation for Human Rights, and the Open Society Foundation, worked in concert to hold a panel discussion on the role that the African Commission could play in promoting accountability for serious crimes. A draft resolution was developed in line with the recommendations the organisations presented. Before this, the last time the African Commission had issued a resolution touching on international justice had been in 2005. The objective of the organisations involved in organising the panel discussion was to re-ignite debate on this critical issue and continental forum. Strategically one of the invited panellists was a senior official in the ICC Office of the Prosecutor (OTP), who was also granted an opportunity by the African Commission during its opening session, to address it through a statement on the ICC involvement in Africa. This was also the first time an ICC official ever addressed the Commissioners formally during the Commission sessions.

Lobbying

Concerted efforts have been used to visit different countries and to meet key officials to discuss the importance of these countries upholding their obligations under the Rome Statute and supporting international justice during discussions and deliberations that transcend their territories and, more so, at AU forums. This approach has been necessitated by the increased politicisation and presentation of inaccurate facts about the ICC's involvement in Africa by the Kenyan government and, by extension, the AU. During these targeted meetings, officials have often requested more information that could provide clarity on some of the information they had received from the Kenyan government or the AU.

The meetings have therefore been useful in countering the propaganda and negative narrative advanced by the Kenyan government, but also in deriving commitments from other governments. In certain instances where the government in question has been outstanding in supporting international justice despite the hostile environment for such supporters, the meetings have been used to affirm those governments.

Engagement with the European Union

Kenyan CSOs, in concert with international NGOS based in Brussels, have previously also

organised bilateral meetings with European Union (EU) officials and parliamentarians when it has been viewed as strategic to explain to them the domestic developments related to the ICC cases and domestic accountability for the post-election violence.

Bashir Litigation

CSO advocacy efforts have also transcended the Kenyan situation. In 2010, ICJ-Kenya filed an application before the High Court seeking an arrest warrant against Sudanese President Omar al-Bashir, after the Kenyan government had previously invited Bashir to attend meetings and events in Kenya.ICJ-Kenya's objective was to domesticate the ICC arrest warrants against Bashir, thereby localising the obligations by the Kenyan government, to honour the request to arrest him should he travel to Kenya in the future. In 2011 the High Court of Kenya issued a provisional arrest warrant against Bashir, should he be found on Kenyan soil. The issuing of the warrant led to diplomatic problems between Kenya and Sudan, and caused a major discussion on the outstanding ICC arrest warrant against Bashir. It also had a significant negative effect on the status of Bashir and demonstrated that judicial power can be deployed to force political will to combat impunity where political leaders are hesitant to do so on their own.

After the arrest warrant was issued, ICJ-Kenya took further steps and extracted the provisional arrest warrant from the Court, and served it on the Attorney General and the Minister for Internal Security. They indicated that, if in the future, they had information that Bashir was to visit the country, they were obligated to put measures in place for his arrest and surrender. Subsequent to the issuing of the provisional arrest warrant, Bashir has been invited on several occasions by the Kenyan government to attend official meetings. During those occasions, ICJ-Kenya has publicised the invitations, which are usually secretive in nature, and also advocated for his arrest upon arrival. In all of these instances Bashir has not travelled to the meetings and it is thought that both Bashir and the government of Kenya find it difficult to contravene the domestic arrest warrant.

Through its action in Kenya, the ICJ-Kenya has set the precedent for activism through the judiciary against Bashir's movement, which has been replicated elsewhere in the continent as discussed in chapter three of this report.[57]

Conclusion

The lessons learned from CSO strategies in Kenya include that the approach of working in concert as CSOs, has proved to be very effective.

The journey hasn't necessarily been easy as there have been challenges. The effort of keeping all CSOs in the networks engaged and committed is one of the challenges, and

57 See Chapter Three, "Accountability Efforts in Uganda, the Democratic Republic of Congo, and Nigeria" 16.

some have fallen by the wayside. However, it has been rewarding to keep trying to pool resources with other CSOs and to engage in joint advocacy. In some instances, individuals who are more visible in the advocacy despite it being a collective effort, have been vilified. A case in point was the singling out of Gladwell Otieno in the aforementioned ICC decision for her role in signing the KPTJ letter, despite it being clear that the letter was written by KPTJ members. In other instances, the network members have been forced to disengage with members who were working at cross purposes with the objectives of the network, thus undermining its work.

In addition, that cross-continental advocacy is also expensive, especially where it involves undertaking bilateral meetings, and can only be sustained if there are sufficient resources. However, this has, to some extent been bridged by the approach of working with colleagues across the globe who are able to fill the gaps where it is impossible for the Kenyan CSOs to physically attend and lobby at some key continental and international forums. All in all, an overall scan of the successes in the cross-continental advocacy is encouraging, and Kenyan CSOs intend to continue with this approach.

CHAPTER FIVE: ACTIVITIES IN FRANCOPHONE AFRICA

ACCOUNTABILITY INITIATIVES IN MALI

Mohamed El Moctar Mahamar[58]

Background

On 17 January 2012, rebel groups attacked the military base of Aguelhok. The killing of dozens of military members followed. On 22 March of the same year, there was a military coup d'état in Mali, which dissolved government institutions and caused an institutional crisis. Rebel groups in the north took advantage of the situation to occupy the northern triangle of Mali. On 10 January 2013, the rebel groups advanced and took the city of Konna, and this promoted the intervention of the French military in an operation known as Operation Serval. Opertaion Serval successfully liberated several regions of Mali from rebel control.

During the rebel occupation of the northern triangle of Mali, human rights violations were rampant prompting civil society to employ diverse tactics.

Justice Initiatives

During the rebel occupation of the northern triangle of Mali, human rights violations were rampant prompting civil society to employ diverse tactics. The first tactic was to reinforce their ability to handle the violations. This included organising meetings to sensitise organisations to the situation and to devise appropriate responses.

The second tactic was focused on efforts to deliver justice in its different forms throughout the country. Three forms of justice were highlighted. First, there was classic domestic justice, which is carried out in Malian courts via a three-tiered court system. In this respect, civil society ensured that victims were heard in court and that arrest warrants

58 Mohamed El Moctar Mahamar is the President of the Malian Coalition of Human Rights Defenders.

were served on suspected perpetrators.

The ICC was seen as the next necessary form of justice. The Malian Coalition was heavily involved in the petitioning and lobbying that led the state to not only create a relationship with the ICC, but also to refer the situation in Mali to the Court. Mali made a formal request to the ICC on 18 July 2012 to investigate offences that had taken place in the country since January 2012. The case is unfolding slowly, but progress is being made.

The third form of justice was transitional justice. The Malian state organised a colloquium that brought together all regions of the country to discuss the idea of transitional justice, and civil society have continued to monitor developments in this regard.

Victim-Centred Approaches

The Malian Coalition (the Coalition) has also worked on issues of victim compensation. Lobbying on this issue has led to the adoption of a law of compensation.[59] Efforts must be directed to the application of this law to ensure it is effectively implemented so that victims may be properly compensated. The Coalition also conducts victim outreach to educate victims about justice mechanisms and how they can access the courts. In addition, the Coalition facilitates access to lawyers for victims.

Documentation of Violations

The Coalition continues to document a range of human rights violations amidst the growing concern that human rights defenders continue to be targeted. Efforts to prevent and address this are ongoing.

Other Initiatives

The Coalition provides economic support to internally displaced people. In addition, with the support of partners, the Coalition has also developed tools and models for psychosocial assistance.

Currently, the primary objective of the Coalition's work is to reinforce lobbying efforts focused on implementation of the victim compensation law, and the creation of stronger security measures for human rights defenders.

The Coalition is also in the process of working towards enlarging its partnerships with the media so that arrest warrants that have been issued can be publically monitored.

59 Law No. 2012-025.

ACCOUNTABILITY INITIATIVES IN CÔTE D'IVOIRE

Eric Aimé Semien[60] *and Ali Ouattara*[61]

Côte d'Ivoire has experienced many years of violence. Defining moments were the attempted military coup of September 2002 and the post-election crisis from November 2010 to May 2011, following the contested results of the 2010 presidential elections. The official number of fatalities during the post-election crisis reached 3,000 with thousands more injured. The failed military coup (which ended with the 2007 Ouagadougou Accords)[62] also led to many deaths and injuries. The Ivorian authorities, facing a prevailing quasi-chaotic, stateless national condition and consistent grave human rights violations, employed a variety of mechanisms and approaches in order to fight impunity and address the crimes committed.

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Domestic Accountability Measures

A number of domestic mechanisms were put in place. First, the National Commission of Inquiry was created in 2011. The National Commission of Inquiry was responsible for non-judicial investigations for the period from 31 October 2010 through 15 May 2011. Its report was made public in 2012 and should, theoretically, serve as a foundation for legal proceedings.

Second, there is the Special Investigation Cell (the Cell) which was created in 2011 by an inter-ministerial ordinance. The Cell addresses the post-election crisis and is technically a branch of the National Prosecutor's Office of the Abidjan-Plateau Tribunal. The Cell's mission is to lead judicial enquiries into the post-electoral crisis period from December 2010 until the Cell's creation in 2011. In December 2013, the Cell's mission was redirected, and it was renamed the Special Enquiry and Investigation Unit. It has the same mandate but with an expanded structure. The new unit's work has primarily focused on persons close to the ex-president and/or the former regime, and these are the people who have been prosecuted. In its investigative report of 6 February 2012, the Special Enquiry and Investigation Unit opened six separate judicial investigations. The report named a dozen people who are to be investigated, all of whom were members of the ex-president's cabinet.

60 A representative from the Ivorian Observatory for Human Rights (OIDH).

61 Ali Ouattara is the President of the Ivorian Coalition for the International Criminal Court.

62 UN Doc S/2007/144 (2007) Available at https://peaceaccords.nd.edu/site_media/media/accords/Ouagadougou_Political_Agreement_OPA.pdf.

Their alleged crimes include genocide, murder, and rape.

The third domestic mechanism to fight impunity is the Military Court, which is a permanent military body mandated to deal with infractions committed by individuals with military status. The Military Court has already convicted several people in connection with the post-election crisis.

Finally, the Dialogue, Truth and Reconciliation Commission (CDVR) which was established in 2011 as an independent administrative body designed to promote reconciliation and search for truth. The original idea was to emulate South Africa's Truth and Reconciliation Commission. Ivorian People have differing views on its work, depending on their personal opinions and political affiliations. The CDVR is currently performing field studies and public hearings.

International Accountability at the ICC

Côte d'Ivoire and the ICC

In order to harmonise domestic law with the Rome Statute of the International Criminal Court (Rome Statute), the Ivorian Coalition prepared a practical analysis of the differences between the Constitution of Côte d'Ivoire and the Rome Statute, in order to create circumstances under which Côte d'Ivoire could fight impunity whilst adhering to the Rome Statute.

The Ivorian Constitution and Rome Statute were compared article by article, in order to analyse the extent to which they were contradictory. Through this comparative analysis, the Ivorian Coalition produced a document which was sent to the authorities in the form of a petition, forcing the then government to consider ratifying the Rome Statute. However, ratification was impossible at the time due to constitutional obstacles. The Ivorian Coalition therefore petitioned the government to accept the jurisdiction of the ICC in accordance with article 12(3) of the Rome Statute, even though Ivoirian constitutional provisions at the time made it impossible to ratify the statute. Côte d'Ivoire subsequently made a declaration to recognise the Court's jurisdiction.

Implementing Legislation

The Ivorian Coalition continued to petition for Côte d'Ivoire to ratify the Rome Statute. The Coalition proposed a draft law to the government that was sent to the National Assembly. The draft law adopted the Rome Statute word for word. After that, and with the support of the International Coalition of the ICC (CICC), the Ivorian Coalition organised an international workshop in 2013 which was designed to prepare more draft implementing legislation for the Rome Statute. The participants compared the Ivorian Constitution and the Rome Statute to see whether there were any contradictory provisions. Unfortunately, the individuals in the ministry who were to take the draft to parliament were dismissed.

Nevertheless, the draft implementing text exists, and it has been sent to the new Ivorian authorities.

Accepting the ICC's Jurisdiction

Côte d'Ivoire officially became a party to the Rome Statute on 15 February 2013 although the ex-president had already accepted the Court's jurisdiction in accordance with article 12(3) of the Rome Statute in April 2003.[63] The new President, Alassane Ouattara, confirmed this acceptance on 14 December 2010 and 3 May 2011. In order to ratify the Rome Statute, Côte d'Ivoire had to modify section 85 of its Constitution by way of a law passed on 13 December 2002, creating an article 85 *bis* to the Constitution.[64] To date, no domestic implementing legislation exists for the Rome Statute[65].

After having performed a preliminary investigation, the Office of the Prosecutor (OTP) at the ICC concluded that a reasonable basis existed to believe that crimes within the Court's jurisdiction had been committed in Côte d'Ivoire. As a result, there are currently three ICC cases concerning the situation in Côte d'Ivoire: *The Prosecutor v Laurent Gbagbo*;[66] T*he Prosecutor v Simone Gbagbo*;[67] and The Prosecutor v Charles Blé Goudé.[68] All three individuals have been charged with crimes against humanity.

Civil Society Efforts

On 17 June 2011, the OTP of the ICC issued a public call for all witnesses and people with any knowledge or information to provide it to the ICC, so it could open an investigation. From that moment, CSOs mobilised to find victims and anyone with information in order to provide the ICC Prosecutor with all necessary information.

Civil society began to work with the ICC Prosecutor by providing information, working with victims, and popularising the ICC Prosecutor's call. Civil society, led by the Ivorian Coalition for the ICC, was the driving force behind the subsequent move to expand the ambit of investigations to include all crimes since 2002.

Civil society organisations also supported victims participating in the proceedings before the ICC. The Ivorian Coalition for the ICC, the Mouvement Ivoirien des Droits de l'Homme (MIDH), the Ligue Ivoirienne des Droits de l'Homme (LidHo), the Convention de la Société Civile Ivoirienne (CSCI), and the Action des Chrétiens pour l'Abolition de la Torture (ACAT), worked to educate victims about participation in the ICC process.

63 Declaration of Acceptance. Available at http://www.icc-cpi.int/NR/rdonlyres/CBE1F16B-5712-4452-87E7-4FDDE5DD70D9/279779/ICDE.pdf

64 Law No. 2012-1134.

65 The Ivorian Penal Code outlaws genocide, crimes against humanity, and war crimes. However, the definitions of these crimes in domestic law are not the same as in the Rome Statute.

66 Case No. ICC-02/11-01/11.

67 Case No. ICC-02/11-01/12.

68 Case No. ICC-02/11-02/11.

The Ivorian Coalition continues to organise petitions and appeals and collaborates with judicial authorities.

The Ivorian Observatory for Human Rights also created a transitional justice observatory which is in charge of observing the processes in place at a national and international level. The transitional justice observatory is present at the beginning of each Military Court session to observe how the process unfolds, to observe whether the process is expeditious, to ensure that the right to a defence is assured, and to ensure also that victims' rights are protected.

Regional Accountability Measures

In the fight against impunity for international crimes, the ICC is not the only option. Under article 34(6) of the Ouagadougou Protocol creating the African Court on Human and Peoples' Rights (the African Court), the Ivorian state declared in 2013 that Ivorian individuals and NGOs with observer status before the African Commission on Human and Peoples' Rights can bring cases before the African Court on Human and Peoples' Rights. One illustration of this was the case of *Norbet Zongo and One Other v Burkina Faso*.[69] In this case, the state of Burkina Faso was found liable for not respecting their responsibility to investigate crimes and was ordered to provide reparations to complainants. This African Court precedent represents strong principles in the fight against impunity.

69 Application No. 013/2011.

CHAPTER SIX:

CIVIL SOCIETY NETWORKS AND CROSS-CONTINENTAL ADVOCACY

THE PAN AFRICAN DEFENDERS' MODEL

Joseph Bikanda[70]

Ensuring accountability is a massive project, and one of the most important legs of this project is encouraging cross-continental international criminal justice advocacy. Developing and sustaining networks advocating for international criminal justice can make a significant impact.

Ensuring accountability is a massive project, and one of the most important legs of this project is encouraging cross-continental international criminal justice advocacy.

The Pan-African Human Rights Defenders Network (PAHRDN) is a continental coordinating and umbrella human rights defenders network comprised of five sub-regional networks. These include the Cairo Institute for Human Rights Studies for North Africa Human Rights Defenders Network (Cairo, Egypt), the East and Horn of Africa Human Rights Defenders Network (Kampala, Uganda), the West Africa Human Rights Defenders Network (Lome, Togo), the Southern Africa Human Rights Defenders chaired by the International Commission of Jurists Africa Regional Programme (Johannesburg, South Africa) and hosted by the Zimbabwe Lawyers for Human Rights, and the Central African Human Rights Defenders Network-REDHAC (Douala, Cameroon). The Secretariat of the PAHRDN is hosted by the East and Horn of Africa Human Rights Defenders Project based in Kampala, Uganda.

The Network was created at a conference held in Johannesburg in November 1998 organised by Amnesty International. It aims to contribute to a safe legal and working environment for human rights defenders, more specifically for the most at-risk human rights defenders including journalists fighting to end impunity and corruption; human rights defenders

70 Joseph Bikanda is the Coordinator for the East and Horn of Africa Human Rights Defenders Project.

working on conflict areas or under an oppressive regime; human rights defenders working on sexual orientation and gender identity; women human rights defenders; and human rights defenders working on natural resources and the environment.

Human rights defenders are working in a shrinking space and cross-continental collaboration is being implemented to open up this shrinking space. Alarming "space-shrinking" trends include, for example, events in east Africa where there has been a marked trend of restrictive legislation being introduced or discussed in several countries – notably Uganda, South Sudan, Kenya, and Ethiopia – targeting CSOs, minority rights, and freedoms of association, assembly, and expression. African human rights defenders are particularly affected by ongoing armed conflict in the Central African Republic (CAR), Mali, Sudan, South Sudan, and Somalia. Forthcoming elections in Burundi, South Sudan, Ethiopia, Uganda, and Rwanda are highly likely to lead to an escalation of the risks facing human rights defenders working on civil and political rights issues across the region over the next two to three years.

PAHRDN contributes to the protection of human rights defenders involved in international criminal justice as witnesses or victims by providing information on crimes committed in certain countries and on the lack of domestic investigations and prosecutions. PAHRDN provides concrete support to human rights defenders participating in proceedings before the International Criminal Court.

Africa, in general, still lacks legislative frameworks that adequately protect the work of human rights defenders. Intimidation and threats are made against human rights defenders, protesters, and journalists who denounce impunity that benefits political actors accused of human rights violations. National and state plans of action are needed to implement the United Nations Declaration on the Right and Responsibility of Individuals, Groups and Organs of Society to Promote and Protect Universally Recognized Human Rights and Fundamental Freedoms (1998).[71] Furthermore, networking formally and informally, is essential to effective participation by civil society in international criminal justice processes.

Enhancing Impact

PAHRDN uses an early warning mechanism for the protection of human rights defenders, but there is an urgent need to set up better early warning mechanisms to equip the African Union (AU), and to translate these early warnings into effective preventative action. It is only the political will of the AU member states that can make it effective and achievable – which is why the Responsibility to Protect Initiative of 2005 is a positive development and is increasingly incorporated into the agenda of national governments. It is a global call to

71 UN GA Resolution 53/144 53rd Session UN Doc A/RES/53/144 (1999). Available at http://www.ohchr.org/en/ProfessionalInterest/Pages/RightAndResponsibility.aspx.

civil society organisations (CSOs) to support states that are building their capacity on the preventative aspects of the responsibility to protect, and to help them respond to tensions before they escalate.

At the more formal level, non-governmental organisations (NGOs) can organise panel discussions for the fora on mass violations, transitional justice, and criminal justice in Africa as an opportunity for sharing ideas and experiences. More informally, networking on the side lines of international fora is where some of the most successful civil society advocacy ideas have been born. The need for networking applies equally to civil society's relationship with the Commissioners of the African Commission. Making connections with the individual Commissioners and their staff on their specific country and thematic areas is one of the best ways to make a meaningful impact.

Other ways in which CSOs might enhance their impact include using new technology which automatically changes the ability of human rights defenders and advocates to monitor, collect, use, and communicate their data. Past experience has seen human rights work move into the digital domain bringing new opportunities but also new threats and risks. Specifically, there is a need to address the legal framework of the right to privacy, the legality of surveillance technologies, surveillance and web filtering in use, targeted, and general threats to human rights defenders online, and potential mitigating strategies. The ultimate aim should be to ensure that social media can be used by human rights defenders as a key space for freedom of expression. Therefore, CSOs should make good use of these new tools, while managing risks to privacy and security to protect human rights defenders from both physical and digital threats.

EFFORTS TO STRENGTHEN COLLABORATION BETWEEN ORGANISATIONS ACROSS AFRICA

Elise Keppler[72]

The past five years have seen a dramatic intensification of cross continental advocacy in order to combat the backlash against the ICC in Africa. This was first seriously unleashed in the wake of the International Criminal Court (ICC)'s issuance of arrest warrants for Sudanese President Omar al-Bashir.

> It is important to have local voices heard on the issues and for local and international groups to work together to create a formidable force.

From the outset it was clear that civil society

72 Elise Keppler is the Associate Director of the International Justice Program at Human Rights Watch.

across Africa was outraged by efforts by the AU to cripple cooperation by African states parties with the ICC. However, some civil society groups were not speaking out as regularly on these issues as they might have done in the past. This was due to a variety of reasons, including that they sometimes seemed to lack access to the most up-to-date information about developments at the African Union (AU) or the Assembly of State Parties to the Rome Statute (ASP), and their focus tended to be more on domestic developments.

As a way to address this, a more coordinated approach of key groups in key capitals was encouraged. It is important to have local voices heard on the issues and for local and international groups to work together to create a formidable force.

Devising a Cross Continental Strategy

Devising an effective cross continental approach involved several components. The first was to identify groups in important African countries that seemed to have the inclination towards these issues. This included countries with a lot of influence in Africa, but also countries that had a tradition of supporting international justice. Once identified, interested groups were assimilated into the discussion on cross-continental group efforts on the ICC.

The next phase required the development of effective tactics, and this has included a relatively small group of most interested/active groups who exchange ideas, plans, and discuss key developments and strategies.

Another key feature of an effective cross continental approach is that once an important advocacy opportunity and strategy has been identified, the work load is shared. This results in all the vested parties reaching out to their diplomatic contacts in order to promote domestic media coverage on the issues, sometimes even hosting press conferences. Other methods include writing articles and letters to raise important issues.

Thus far, the work has taken a few different threads substantively including analytical input on key issues. This can take various forms, including memos in advance of major summits; group statements ahead of key events; panel discussions at such events; advocacy; press work; litigation around any visit by Bashir to an ICC state party; op-ed campaigns to get views on the ICC that are not covered in news articles; advocacy by groups at AU summits; advocacy at ICC Assembly of States Parties; and major reports on activism in support of international criminal justice in Africa.

Lessons Learnt and Ways to Enhance the Positive Impact

Firstly, encouraging semi-regular face-to-face interaction is key to fostering effective collaboration. When activists working across the continent on these issues have had no direct contact, it obviously limits the extent of candid exchange. By being in touch,

groups can spring into action effectively when needed, for example, responding to travel by Bashir. The NCICC, as mentioned by Mr Chino Edmund Obiagwu in chapter three,[73] drew substantially from work done in Kenya and South Africa to respond to Bashir's visits.

Secondly, the pressure on governments to conform to the general negative approach to the ICC at the AU is intense. With the exception of Botswana, a more robust, positive approach is incredibly difficult to come by. As a result, more attention to the public debate may be merited.

Thirdly, civil society can also make an issue out of developments that were not otherwise attracting attention. For example, nearly all the articles on the immunity issue for sitting leaders before an expanded African Court of Justice and Human Rights in May 2014, were those that discussed concerns raised by the existing cross continental network. Other civil society organisations used the information sourced from the cross continental network's advocacy initiatives. It seemed quite likely the issue would not have been covered in the absence of the group advocacy.

Fourthly, more discussion on what is working and not working to promote domestic accountability, is required. Conferences were an important step in that arena and more regular exchange on that basis would be very useful.

Fifthly, civil society needs to encourage more regular work with Francophone activists, as they too can contribute to the discussion. More sharing of work across all existing collaborative networks is key to creating a sustainable movement in support of justice both domestically and cross continentally.

Civil society groups need to think about whether an increased focus on media – as opposed to diplomats – makes sense and to identify ways to implement agreed-upon strategies.

Making use of sub-regional institutions like the Economic Community of West African States is key to fostering a better understanding of how different groups feel about their engagement in cross-continental efforts and how civil society can better support each other in that work and apply lessons domestically.

73 See Chapter Three "Accountability Efforts in Uganda, the Democratic Republic of Congo, and Nigeria", 16

CHAPTER SEVEN:
DOMESTICATION AND LITIGATION - THE SOUTH AFRICAN EXPERIENCE

DOMESTICATION – THE FOUNDATION OF INTERNATIONAL CRIMINAL LAW IN SOUTH AFRICA

Christopher Gevers[74]

Since 1994, South Africa has been at the forefront of much of Africa's engagement with international criminal law in ways that are both positive and negative.

Since 1994, South Africa has been at the forefront of much of Africa's engagement with international criminal law in ways that are both positive and negative.

South Africa participated actively in Rome in 1998, ratified the Rome Statute of the International Criminal Court 1998 (Rome Statute) in 2000, and two years later became the first African country to implement the Rome Statute domestically. Its legislation has since become a model for other African countries. A South African judge, Navanethem Pillay, was elected to serve on the inaugural bench and assigned to the Appeals Division and a number of South Africans also hold key positions in the Office of the Prosecutor (OTP) at the International Criminal Court (ICC).

On the negative side, while South Africa's position has not always been a model of clarity, it has, for the most part, towed the African Union's increasingly hostile line insofar as the ICC is concerned. It was South Africa that was tasked with proposing a controversial amendment to the Rome Statute at the ASP in 2010. More recently, South Africa's Deputy-President put the country's support firmly behind the AU's proposal for an "African Criminal Court", arguing that "Africa needs its own Court, vested with universal jurisdiction over the three core international crimes of genocide, crimes against humanity, and war crimes". The main justification given for this "African Criminal Court" was "the perception that the ICC is biased against Africans".

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South Africa's contribution to the development of international criminal law at a domestic level has also been a mixed bag and it unfortunately started badly. Following the country's transition to democracy, the new parliament adopted the Promotion of National Unity and Reconciliation Act[75] (the TRC Act) in 1995. One of the aims of the TRC Act was to "provide for the investigation and the establishment of as complete a picture as possible of the ... gross violations of human rights committed ... within or outside the Republic, emanating from the conflicts of the past".[76] In order to facilitate truth-telling, the truth and reconciliation process offered civil and criminal amnesty "to persons who make full disclosure of all the relevant facts relating to acts associated with a political objective"[77].

However, the Truth and Reconciliation Commission (TRC)'s offer of amnesty came at a time when there was a growing recognition that certain international crimes, including war crimes and crimes against humanity, must, as a matter of international law, be punished by states.[78] And certainly, the atrocities committed during apartheid – those subject to amnesty under the TRC Act – were good candidates for such crimes.

It was not long until the Constitutional Court of South Africa (Constitutional Court) had to address the question of South Africa's past crimes and present obligations. In *AZAPO v President of the Republic of South Africa*[79] the Constitutional Court faced a challenge to the TRC Act by victim's families on the basis that, "the state was obliged by international law to prosecute those responsible for gross human rights violations and that the provisions of [the TRC Act] ... which authorised amnesty for such offenders constituted a breach of international law".[80] In rejecting the challenge, the Court dismissed the suggestion that the struggle against apartheid could, at any point, be classified as an armed conflict – whether international[81] or non-international.[82] It did so in a footnote. The scant legal reasoning

75 Act 34 of 1995 (TRC Act).

76 Preamble, TRC Act.

77 *Id.*

78 While the existence of a general customary international obligation to punish such crimes remains controversial, at the very least there are (and were at the time) treaty-based obligations to punish war crimes and genocide (under certain conditions). All four of the 1949 Geneva Conventions contain a common article setting out an obligation – either to prosecute individuals alleged to have committed or ordered the commission of war crimes, regardless of their nationality – or to "hand such persons over for trial to another High Contracting Party concerned, provided such High Contracting Party has made out a prima facie case". See article 49, Geneva Convention 1; article 50, Geneva Convention II; article 129, Geneva Convention III; and article 146, Geneva Convention IV. See also articles I, II, IV, VI, United Nations Convention on the Prevention and Punishment of the Crime of Genocide (1948), which came into force on 12 January 1951; and Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v Serbia and Montenegro), (Judgment) 2007 ICJ Reports 43 (26 February 2007).

79 1996 (4) SA 672 (CC).

80 Id at para 25.

81 Id at footnote 29. "The Geneva Conventions of 1949 apply only to cases of declared war or of any armed conflict which may arise between two or more of the High Contracting Parties" (no High Contracting Parties were involved in the South African conflict). It also summarily dismissed the argument that article 1(4) of Additional Protocol I cannot be used to 'escalate' the conflict, as that instrument "was never signed or ratified by South Africa during the conflict and no such 'declaration' was deposited with that Council by any of the parties to the conflict".

82 As far as non-international armed conflicts are concerned, the Court held "it is doubtful whether [Additional Protocol II] applies at all (see article 1(1) to Protocol II) but if it does, it actually requires the authorities in power, after the end of hostilities, to grant amnesty to those previously engaged in the conflict." Azanian Peoples Organization (AZAPO) and Others v President of the Republic of South Africa and Others at footnote 29.

underpinning the Court's conclusion is far from unassailable. However, the upshot of *AZAPO* was that as there was no armed conflict in South Africa, and crimes committed during this period could not be considered to be war crimes. It was quite remarkable that the Court did not even address the question of crimes against humanity.

The inadequacies of the Constitutional Court's approach to the issue of apartheid-era crimes has haunted its attempts to address the question in subsequent cases. In the first of two cases involving Wouter Basson, the head of the apartheid government's chemical weapons programme, the Constitutional Court remarked that it is "clear that the practice of apartheid constituted crimes against humanity and some of the practices of the apartheid government constituted war crimes".[83] What is more, the Court accepted that "international law obliges the state to punish crimes against humanity and war crimes". These remarks, although o*biter dicta*, are difficult to reconcile with the finding in *AZAPO* that crimes committed under apartheid could not constitute war crimes, as South Africa was not engaged in an international or non-international armed conflict. Nor does the Court's acceptance that: (i) apartheid was a crime against humanity; and (ii) South Africa is under an obligation to prosecute such crimes, sit well with its failure to even consider the question of crimes against humanity in *AZAPO*.

The Constitutional Court again addressed the above issue in its second consideration of Mr Basson's case, but this time it went further. In *S v Basson II* [84], the Court (in a rambling, difficult to decipher passage that included historical and moral excuses) found that regardless of the characterisation of the conflict in question, the conduct Mr Basson had been accused of was "grossly transgressing even the most minimal standards of international humanitarian law".[85] In other words, the conduct amounted to war crimes. Although the Court focused its attention mainly on the crimes committed against "hundreds of South-West Africa People's Organisation (SWAPO) captives" in Namibia, the Court's findings cannot be limited to such crimes. Mr Basson was also charged with crimes committed against members of the African National Congress (and others) in South Africa and beyond. More importantly, the Court's findings in *AZAPO* cannot be territorially limited: they apply equally to crimes committed beyond the borders (including those committed against SWAPO), as the TRC Act was not territorially limited.[86]

The result is that it is difficult, if not impossible, to reconcile the Constitutional Court's finding in *AZAPO* – to the effect that the Geneva Conventions of 1949 and its Protocols did not apply to the conflict in South Africa – with its subsequent findings, on two occasions,

83 *S v Basson* 2005 (1) SA 171 (CC) at para. 37.

84 2007 (3) SA 582 (CC).

85 *Id* at para. 179.

86 In the TRC Act, human rights violations were defined as "violation of human rights ... which emanated from conflicts of the past and **which was committed during the period 1 March 1960 to the cut-off date within or outside the Republic**, and the commission of which was carried out, advised, planned, directed, commanded or ordered, by any person acting with a political motive" (emphasis added). See further, *Stopforth v Minister of Justice and Others; Veenendaal v Minister of Justice and Others* 2000 (1) SA 113 (ZA SCA).

that war crimes of some description were committed during that period. It is also difficult to square the Court's twin assertions that crimes against humanity were committed in South Africa during apartheid and that South Africa was under an international obligation to prosecute those crimes, with the failure of the Court in *AZAPO* to even consider those crimes. Of course, these antinomies did not unsettle the finding of *AZAPO*, nor the TRC which had safely completed its work before the *Basson* cases. They do, however, mean that, despite all the hype around the TRC, democratic South Africa got off to an ignominious start, insofar as the prosecution of international crimes is concerned.

After this rocky start, and over the past decade, South Africa has made important strides insofar as the domestic prosecution of international crimes is concerned. This began with the adoption of the Implementation of the Rome Statute of the International Criminal Court Act 27 of 2002 (Rome Statute Act). The Act not only provides for universal jurisdiction to be exercised over international crimes by South African courts, but also (in some commentators' views) discarded the diplomatic immunity of state officials accused of international crimes, despite a contemporaneous ruling by the International Court of Justice that those immunities continue to apply regardless of the crime in question.[87] Then, in 2012, South Africa became the first country to adopt implementing legislation for the various 1949 Geneva Conventions and their Protocols, after the incorporation of the 1998 Rome Statute of the ICC. In doing so, South Africa granted its courts universal jurisdiction over "grave breaches" of the Geneva Conventions, and made novel contributions to the law relating to modes of responsibility.

The relevant laws (discussed below) are far from perfect, but they place South Africa at the front of the trend towards domestic prosecutions of international crimes.

The Implementation of the Rome Statute of the International Criminal Court Act 27 of 2002

South Africa ratified the Rome Statute on 27 November 2000, and, in order to give effect to its provisions, passed the Rome Statute Act (otherwise referred to as the ICC Act) in 2002. The Rome Statute Act has two main purposes. The first is to establish a comprehensive cooperative scheme for South Africa *vis-à-vis* the ICC, pursuant to article 88 of the Rome Statute.[88] The second, which is more interesting, is the aim to provide a statutory basis for domestic prosecution of crimes against humanity, genocide, and war crimes before a South African court, in line with the principle of complementarity. While South Africa was not obliged under the Rome Statute to create the necessary conditions for domestic prosecutions, it elected to do so. In doing so, it elected to create a very strong regime to bring "persons who commit such atrocities to justice ... in a court of law of the Republic in

87 See *Arrest Warrant of 11 April 2000 (Democratic Republic of the Congo v Belgium)*, Judgment, I.C.J. Reports 2002, p.3.

88 Article 88 states: "States Parties shall ensure that there are procedures available under their national law for all of the forms of cooperation which are specified under this Part".

terms of its domestic law where possible".[89]

The starting point is section 4(1) of the Rome Statute Act, which provides that "[d]espite anything to the contrary in any other law in the Republic, any person who commits a [international] crime, is guilty of an offence".[90] The international crimes referred to in the Act are genocide, crimes against humanity, and war crimes. Furthermore, the Rome Statute's definitions of these "core crimes" are incorporated directly into South African law through a schedule appended to the Rome Statute Act.[91] As discussed later on, the Act does not include or incorporate the modes of liability provided for in the Rome Statute, some of which are peculiar to international law. In order to remedy these omissions, South African courts will have to turn to analogous domestic modes of liability – such as aiding and abetting and the common purpose doctrine – when it comes to prosecutions under the Act. However, not all international modes of liability have domestic counterparts (i.e. the doctrine of command responsibility).

There are four grounds upon which jurisdiction may be exercised over international crimes by South African courts under the Rome Statute Act: territoriality, nationality, passive personality, and the universality principle. The first three grounds are fairly unremarkable, except that nationality and active personality jurisdiction may be founded on citizenship or if the person concerned (either the perpetrator or victim respectively) is "ordinarily resident in the Republic". It is the fourth ground (universal jurisdiction) that has and will continue to generate the most legal and political interest.

Section 4(3)(c) of the Rome Statute Act states that in order "to secure the jurisdiction of a South African court for purposes of this Chapter, any person who commits [an ICC] crime outside the territory of the Republic, is deemed to have committed that crime within the territory of the Republic if ... that person, after the commission of the crime, is present in the territory of the Republic".This provision contemplates an exercise of jurisdiction by South African courts over international crimes when none of the "traditional" connecting factors – such as the nationality of the accused or victim or the location of the crimes – are present. In other words, it contemplates so-called universal jurisdiction.[92]

The concept of universal jurisdiction remains controversial in terms of its origin, doctrinal basis, the crimes covered, the conditions under which it is exercised, and whether it is mandatory or voluntary. Unfortunately, debates regarding universal jurisdiction (with

89 Rome Statute Act preamble.

90 This provision establishes the *prescriptive* jurisdiction over such crimes, notably without reference to territory.

91 Rome Statute Act Schedule 1.

92 According to *The Princeton Principles on Universal Jurisdiction* (2001): "universal jurisdiction is criminal jurisdiction based solely on the nature of the crime, without regard to where the crime was committed, the nationality of the alleged or convicted perpetrator, the nationality of the victim, or any other connection to the state exercising such jurisdiction". Principle 1(1), T*he Princeton Principles on Universal Jurisdiction* (2001). A preferred definition is that offered by O'Keefe, who defines it as: "the assertion of jurisdiction to prescribe in the absence of any other accepted jurisdictional nexus at the time of the relevant conduct". O'Keefe "Universal Jurisdiction: Clarifying the Basic Concept" (2004) 2(3) *JICJ* 735, 745.

few exceptions) have provided more heat than light.[93] While not wanting to reopen the debate,[94] section 4(3)(c) alone does not provide for universal jurisdiction; it must be read with section 4(1) which provides for the prescriptive jurisdiction of South Africa over the crimes in question. As a result, to the extent that universal jurisdiction can be conditional, it is enforcement and/or adjudicative jurisdiction that is made conditional on the presence of an accused under the Rome Statute Act. The real issue is the point at which presence is required in order for such jurisdiction to be exercised: i.e. at the time of the opening of an investigation or the issuance of an arrest warrant, or, eventually, the trial of a person.

The North Gauteng High Court recently found that the presence of a suspect was not a requirement for the initiation of an investigation under the Rome Statute Act.[95] When the matter went on appeal, the Supreme Court of Appeal agreed, finding that "the SAPS are empowered to investigate the alleged offences irrespective of whether or not the alleged perpetrators are present in South Africa".[96] The matter was heard in the Constitutional Court, and judgment is yet to be handed down.

As far as the vexed question of immunity is concerned, South Africa's Rome Statute Act provides that notwithstanding "any other law to the contrary, including customary and conventional international law, the fact that a person ... is or was a head of State or government, a member of a government or parliament, an elected representative or a government official ... is neither – (i) a defence to a crime; nor (ii) a ground for any possible reduction of sentence once a person has been convicted of a crime".[97] Most commentators have interpreted this provision as removing personal immunity (as opposed to functional immunity) before South African courts. Dugard and Abraham argue that section 4(2)(a) of the Rome Statute Act represents a choice by the legislature not to follow the "unfortunate" *Arrest Warrant* decision, "of which it must have been aware".[98] While section 232 of the South African Constitution makes customary international law part of South African law, it does so only to the extent that it is not "inconsistent with the Constitution or an Act of Parliament". Therefore, if the Rome Statute Act is interpreted as removing personal immunity, then it would do so notwithstanding the customary international law obligations on South Africa to observe it.

In the alternative, however, one could argue that section 4(2)(a) is clearly modelled on article 27(1) of the Rome Statute – which deals with the irrelevance of official capacity as a defence or as a ground for the reduction of sentence – and not article 27(2), which

93 One such exception is O'Keefe "Universal Jurisdiction: Clarifying the Basic Concept" (2004) 2(3) *JICJ* 735.

94 For an elaboration of this argument see Gevers *"Southern African Litigation Centre and Another v NDPP and Others :* Note" (2013) 130 SALJ 293.

95 See *Southern African Litigation Centre and Another v National Director of Public Prosecutions and Others* [2012] 3 All SA 198 (GNP). See the discussion of the case in the next chapter of the report.

96 *National Commissioner of the South African Police Service v Southern African Human Rights Litigation Centre* 2013 (485/2012) ZASCA 168 (27 November 2013) at para. 3.2.1

97 Section 4(2)(a), Rome Statute Act.

98 See J Dugard and GAbraham "Public International Law" (2002) *Ann Surv of S Afr L* 140, 166.

deals with personal immunity.[99] If this is the case, then article 4(2)(a) of the Rome Statute Act effectively removes functional immunity of persons, but leaves personal immunity intact.[100] One argument that might be raised in favour of the interpretation of this section adopted here is based on the interpretive presumption contained in section 233 of the Constitution, which states: "When interpreting any legislation, every court must prefer any reasonable interpretation of the legislation that is consistent with international law over any alternative interpretation that is inconsistent with international law". The counter-argument to this might be a teleological one, to the effect that customary international-law personal immunity is contrary to the spirit, purport, and object of South Africa's Constitution.

The Rome Statute Act provides that "[n]o prosecution may be instituted against a person accused of having committed [an international] crime without the consent of the National Director [of Public Prosecutions]".[101] If the Prosecution declines to prosecute a person under the Rome Statute Act, the Director General for Justice and Constitutional Development must be provided with the full reasons for that decision, because he or she is then obliged to forward the decision, together with reasons, to the Registrar of the ICC in The Hague. In order to fulfil these obligations, the National Prosecuting Authority established a "Priority Crimes Litigation Unit", headed by a Special Director of Public Prosecutions. The Special Director has two powers: to "head the Priority Crimes Litigation Unit"; and to "manage and direct the investigation and prosecution of crimes contemplated in the [Rome Statute Act]". In this way, the unit is tasked specifically with dealing with the ICC crimes set out in the Rome Statute Act, and the Special Director that heads the unit is empowered to "manage and direct the investigation" of those crimes. If the unit opens an investigation and issues a warrant of arrest, and the suspect is arrested, then the matter will move to the prosecution stage.

Furthermore, the Rome Statute Act requires that an appropriate, specialised High Court be designated to hear cases brought under the Act. It does not, however, provide any specific trial procedure or punishment regime for domestic courts. Thus, it can be assumed that the regular trial procedure for a criminal trial will be followed, and that the Court will be empowered to pass any of the sentences regularly imposed.

The Implementation of the Geneva Conventions Act 8 of 2012

The next important piece of international legislation that has been domesticated in South Africa: the Implementation of the Geneva Conventions Act 8 of 2012.[102] In 2012,

99 Article 27(2) states: "Immunities or special procedural rules which may attach to the official capacity of a person, whether under national or international law, shall not bar the Court from exercising its jurisdiction over such a person."

100 See, further, C Gevers, "Immunity and the Implementation Legislation of South Africa, Kenya and Uganda" in K Ambos & OA Maunganidze (eds) *Power and Prosecution* (2012).

101 Section 5(1), Rome Statute Act.

102 For an overview, see C Gevers, M du Plessis & A Wallis, "Geneva Conventions Act: Sixty Years in the Making" *Afr YB of*

South Africa became the first country to implement the Geneva Conventions after the implementation of the Rome Statute. It did so 60 years after South Africa acceded to the 1949 Geneva Conventions.[103] According to its preamble, the Geneva Convention Act's purpose is two-fold: (i) to enact the Geneva Conventions and Protocols additional to those conventions, into law; and (ii) to ensure the prevention and punishment of grave breaches and other breaches of the Conventions and Protocols.

The first aim is accomplished by annexing the Conventions in full to the Act, and providing that subject to "the Constitution and this Act, the Conventions have the force of law in the Republic".[104] The second was accomplished by creating a war crimes regime for prosecuting "breaches" of the Geneva Conventions in South African courts, notwithstanding that fact that the "grave breaches" regime of the 1949 Geneva Conventions and its Protocols has already, in substance, been implemented through the Rome Statute Act. In addition, the "grave breaches" now form part of customary international law, and, therefore, by operation of section 232 of the Constitution, are already part of South African law. The important question is whether the Geneva Conventions Act has any use in light of the more substantively expansive Rome Statute Act, and, if it does, how do the two pieces of legislation interact?

The Geneva Conventions Act criminalises two categories of offences: "grave breaches" and "other offences". The former category comprises first-order war crimes contained in the 1949 Geneva Conventions and its 1977 Protocol 1.[105] Notably, these crimes can only be committed in an international armed conflict between two states.[106] In addition to this, the Geneva Conventions Act criminalises the contravention of any other provision not covered by the "grave breaches" regime.[107] This as a "catch-all" category of offences, which opens up the possibility of a second set of war crimes being prosecuted under this Act: war crimes committed in non-international armed conflict. This is so, because included in this "catch-all" category of offences would be Common Article III, which covers violations committed in "armed conflicts not of an international character", as well as similar provisions in Additional Protocol II.

The Geneva Conventions Act provides for differing jurisdictional regimes for these two categories of offences. "Grave breaches" are subject to "universal jurisdiction" – they can be

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103 South Africa acceded to the four 1949 Geneva Conventions in 1952, and the 1977 Additional Protocols on 21 November 1995. For a discussion of South Africa's reasons for not implementing the Conventions sooner, see Gevers et al., *id.*

104 Section 4(1), Geneva Conventions Act.

105 According to the Geneva Conventions Act, a "grave breach" means a breach referred to in article 50 of the First Convention, article 51 of the Second Convention, article 130 of the Third Convention, article 147 of the Fourth Convention, article 11 or 85 of Protocol I, and Section 5(2) of the Geneva Conventions Act. Notably, when Additional Protocol I was drafted, it was decided that breaches of its provisions would not attract criminal liability.

106 Or foreign occupation. See Common article II of the 1949 Conventions and article 1 of Additional Protocol I (1977).

107 The Geneva Conventions Act states that "[a]ny person who within the Republic contravenes or fails to comply with a provision of the Conventions not covered by subsection (2), is guilty of an offence".

prosecuted by South African courts regardless of where they are committed.[108] Notably, this "universal jurisdiction" provision differs from that found in the Rome Statute Act in that it does not contain a so-called "presence requirement". In contrast, "other" offences under the Geneva Conventions Act, including non-international war crimes, are not subject to universal jurisdiction. These offences are subject to the "traditional" jurisdictional bases of territoriality[109] and nationality,[110] but not passive personality jurisdiction (i.e. based on the victim's nationality).

Another notable feature of the Geneva Conventions Act is the enigmatic section 7(4), which states:

> "Nothing in this Act must be construed as precluding the prosecution of any person accused of having committed a breach under customary international law before this Act took effect".

Whilst this is welcome in principle, the operation of this provision is potentially confusing: it confirms that prosecutions can take place in respect of crimes committed before the Act came into force, but it does not give any indication how this might take place.One possible avenue would be to interpret section 7(4) of the Act as a "retrospectivity clause" that provides for the retrospective application of the Act until the point at which the breach in question became a breach under customary international law. This interpretation is supported by its reference to a breach of customary international law, a term that is particular to the Geneva Conventions. However, given the general interpretive presumption against retrospective application, such a provision would likely be formulated in express positive terms, and not "defensively" (as section 7(4) is). Furthermore, this section differs considerably from the examples of such "retrospective application" provisions given during the public hearings on the Act, in particular those of Canada and the United Kingdom, which the drafters were open to follow should they have wanted to provide for the retrospective application of the Act. Another possible interpretation of section 7(4), is that this provision recognises that South African courts are empowered to prosecute customary international law crimes without implementing legislation, under customary international law.

The Geneva Conventions Act introduces specialised modes of liability for international crimes.[111] Firstly, section 5 of the Act provides for responsibility by way of direct

108 Section 5(1) of the Geneva Conventions Act states that "[a]ny person who, whether within or outside the Republic, commits a grave breach of the Conventions, is guilty of an offence". Section 7(1) states: "Any court in the Republic may try a person for any offence under this Act in the same manner as if the offence had been committed in the area of jurisdiction of that court, notwithstanding that the act or omission to which the charge relates was committed outside the Republic."

109 Section 5(3) states: "Any person who within the Republic contravenes or fails to comply with a provision of the Conventions not covered by subsection (2), is guilty of an offence".

110 Section 5(4) states: "Any citizen of the Republic who outside the Republic contravenes or fails to comply with a provision of the Conventions not covered by subsection (2), is guilty of an offence". The Act does not, *contra* the Rome Statute Act, extend its nationality jurisdiction to persons "ordinarily resident" in the Republic. See Rome Statute Act Section 4(3)(b).

111 In this respect, the Geneva Conventions Act goes further than the Rome Statute Act – but not as far as the Rome Statute.

perpetration of breaches of the Geneva Conventions. Secondly, section 6 of the Act incorporates the doctrine of command responsibility into South African law, and states that a "military superior officer"[112] is guilty of an offence if: (i) forces under his or her effective command, authority, and control (ii) commit a "grave breach" or an ordinary breach;[113] (iii) the superior knew, or in the circumstances ought to have reasonably known, that his or her subordinates were committing such a breach;[114] and (iv) failed to take the necessary steps to prevent and/or punish said breach.[115] Section 6(1)(c) further specifies that the failure to take necessary steps means failure to "exercise effective command, authority and control over the forces",[116] to "take all necessary and reasonable measures within his or her power to prevent or repress the commission of any breach or offence",[117] or "submit the commission of the breach or offence ... to the competent authorities for investigation and prosecution".[118]

The liability of the military superior officer, under this provision, arises irrespective of where the "breach" in question was committed by the subordinate.[119] This creates the potential for an anomalous situation where a superior is held criminally liable for an "ordinary breach" by a subordinate outside the Republic, for which that subordinate cannot be prosecuted.[120] Such a scenario is unlikely to materialise insofar as South Africa's armed forces are concerned as in the ordinary course subordinates would be citizens (thereby fulfilling the personality-based ground of jurisdiction).[121] However, it is not inconceivable that a foreign citizen will fall under the *de facto* if not *de jure* control of a South African commander during the course of a multinational military operation, such as an AU or UN peacekeeping mission. In any event, the commanders of foreign armed forces will be bound under this provision. Section 6(2) provides for criminal liability for any person who was "under a duty" to prevent the commission of a breach of the Convention at the relevant time.[122] This is a novel and potentially expansive provision and it remains to be

112 Notably, the term "military superior officer" includes a military superior officer and a person holding a superior civil position. Geneva Conventions Act section 6(4)(a) and (b).

113 Section 6(1)(a) Geneva Conventions Act.

114 Section 6(1)(b) Geneva Conventions Act

115 Section 6(1)(c) Geneva Conventions Act

116 Section 6(1)(c)(i) Geneva Conventions Act

117 Section 6(1)(c)(ii) Geneva Conventions Act

118 Section 6(1)(c)(iii)Geneva Conventions Act

119 The section 5 territorial limitations would not be applicable to military superior officers who, in terms of section 5(1)(a), fail to exercise the necessary control to prevent a breach of the Conventions "whether within or outside the borders of the Republic". Furthermore, there is no indication whether the nationality of a military superior officer will determine the application of the Geneva Conventions Act.

120 This 'anomaly' could be remedied by interpreting section 6 as incorporating the territorial limits of section 5(3)-(4).

121 Section 52(4)(a) of the Defence Act 42 of 2002 provides that "[n]o person may enrol in the Regular Force [of the South African National Defence Force] unless he or she is a citizen".

122 Section 6(2) makes it an offence for "[a]ny person, whether within or outside the borders of the Republic, who fails to act when under a duty to do so in order to prevent the commission of a breach of the Conventions". Similarly, a plain reading of this section suggests that the jurisdictional limits applicable to "ordinary breaches" of the conventions (see sections 5(3)-(4)) do not apply when an offence contemplated in section 6 is committed – i.e. when persons are found to be "under a duty" to prevent the commission of a breach of the conventions.

seen how the courts give effect to it.

While the introduction of command responsibility into South African law is a positive development, on the whole the Geneva Conventions Act is somewhat under-inclusive insofar as modes of liability are concerned. The glaring omission in this regard is forms of indirect participation or "accessorial liability" (such as aiding and abetting or procuring the commission of an offence), notwithstanding that such liability has been accepted as part of international law since the Nuremberg trial. More recently, the principles of accessorial liability for international crimes were codified in the Rome Statute.[123] Similarly, the International Committee of the Red Cross's Model Law on the Geneva Conventions, and the relevant legislation of numerous foreign jurisdictions, provide for criminal responsibility for any person who "commits or aids, abets or procures any other person to commit" a breach of the Geneva Conventions and the 1977 Additional Protocols.[124] In addition, the Geneva Conventions Act also does not include the "joint criminal enterprise" doctrine as a mode of liability.[125]

Nevertheless, the omission of certain modes of liability from the Geneva Conventions Act is clumsy but not fatal, as the Act empowers courts to consider and apply international law (both convention and customary) and comparable foreign law, which should lead to the incorporation of further international modes of liability, as required.[126]

Customary International (Criminal) Law under the 1996 Constitution of South Africa

In addition to these legislative avenues, the potential exists for the prosecution of

123 See Article 25(3)(c)-(d), Rome Statute. A number of other international instruments also criminalise the conduct of a person who contributes to the commission of a crime. See article 7(1) of the Statute for the International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the Former Yugoslavia since 1991, UN Doc. S/25704 (ICTY Statute); Article 6(1) Statute of the International Criminal Tribunal for Rwanda, UN Doc. S/RES955 (ICTR Statute); article 4, United Nations Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, 1465 UNTS 85 (Dec. 10, 1984); article III(b), International Convention on the Suppression and Punishment of the Crime of Apartheid 1015 UNTS 243 (Nov. 30, 1973); Article 6, Supplementary Convention on the Abolition of Slavery, the Slave Trade and Institutions and Practices Similar to Slavery 266 UNTS 3 (Sept. 7, 1956); article III(e), Convention on the Prevention and Punishment of the Crime of Genocide 78 UNTS 277, 280 (Dec. 9, 1948).

124 Section 3(1) and 4(1)-(2) thereof, International Committee of the Red Cross Model Law on the Geneva Conventions. See, for example, the implementing legislation in Ghana, Namibia, the United Kingdom, New Zealand, Australia, Sri Lanka, India and Canada. See, also, article 17 of Rwanda's Law No. 33 bis 2003.

125 See article 25(3)(d), Rome Statute.

126 Section 3 of the Geneva Conventions Act provides that: "In addition to the Constitution and the law, any court in the Republic hearing any matter arising from the application of this Act must also consider and, where, appropriate, may apply- (a) conventional international law; (b) customary international law; and (c) comparable foreign law". This provision – included following submissions by civil society - is modelled on section 2 of the Rome Statute Act. This raises broader issues of whether South African courts could extend the Geneva Convention Act's criminal scope by interpretation using this provision, taking into account subsequent developments in international law. The Geneva Conventions came into force 62 years ago. They have thus far been frequently interpreted and applied by both domestic and international courts and over time have developed considerably. Those developments could be a useful source of legal rules and principles for consideration and application by a South African court, seized with a case under the Geneva Conventions Act.

international crimes through the direct application of customary international law by South African courts. In this regard, section 232 of the 1996 Constitution of South Africa states: "Customary international law is law in the Republic unless it is inconsistent with the Constitution or an Act of Parliament."

In *S v Basson II*, the Constitutional Court recognised this potential, although it ultimately left the question open, noting:[127]

> "For the purposes of this case it is not necessary to enter into controversies surrounding the existence of universal jurisdiction for crimes against humanity and war crimes, and a concomitant duty to prosecute. We have not found it necessary to consider whether customary international law could be used either as the basis in itself for a prosecution under the common law, or, alternatively, as an aid to the interpretation of section 18(2)(a) of the Riotous Assemblies Act."

As described above, it is possible to interpret section 7(4) of the Geneva Conventions Act as implicitly recognising the direct application of customary international (criminal) law by South African courts. Textually, this provision could be interpreted as heading off any suggestion that the Geneva Conventions Act limits or curtails the prosecution of war crimes under some other piece of legislation, or the common law. The only relevant legislation is the Rome Statute Act. However, insofar as that Act is concerned, this interpretation is both unnecessary and redundant as nothing in the Act suggests it is meant to limit other prosecutions and the Geneva Conventions Act already addresses this issue, noting that its provisions "must not be construed as limiting, amending, repealing or otherwise altering any provision of the [Rome Statute Act]".[128]

The final option is to use the common law for prosecutions, or more especially customary international law as the basis for a prosecution under the common law. A plain reading of the text of section 7(4) – which refers to the "prosecution of any person accused of having committed a breach under customary international law"– supports this interpretation. What is more, section 7(4) could be seen as necessary in light of the fact that section 232 of the Constitution provides that "[c]ustomary international law is law in the Republic unless it is inconsistent with the Constitution or an Act of Parliament". In the absence of section 7(4), the argument could be made that the differences between the Geneva Conventions Act and customary international law are "inconsistencies" and therefore the latter must be read down in favour of the former. Given that customary international law is more progressive in many respects than the Geneva Conventions Act, this would result in a less effective regime for prosecuting war crimes. Therefore, section 7(4) is necessary to prevent such an interpretation.

If accepted, this is the most far-reaching interpretation of section 7(4). If section 232

127 (3) SA 582 (CC) at footnote 147.

128 Geneva Conventions Act section 19.

provides for the direct application of customary international (criminal) law, prosecutions could be brought in respect of all customary international law crimes (including the crime of aggression). In a South African context, this raises interesting possibilities given the suggestion in *S v Basson* that both war crimes and crimes against humanity were committed under apartheid. Admittedly, this avenue places the additional burden on those seeking to prosecute an accused for a crime in breach of customary international law to prove that the crimes(s) in question were crimes under customary international law at the relevant time. However, at the very least, the crimes against humanity of murder and persecution have been recognised as forming part of customary international law since the post-World War II Nuremberg and Tokyo Trials. Furthermore, it is by now incontrovertible that the 1949 Geneva Conventions' grave breaches regime forms part of customary international law.

The Role of South African Courts in Applying and Developing International Criminal Law

Until recently, the seminal international criminal law cases in South Africa were the unfortunate *AZAPO* and *S v Basson* decisions. However, this changed dramatically with the *SALC* decisions which will be discussed below.[129]

Conclusion

While South Africa has been slow to do so, it has over the past ten years comprehensively incorporated international criminal law into its domestic legal order, and, with a little help from the courts, looks set to operationalise it fully over the next few years. However, there are some lingering questions about the domestic implementing legislation that need to be addressed, in order to make sure this process is successful.

As previously described, South Africa's idiosyncratic approach to international criminal law has generally permeated its implementing legislation. In fact, closer examination reveals no fewer than six discrepancies between the Rome Statute Act and the Geneva Conventions Act that are likely to create confusion and may undermine their operation.

First, there is considerable overlap between the war crimes covered by the Geneva Conventions Act and those covered by the Rome Statute Act: the latter all but subsuming the former.[130] This begs the question of which of the two will be applied and why. What is more, there are potentially three different definitions of non-international armed conflict to be applied, with varying "thresholds": the lowest being that of "Common Article III crimes"; followed by the Rome Statute Act, which requires a conflict to be "protracted";

129 "Strategically Litigating International Crimes at a Domestic Level – the Zimbabwe Torture Case, 80.

130 Coming as it did after the incorporation of the Rome Statute into South African law, the Geneva Conventions Act runs the risk of being superfluous from an international criminal law perspective. Both the 'grave breaches' regime and the 'Common Article III' regime are *in substance* already included in the Rome Statute Act.

followed by the highest threshold contained in "Additional Protocol II".

Secondly, the two pieces of legislation provide for different jurisdictional regimes over the same subject matter. The jurisdictional regime under the Rome Statute Act is more extensive than that of the Geneva Conventions Act. The former provides for universal jurisdiction over all war crimes (both international and non-international), whereas the latter provides for such jurisdiction only in respect of "grave breaches". Furthermore, while both provide for universal jurisdiction over "grave breaches", the Geneva Conventions Act makes no mention of the "presence" of the accused, whereas the Rome Statute Act does. To the extent that it is determined that this presence requirement is interpreted as a limitation on the prosecution of crimes under universal jurisdiction, this limitation will not apply in respect of "grave breaches" prosecuted under the Geneva Conventions Act.

Thirdly, while the Rome Statute Act does not contain any modes of liability, the Geneva Conventions Act takes a patchwork approach: incorporating some international criminal law-specific modes of liability and omitting others, and then adding a new one. As a result, prosecutors may have to choose between using one of these two prosecutorial regimes in circumstances where one provides for a better jurisdictional basis, and the other provides for a more appropriate mode of liability.

Fourthly, the Rome Statute Act (according to one widely held view) removes the personal immunity of heads of states and diplomats insofar as prosecutions under the Act are concerned. The Geneva Conventions Act makes no mention of immunity. This, again might place prosecutors in tactical dilemmas when it comes to prosecuting high-ranking officials. It also casts doubt on whether South Africa, customary international law obligations notwithstanding, has decided not to afford such immunity for international crimes – a position with potentially significant consequences for relations with other states, and hence not one that should be mired in uncertainty.

A fifth point of confusion must be noted. While the Rome Statute Act sets out specific procedures for prosecutions carried out under its authority – including a requirement that the National Director of Public Prosecutions sign off on any prosecution – the Geneva Conventions Act does not have an equivalent regime. As a result, it is presumably left up to "ordinary" prosecutors to bring cases under the Geneva Conventions Act, which not only creates potential conflicts in prosecutorial policy, but does not consider that such prosecutions require specialised skills and resources.

In addition to these concerns, clarity is needed on a number of other issues raised above, including the correct interpretation of section 7(4) of the Geneva Conventions Act and the possibility of bringing prosecutions by the direct application of customary international (criminal) law under section 232.

STRATEGICALLY LITIGATING INTERNATIONAL CRIMES AT A DOMESTIC LEVEL – THE ZIMBABWE TORTURE CASE

Angela Mudukuti[131]

Strategic litigation continues to be the method by which the Southern Africa Litigation Centre (SALC) contributes to the fight against international crimes. The case of *Southern Africa Litigation Centre and Another v The National Director of Public Prosecutions and Others*[132] – commonly known as the Zimbabwe Torture Case – is a prime example.

Where governments are afraid to act, civil society must navigate this space and aim for accountability.

Southern Africa Litigation Centre and Another v The National Director of Public Prosecutions and Others

This case was the first judicial pronouncement on South Africa's ICC Act. The events that gave rise to this case took place in Zimbabwe in March 2007, when state police raided the headquarters of the Zimbabwean opposition party, the Movement for Democratic Change (MDC), and subsequently tortured and detained a number of suspected and actual MDC members. Acts of torture included waterboarding, electrocution, and severe beatings. SALC, in conjunction with the South Africa based Zimbabwe Exiles Forum (ZEF), compiled a detailed dossier containing evidence of widespread and systematic torture implicating eighteen high-ranking Zimbabwean officials. The dossier was submitted by SALC to the South African Priority Crimes Litigation Unit of the National Prosecuting Authority (NPA) requesting that the authorities investigate these crimes pursuant to the ICC Act. The evidence in SALC's dossier demonstrated that the raid on the MDC headquarters and the subsequent acts of torture were not isolated and formed part of a larger campaign of state-sanctioned torture sufficient to fall under the definition of crimes against humanity.

More than a year after the submission of the docket, the NPA and the South African Police Service (SAPS) notified SALC that they would not be initiating an investigation into the allegations of torture as requested by SALC. SALC was of the view that the authorities had not dealt with the dossier in accordance with South Africa's obligations in terms of the ICC

131 Angela Mudukuti is the International Criminal Justice Project Lawyer at the Southern Africa Litigation Centre.

132 2012 (3) All SA 198 (GNP). At the Supreme Court of Appeal the case name changed to *National Commissioner of the South African Police Service and Another v Southern African Human Rights Litigation Centre and Another* 2013 (485/2012) 168 (ZASCA). At the Constitutional Court of South Africa, the case became the *National Commissioner of the South African Police Service v Southern African Human Rights Litigation Centre and Another* 2014 (CCT 02/2014) 30 (ZACC).

Act, and so had acted unlawfully. SALC accordingly approached the North Gauteng High Court seeking judicial review of the decision by the NPA and SAPS not to investigate.

The High Court[133]

The High Court was tasked with determining a number of issues including: the legal standing of the applicants; the nature and extent of South African authorities' obligation to investigate and prosecute international crimes; the requisite threshold to initiate an investigation; matters of jurisdiction; and the relevance of political considerations.

The authorities submitted that SALC had no legal standing and that SALC lacked sufficient interest to bring this matter to court. In response, SALC submitted that in accordance with South African law, an organisation can bring a matter before the court provided the matter is of public interest and being brought on behalf of people who cannot act in their own name. The Court agreed with SALC, indicating that denying legal standing would "lead to the untenable situation that would deny victims of international crimes standing in South African proceedings".[134]

The nature and extent of the obligation on the South African authorities to investigate and prosecute international crimes was central to this case, and the Court made it abundantly clear that South Africa has the obligation to investigate and prosecute crimes against humanity. The Court also shed light on the requisite threshold for the initiation of an investigation in terms of the ICC Act, and determined that there must be a "reasonable basis" upon which to open an investigation[135]. This is the same standard used at the ICC when the ICC prosecutor is deciding whether to initiate an investigation[136]. This determination by the High Court was significant because the ICC Act itself is silent on investigations, and SALC used relevant jurisprudence from cases brought before the ICC to demonstrate that the authorities had conflated different thresholds by using the sufficiency of evidence for prosecution standard, instead of the standard related to investigations. The authorities should have asked themselves whether there was enough evidence to open an investigation, and not whether there was enough evidence in the docket to prosecute.

The most important aspect of this case was the verdict on matters of jurisdiction. Understanding whether a South African court has jurisdiction over crimes against humanity perpetrated in Zimbabwe by Zimbabweans who visit South Africa, hinges on the correct interpretation of section 4 (3)(c) of the ICC Act, which states:

> "any person who commits [an ICC] crime outside the territory of the Republic, is

133 *Southern Africa Litigation Centre and Another v The National Director of Public Prosecutions and Others* 2012 (3) All SA 198 (GNP).

134 *Id*, 50.

135 *Id*, 87.

136 *Id*, 83.

> deemed to have committed that crime within the territory of the Republic if that person, after the commission of the crime, is present in the territory of the Republic".

The authorities argued that section 4(3)(c) should be interpreted to mean that South Africa could not exercise any form of jurisdiction over the crimes in the docket until the suspects were physically present in the country. SALC countered this argument by invoking section 4 (1) of the ICC Act which states that "[d]espite anything to the contrary in any other law in the Republic, any person who commits a [international] crime, is guilty of an offence". SALC argued that when section 4 (1) and 4 (3) (c) of the ICC Act are read together, the legislation confers jurisdiction on South African authorities to investigate alleged offences because section 4(1) relates to prescriptive jurisdiction (the power to make laws) and 4(3) pertains solely to enforcement jurisdiction (the power to enforce laws and rules). SALC explained that presence is required when exercising enforcement jurisdiction (to avoid trials in absentia), but not for prescriptive jurisdiction – and so presence was not required for investigations. The Court agreed with this argument, and rejected the authorities' view that investigations can only occur when the suspect is present in the country.

Judge Hans Fabricius of the North Gauteng High Court held that the decision not to investigate was unlawful and inconsistent with South Africa's Constitution, and therefore invalid137. The NPA and the SAPS were found not to have acted in accordance with their obligations under the ICC Act, as well as the National Prosecuting Authority Act 32 of 1998 and the South African Police Service Act 68 of 1995.138 The Judge ordered that they do the "necessary expeditious and comprehensive investigation of the crimes alleged in the torture docket". 139

The High Court judgment was particularly significant and unique in its tone and emphatic language, but, more importantly, it provided practical and substantive content to the obligations to investigate and prosecute international crimes. It was the first judgment to underscore South Africa's international criminal law obligations, and confirmed that South Africa would not be a safe haven for perpetrators of egregious crimes. This judgment also confirmed that civil society organisations do have the required legal standing to challenge government's failure to adhere to legal obligations, and demonstrated the vital role civil society can play when authorities are unwilling or when they have misunderstood their responsibilities.

The decision was taken on appeal to the Supreme Court of Appeal (SCA) by the NPA and SAPS, and was heard in November 2013.

137 *Id*, 93.
138 *Id*, 93–94.
139 *Id*, 94.

Supreme Court of Appeal[140]

A full bench of the SCA heard the case, and the following three issues were tackled: whether South African authorities are competent to investigate allegations of international crimes when the suspect is not present in South Africa; whether investigations and prosecutions are subject to the same jurisdictional requirements under the ICC Act; and if there is indeed competence to investigate, whether there is a duty to investigate in every situation. Submissions from all parties remained largely unchanged, and judgment on the matter was issued on 29 November 2013.

The SCA held that SAPS is both empowered and required to investigate the crimes against humanity detailed in the dossier. The judgment effectively set aside the High Court ruling and distanced itself from some of the statements made by Judge Fabricius in his High Court judgment. The SCA opted for a more careful approach and made it clear that, although it was sufficiently empowered to order that an investigation take place, it was not within the Court's mandate to tell the authorities how to go about their work. The SCA also made it clear that this ruling is intrinsically linked to the facts of the case and the evidence in the dossier, and so removed the concern that its judgment would open the flood gates and make South Africa responsible for core crimes committed everywhere. Despite two judgments in favour of investigation, the matter did not end there as the SAPS took the SCA judgment on appeal to the Constitutional Court.

Constitutional Court Proceedings[141]

By this time the NPA had fallen out of the matter leaving the SAPS to tackle the SCA judgment. The appeal was heard in May 2014, and judgment was reserved. The argument in this Court was limited to whether SAPS has the power to investigate international crimes committed outside South Africa if the suspect is not present within South Africa's territory. The question of presence became the focus of the case as it was commonly accepted by both parties that prosecution cannot be commenced without the physical presence of the suspect in the country. However, now the Constitutional Court has to determine whether the link between investigations and prosecutions is so close that the same presence restrictions apply to investigations. If the Court decides that SAPS has the power, the next question for the Court to consider is whether there is a duty to investigate in this case, and whether the SCA was correct in ordering an investigation.

The SAPS argued that the SCA had usurped the power of the SAPS by ordering an investigation, and submitted that the correct decision would be to remit the decision back to the SAPS to allow the relevant bodies to make decisions that fall within their area of

140 *National Commissioner of the South African Police Service v Southern African Human Rights Litigation Centre* 2013 168 (ZASCA). Available at http://www.southernafricalitigationcentre.org/1/wp-content/uploads/2012/11/Supreme-Court-of-Appeal-Judgment.pdf.

141 *National Commissioner of the South African Police Service v Southern African Human Rights Litigation Centre and Another* 2014 (CCT 02/2014) 30 (ZACC). Available at http://www.southernafricalitigationcentre.org/1/wp-content/uploads/2012/11/Judgment.pdf.

expertise. They argued that it would be against the separation of powers doctrine for the Court to order an investigation. The SAPS also submitted that the presence of the suspected perpetrators in this case was highly unlikely. They contended that the SCA had employed an "extreme variant of absolutism as regards universal jurisdiction"142 by expecting the SAPS to investigate the docket. The SAPS remained adamant that they simply did not have the power to investigate crimes committed outside the country unless the suspects are present in South Africa, and that even if they did have the power to investigate, they should not be expected to do so in this case as there is no duty to investigate.

SALC's submissions focused on the state's duty to investigate and prosecute crimes against humanity under the Rome Statute and the ICC Act reiterating that the SAPS have the power to investigate crimes against humanity committed in Zimbabwe by Zimbabweans who visit South Africa. SALC also argued that international law does not prohibit "investigations in absentia",143 and provided the Court with a number of examples of different approaches countries take to investigations, showing that there is no unified international law rule requiring physical presence before an investigation can be initiated. SALC added that, the SAPS's complaint that the SCA substituted its decision not to investigate instead of referring the matter back to the SAPS for consideration was without merit. The Court reserved judgment.

At this level of adjudication, the case attracted four *amici curiae* (friends of the court) submissions including distinguished experts like Professor John Dugard whose submission highlighted that there is nothing in international law that prohibits investigations without physical presence in the territory of the investigating country.

While the outcome is yet to be determined, this case has already made an impact on international criminal justice in South Africa. Regardless of the ruling, great strides have been made in taking a case such as this to the highest court in South Africa. Bringing this issue to the attention of the judiciary and raising awareness about the state's responsibilities in terms of international criminal law will go a long way towards ending impunity. The Constitutional Court could rule that there is no power to investigate. However, should the Constitutional Court rule that the SAPS are empowered to investigate, but there is no duty to investigate, that alone is a victory for international criminal justice as it will facilitate investigations of other cases in the future. Should the Court indicate that there is also a duty to investigate, this too will set in motion the actualisation of justice for international crimes at a domestic level.

Role of Civil Society

Civil society can and should play a role in promoting international criminal justice at

142 SAPS' Written Submissions CCT 02/2014, 4. Available at http://www.constitutionalcourt.org.za/Archimages/21999.PDF.
143 Respondents' Submissions CCT 02/14, 10. Available at http://www.constitutionalcourt.org.za/Archimages/22022.PDF.

the domestic level. Civil society must know the law or engage with experts who can assist in using the law to protect victims and to seek justice. Civil society must enhance this engagement and actively participate in strategic, well-conceived litigation to set the correct precedent. The ICC should not be the only mechanism tasked with accountability for egregious crimes.

With regard to matters like universal jurisdiction that can raise political concerns, civil society as, neutral, non-aligned bodies should advance the view that political considerations should not be given precedence over accountability for human rights violations. Public interest litigation is a very good way to raise awareness and ventilate complex issues like universal jurisdiction.

Civil society must also find the correct forum to air their issues. In South Africa, the courts are a good place to start. Civil society must also work together to achieve united goals. For example in the Zimbabwe Torture Case, SALC worked in conjunction with the ZEF.

Where the governments are afraid to act, civil society must navigate this space and aim for accountability. Litigating international crimes at a domestic level is not without its challenges. The Zimbabwe Torture Case has been ongoing since 2008, and years later the matter has not been resolved. However, important ground has been covered and international criminal justice will mark the Zimbabwe Torture Case as the point where public interest litigation was used to try to secure accountability for crimes regardless of where they were perpetrated.

CLOSING THE IMPUNITY GAP IN AFRICA – HOW TO MOBILISE AND ENCOURAGE DOMESTICATION OF ICC LEGISLATION

Stephen A Lamony[144]

National governments and courts retain primary responsibility to exercise jurisdiction in the Rome Statute system. States must implement all of the crimes under the Rome Statute into domestic legislation, as well as enact cooperation legislation. Implementation also provides opportunities for a state to modernise criminal and procedural codes,

The international and domestic justice goals will be one and the same if domestication of the Rome Statute is encouraged.

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strengthen the rule of law, and advance greater accountability within the country. The Coalition for the ICC (CICC) has been working to assist national jurisdictions to domesticate the Rome Statute.

A comparative review of International Criminal Court (ICC) implementation legislation reveals that the laws are not uniform in terms of quality. In some cases, not all conduct (or sub-categories) of the crimes contemplated within the Rome Statute are included in domestic legislation (i.e. some laws include certain war crimes but not all of those included in article 8 of the Rome Statute). Other laws implement international crimes at the domestic level adequately, but exclude the implementation of certain principles of international criminal law contemplated within the Rome Statute (i.e. the irrelevance of immunities or the non-applicability of statutes of limitations). Finally, other laws go beyond the Rome Statute and incorporate higher standards or thresholds within their domestic legislation. This shows that the international treaties include minimum requirements, yet states are not impeded from including the highest protective measures. One of the challenges in advancing domestic implementation of international crimes is precisely ensuring the adoption of robust legislation that will allow for the prosecution of ICC crimes nationally, as well as the establishment of provisions that will permit states to effectively cooperate with the ICC.

To date, approximately 65 states have adopted partial or full implementation legislation on cooperation and complementarity with the Court, and a further 35 have advanced drafts in circulation, with a number of other states likely to produce drafts in the near future. The Coalition for the International Criminal Court (CICC) has created a compilation of the status of national domestic legislation of all countries, and updates it yearly.

To encourage domestication of the Rome Statute the following steps are recommended. Civil society organisations (CSOs) should be ready for when an opportunity presents itself. For example, Mali's Minister of Justice was present at a CICC/National Coalition conference in Bamako in May 2014, and the CICC was able to present him with draft implementation legislation at the event. CSOs should also involve themselves in sustained follow-up efforts as this will ensure that none of the domestic implementation drafts get lost in the committees. In some unnamed countries, the CICC has been following draft legislation for more than five years. The CICC has also been working with the Assembly of State Parties to the Rome Statute (ASP) Secretariat and state parties on positive complementarity initiatives, seeking, for example, to build capacity at the national level via projects.

Supporting the building of expertise that includes training judges, police, prosecutors, immigration authorities, as well as sharing best practices/lessons learned from implementation and complementarity experiences will encourage domestication of ICC legislation. Trying to match needs at the national level with expertise and assistance available internationally would make a tremendous impact. The CICC continues to assist

the process by advancing efforts and discussions that came out of the stocktaking exercise at the Review Conference in 2010, which included a focus on complementarity. The CICC has also assisted with a number of additional efforts by organisations, including a complementarity toolkit being produced by the European Union (EU) and the ASP's project on complementarity assistance matching.

In states where no discussion pertaining to domestication exists, the creation of a discussion forum between non-governmental organisations (NGOs) and other civil society groups is required as there must be some sense of ownership in the process. For example the Philippines National Coalition for the ICC were not content with the draft legislation provided to them, and thus formed a committee of their own national experts to create a product that was entirely theirs. The same process occurred with the Coalition for the ICC in Cote d'Ivoire, and, after a conference last July, implementation legislation was drafted and presented to the Ministry of Justice. Civil society groups must work with a common plan of action in order to orchestrate advocacy efficiently. Therefore, national civil society conferences designed to create a common strategy can be particularly useful, both in the beginning stages and as a review.

Actively involving the press in this process is necessary and using appropriate context specific language. This is because one must sensitise the media to the proper terminology with regards to Rome Statute language and ensure that proper context is given. For example, whenever the CICC organises a conference, local media are contacted in advance to ensure the story is communicated effectively. The CICC's communications department also works to ensure that laymen's terms can be used in areas where technical language is more alienating.

To encourage domestication of ICC legislation organisations should facilitate government partnership through conversation. The CICC monitors progress in target countries and finds windows of opportunity to advance legislation (for example, from the drafting committee to cabinet, or from cabinet to parliament, congress, or house of representatives). In many cases, movement forward in the process is followed by months, or even years, of delay, often due to elections, which can shift the national focus to other priorities or usher in leaders with less favourable or less informed views on international criminal accountability. Long term, sustained relationships that engage contacts in government and parliament on these issues are necessary. Nobody accomplishes ratification or legislation overnight; rather, it is a continual conversation that requires cooperation between civil society and government officials.

At the NGO level, relationships should be particularly developed with core ministry of justice and office of the president officials working on these issues, as well as heads of legal, parliamentary, or house of representative committees responsible for review of policies, and oversight over the ministry of justice and law reform. These contacts need to be updated from time to time as those who hold office change, and it is important to

share and present ratification and implementation information with government officials –- particularly on domestication or ICC legislation. Building these relationships allows government officials to update CSOs about developments in their specific countries, and, in turn, government officials will approach more experienced and well-established NGOs and provide them with copies of their draft legislation for comment and careful analysis. This is aimed at strengthening their draft bills before they are passed into law. For example, last year, the Ghanaian government approached the CICC Africa team specifically for comments on the ICC bill. In the past, the Legal and Parliamentary Affairs Committee of the Ugandan Parliament has also approached the Ugandan CICC (UCICC) and Amnesty International for comments.

NGOS could also be invited to participate in drafting legislation or to help with consultations with respect to citizens' views. For example, during the period from 2004 to 2007, the Legal and Parliamentary Affairs Committee of Uganda worked with the UCICC and Advocates for Public International Law in Uganda in order to seek the views of Ugandans on the draft ICC bill.

CSOs should provide technical support for domestic legislation implementing ICC legislation, and there must be sustainable technical assistance linked with tactical lobbying for the implementation of laws. Moldova is a good example, following Moldova's ratification of the Rome State in October 2010, it adopted amendments to the Criminal Code. This included provisions on genocide, crimes against humanity, and war crimes, as well as the use of prohibited means in the conduct of war adopted by the Parliament in April 2013 and promulgated in May 2013.

The CICC was informed by the Moldovan Ministry of Justice that it is preparing a draft law on cooperation with the ICC as Moldova has no specific provisions on this matter. The Ministry of Justice started analysing the legislation in 2013 and committed to finalise the process. The CICC consulted with the Ministry of Justice and provided examples of cooperation legislation to support the process. The CICC also encouraged the EU to raise this issue in the regular EU-Moldova Human Rights Dialogue.

The ICC Complementarity Extranet[145] is a very useful tool. It is intended to provide an information base on events relating to complementarity, to identify the main actors and their activities, and to facilitate contacts between donor states, international and regional organisations, civil society, and recipients. All of this is designed to strengthen national capacity to investigate and prosecute the most serious crimes of concern to the international community.

The ICC is merely one issue amongst a range of other issues on which a government official works. Thus, advocacy means going the extra mile and laying out the research and

145 For more information please see http://www.icc-cpi.int/en_menus/icc/press%20and%20media/press%20releases/press%20releases%20(2011)/Pages/icc-asp-20110802-pr707.aspx

steps ahead for the official, making civil society's role even more crucial.

The benefits of implementation legislation include that it can have a positive impact on national legal systems, leading to an increase in national prosecutions and stronger human rights protections. Many national laws are outdated, incomplete, and include serious shortcomings in terms of human rights standards. The ICC implementation process provides an opportunity to reinvigorate the modernisation of criminal and procedural codes in countries around the world, leading to better national laws with higher standards of justice and more complete jurisdiction over grave crimes. Once these laws are in effect, they can then be applied to a range of national cases—including cases that are outside the ICC's mandate. In this way, work on implementation has a greater impact and purpose, beyond simply the ICC.

The international and domestic justice goals will be one and the same if domestication of the Rome Statute is encouraged. It is incredibly important to attend meetings with government officials at national, regional, and international levels if the opportunity presents itself. This is to advocate for changes to draft protocols, oppose legislation, or discuss domestic goals pertinent to NGOs.

The CICC is leading by example in Africa, Latin America, and Europe, where most of the countries have ratified the Rome Statute already. As such, maintaining support and promoting implementation are at the forefront of the CICC's objectives. In some states in the Middle East and north Africa, as well as with major regional powers such as China and India (where ratification is unlikely in the short-term), the CICC is gearing efforts towards strengthening national legislation as a concrete short-term goal.

More collaboration between the Legal Advisory Section of the International Committee of the Red Cross is encouraged, as it does a lot of work on implementation and ratification, especially on international humanitarian law and war crimes issues. The International Committee of Red Cross officers based in different regions and countries may be able to provide some useful comments on draft bills. Other possible partners could include the Legal Section and Special Advisory Services Division of the Commonwealth Secretariat.

The involvement of necessary funders and other development partners is encouraged particularly when lobbying the government and parliament, if necessary. However, this could backfire, especially if the government feels this is too heavy-handed. This must only be done in consultation with local partners.

The strength in utilising domestic legislation to request governments to act in accordance with legislation that supports international norms must be maximised. For example, during Bashir's visit to Nigeria, the Nigerian Coalition for the ICC pursued legal action through their country's High Court, requesting that he be arrested. In Kenya, the Kenyan Constitution itself states that "immunity of the President ... shall not extend to a crime

for which the President may be prosecuted under any treaty to which Kenya is party and which prohibits such immunity". [146]

Encouraging domestication will go a long way in the fight for international criminal justice.

146 Section 143(4), Constitution of Kenya, 2010. Available at https://www.kenyaembassy.com/pdfs/The%20Constitution%20of%20Kenya.pdf.

CHAPTER EIGHT: RECOMMENDATIONS

After two days of deliberations, the delegates held a strategy session to decide the way forward. All the thoughts and views expressed during the conference were condensed into the following recommendations:

- Civil society must consolidate its efforts and work in networks and groups to achieve mutual objectives. This includes information sharing, creation of databases, and the facilitation of regular and focused meetings.

- **Domestication of International Criminal Court (ICC) legislation** must be encouraged and pushed in countries that have not domesticated the Rome Statute. To achieve this goal:

    - Domestication must be made relevant to the needs of the countries and the needs of the communities because if it is approached as a stand-alone issue it may not get the necessary support. Suggested approaches included connecting the domestication of ICC legislation to other relevant issues like sexual and gender based violence, use of children in combat, and matters of impunity. This approach will increase the chances of securing support from society.
    - Advocacy should be used as a tool for the domestication processes.
    - The identification of key government personnel who can help drive the agenda is recommended. Establishing a relationship with a particular office as opposed to an individual is encouraged, as individuals move on or retire. However, (depending on the context) the message must be structured in such a way that avoids creating conflict or animosity with government, and rather builds trust with government personnel willing to assist with the process. In addition, messages need to be tailored for different audiences. For instance, governments are more accommodative of analysis as opposed to newsletters, and take the former more seriously. Judges, on the other hand, want information to be presented before them in a more systematic legal manner. Therefore, civil society needs to establish context-specific advocacy.
    - Civil society must anticipate possible hurdles and challenges to the domestication process and then plan ahead.
    - In countries where a draft bill for domestication exists (e.g. Botswana), where possible, a commentary or analysis of proposed bills should be carried out to

provide another advocacy tool.

- Where domestication is unlikely to happen soon **positive complementarity** must be encouraged. This includes:
  - Harmonising existing penal codes with the Rome Statute.
  - Providing training on ICC issues and domestic accountability measures.
  - Capacity building for law enforcement, civil society actors, decision makers, policy makers, political and national leaders, the legal fraternity, military personnel, and the judiciary.
  - Education of the general public with regard to their rights and where to seek redress must be focused upon. The general public must be assisted to understand ICC issues and to appreciate the positive impact that can be made by domesticating the Rome Statute.
  - Coupling litigation with truth and reconciliation mechanisms that have clear mandates and a clear transitional justice policy.
- **Cooperation** between African states and the ICC should be encouraged. This includes:
  - Assisting with relocation of witnesses, incarceration of convicted persons, and the lawful detention of people wanted by the ICC.
  - Promotion of access to all relevant information, as it will facilitate transparency and cooperation.
  - Promotion of access to international and domestic justice.
  - Extensive and frequent critical engagement with functioning judiciaries.
  - Intensifying and consolidating efforts to support victims. Support should be legal, financial, and psychosocial.
  - Documenting and accurately recording ongoing violations, as this will lay the ground work for successful prosecution of perpetrators in the future. This is particularly relevant in countries where justice is constrained by political obstacles.
  - Aggressively and constructively engaging existing regional and international mechanisms.
  - Better use of the media to spread a positive message promoting justice, accountability and cooperation with the ICC.

Conference Participants

#	Name	Title	Organization	Country
1	Rose Hanzi	Human Rights Defenders Project Manager	Zimbabwe Lawyers for Human Rights	Zimbabwe
2	Stella Ndirangu	Programme Manager	International Commission of Jurists	Kenya
3	Obby Chibuluma	Information/ Advocacy Officer	SACCORD	Zambia
4	Melissa Lynch	Programme Advisor	Ditswanelo	Botswana
5	Ibrahim Tommy	Director	Centre for Accountability and Rule of Law	Sierra Leone
6	Joseph Bikanda	Coordinator	East and Horn of Africa Human Rights Defenders Project	Uganda
7	Timothy Mtambo	Director	Centre for Human Rights and Rehabilitation	Malawi
8	Jemima Njeri	Senior Researcher	Institute for Security Studies, International Crime in Africa Programme	South Africa
9	Otillia Maunganidze	Researcher	Institute for Security Studies, International Crime in Africa Programme	South Africa
10	Jane Bako	Project Officer	Ugandan Coalition for the ICC	Uganda
11	Tšoeu Petlane	Director	Transformation Resource Centre	Lesotho
12	Hope Chanda	Chief Executive Officer	Law Association of Zambia	Zambia
13	Mohamed El Moctar Mahamar	President	Malian Commission for Human Rights Defenders	Mali
14	Ali Ouattara	Chairperson	Ivorian Coalition for the International Criminal Court	Ivory Coast
15	Jeanne Elone	Program Officer	Trust Africa, International Criminal Justice Fund	Senegal
16	Richard Malengule	Director	ABA ROLI's Women's Justice and Empowerment Program	DRC
17	Chino Obiagwu	Chair	Nigerian Coalition for the ICC	Nigeria

18	Esther Waweru	Program Officer	Kenyan Human Rights Commission	Kenya
19	Angela Mudukuti	ICJ Project Lawyer	Southern Africa Litigation Centre	South Africa
20	Eric-Aime Semien	Representative	Ivorian Observatory for Human Rights	Cote D'Ivoire
21	Stephen Lamony	Senior Advisor	Coalition for the ICC	USA
22	Joyce Freda Apio	Representative	Parliamentarians for Global Action	Uganda
23	Njonjo Mue	Program Advisor	Kenyans for Peace with Truth and Justice	Kenya
24	Lydia Muthiani	Deputy Executive Director	Coalition on Violence Against Women	Kenya
25	Libby Marsh	Director, Foundations and Program Liaison Office	Human Rights Watch	USA
26	Rosemary Tollo	Journalist	Journalists for Justice	Kenya
27	Christopher Gevers	Lecturer	University of Kwazulu Natal	South Africa
28	Eric Witte	Senior Project Manager	Open Society Justice Initiative	Belgium

SOUTHERN AFRICA
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