

CHAPTER 5: THE ROLE OF CIVIL SOCIETY

I think it is clear that there is a new diplomacy, where NGOs, peoples from across nations, international organisations, the Red Cross, and governments come together to pursue an objective. When we do – and we are determined, as has been proven in the land mines issues and the International Criminal Court – there is nothing we can take on that we cannot succeed in, and this partnership ... is a powerful partnership for the future.

KOFI ANNAN¹
FORMER UN SECRETARY-GENERAL, 1999

Civil Society: A Force to be Reckoned With

“In a globalising world, preventing violent conflict and building sustainable peace requires complex strategies. These need to address structural causes of conflict, many of which may be inherent in the global system. To do so effectively **requires cooperation between civil society actors at the local, national, regional and global levels and with governments, intergovernmental organisations** and, in some cases, businesses.

CSO-led processes are often focused on enabling ordinary people to articulate what they really need and then working to find a common ground from which they can work to establish peaceful co-existence. Instead of the use of force, civil society actors generally rely on their creativity by stimulating a new sense of what is possible and how it can be achieved. This capacity is rooted, ultimately, in a sense of agency: the ability to act together with others to change the world.

They often **combine formal legal strategies with approaches that aim to foster public awareness** and the transformation of conflict attitudes and relationships. CSOs can bear witness to violations and undermine the moral authority and legitimacy of abusers. The very act of public disclosure and/or denouncing the situation can make the truth evident in ways that are very difficult to ignore and may empower people to take action to change the situation. This exposure sometimes stimulates conditions that lead to the collapse of regimes over the long term. **They can also dissuade the wider public from accepting or anticipating in acts that enable abuse and oppression.**

Civil society groups can analyse the situation, formulate recommendations, develop policy options and engage in policy dialogue to address conflicts. They can also mobilise advocacy campaigns to generate political will among decision-makers and implement strategies to achieve the desired results. **Thus civil society efforts at raising public awareness about a particular set of problems is intertwined with efforts to motivate political decision-makers to take action to address them”.**²

The revival of the international criminal justice project in the 1990s was due in large part to a global movement of CSOs committed to the creation of an international criminal court to address the problem of impunity. CSO involvement began after the General Assembly requested the International Law Commission in 1989 to reconsider the issue of establishing an international court. These forces coalesced around the Coalition for an International Criminal Court (CICC) – an umbrella body of 31 international CSOs including Amnesty International, Human Rights Watch and the Fédération Internationale des Ligues des Droits de l’Homme, established in 1995 to support the development of the ICC. The Coalition was instrumental throughout the drafting and adoption of the Rome Statute, and without the active involvement of these CSOs, and the co-ordination of their efforts through the Coalition, it is likely that the ICC would not have been formed at all or, if it had been, it would have been significantly less independent and powerful.

As the drafting process for the Statute unfolded, CSOs formed partnerships with states on issues of mutual concern, in particular to counteract efforts to derail the process by a small number of powerful states unhappy with the current draft, and the related issues of the ICC’s jurisdiction and the role of the Security Council in its operation.³ In addition, CSOs began to drum up support

for the court globally through the dissemination of information and strategic advocacy.⁴

This gradual evolution of CSO involvement continued until the Rome Conference, at which time the Coalition consisted of over 800 organisations from all over the globe, 236 of whom were accredited to participate in proceedings.⁵ Ahead of the conference the Coalition – in conjunction with the Like Minded Group of States, a coalition that included a number of African states – agreed on a list of guiding principles that were to inform their participation in the different working groups. These included securing universal jurisdiction for the ICC over international crimes, the principle of complementarity, an independent prosecutor, no role for the Security Council, provisions for victim participation and fair trial guarantees.⁶

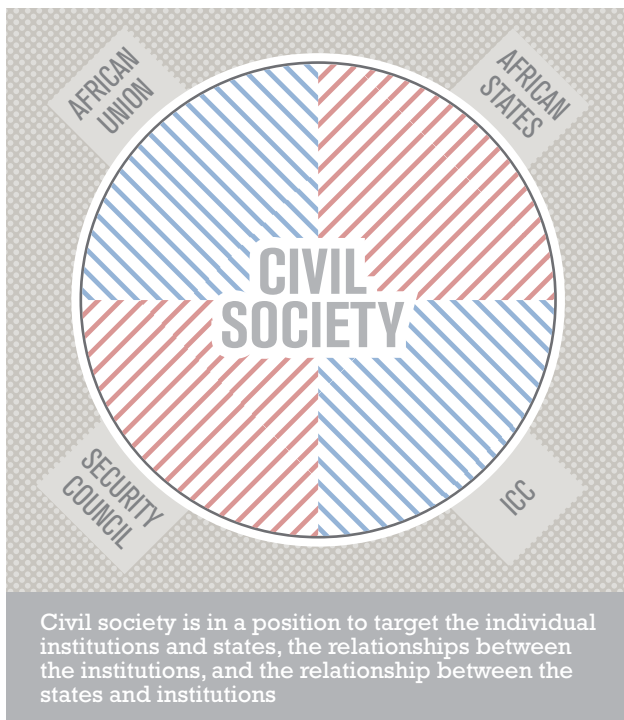
The extensive role played by CSOs in Rome was commended and Kofi Annan noted the “unprecedented level of participation by civil society in a law-making conference”.⁷ While the CSOs were unable to secure every position they set out to achieve at Rome, their influence is clear in the final outcome, particularly insofar as the independent prosecutor and a limited role for the Security Council is concerned.

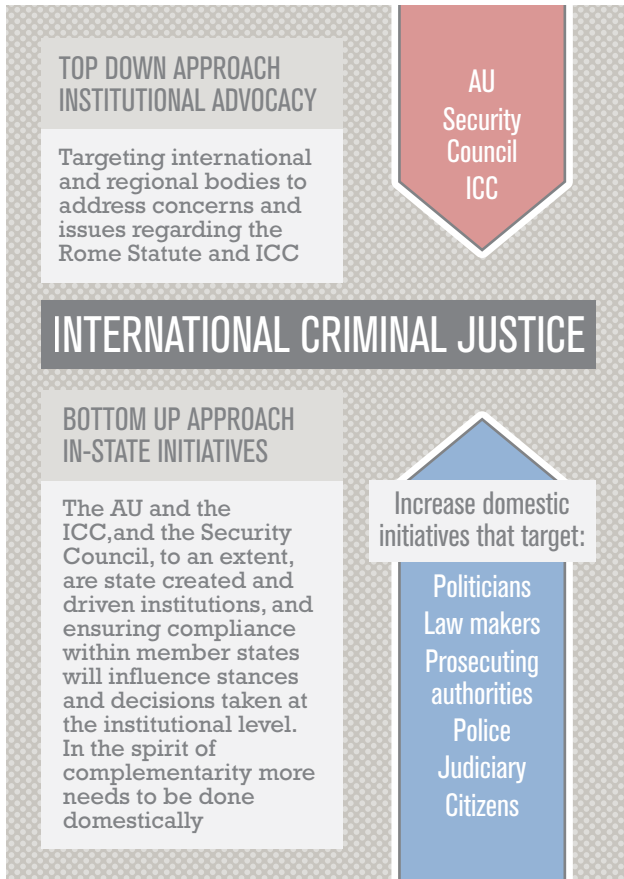
Equally important was the impact this process had on the role and function of CSOs within the international diplomatic sphere more generally. As Pace and Schense note:⁸

“The constructive evolution of coordination among governments, and between governments, civil society and international organizations, and the influence of their cumulative contributions to the [ICC] signal a significant success for this new approach to international diplomacy.”

This “new diplomacy” – “where NGOs, peoples from across nations, international organizations, the Red Cross, and governments come together to pursue an objective”⁹ – has continued into the operationalisation of the Rome Statute and the implementation of the international criminal justice project generally. After the adoption of the Rome Statute, the Coalition’s attention quickly turned to securing universal ratification of the Statute.

The success and impact of the Rome Statute and ICC, however, cannot be sustained on signatures and ratifications alone. Paper promises will not see justice done and the biggest challenge is ensuring that states





that are party to the Rome Statute implement the principle of complementarity and cooperate with the ICC. The Open Society Foundation aptly notes that:

"[I]t is clear that the ICC will only ever be able to process a handful of cases at a time. It can serve as a court of last resort for the worst and most difficult cases, where local capacity and (usually the greater hurdle) political will to deal with them are absent. But without the proliferation of other credible forums, there will be insufficient justice for victims of most international crimes, even where the ICC has launched investigations. Fulfilling the Rome Statute's aspiration that 'the most serious crimes of concern to the international community as a whole must not go unpunished' requires broad efforts to enable local justice mechanisms to address war crimes, crimes against humanity, and genocide."¹⁰

Following the successful adoption of the Rome Statute, CSOs' attention turned to campaigning for its universal ratification and ensuring that the Statute's objective of punishing those individuals most responsible for international crimes is carried out impartially and

effectively. This requires activism in respect of both the work of the ICC, as well as the domestic prosecution of international crimes under the principle of positive complementarity. Such is the impact that CSOs had on the revival of the international criminal justice project, and continue to have in respect of its implementation, that they are rightly considered the third leg of the International Criminal Justice stool – without which the project could not stand.

Conversations with African Civil Society – Challenges¹¹

As the ICC enters its second decade, CSOs should question where best to focus their efforts.

While the discourse on issues of international criminal justice is extensive, it is clear after speaking to CSOs from the DRC, Malawi, Sierra Leone, Zambia, Kenya, Tanzania, Nigeria and South Africa, that knowledge of the international criminal justice project is limited, especially within governments and among African citizens.

Regional and institutional advocacy has been relatively consistent to date. However, while it is true that what happens at a regional and institutional level – AU, ICC and Security Council – is an indication of the state of the support for the international criminal justice project, it is not the sole determinant of the project's success or even a true indicator of where individual countries stand. There is a lot of space for civil society to advocate for international criminal justice issues, and there is a dynamic relationship which demonstrates that the international criminal justice project is made up of a number of components, each providing opportunity for CSO involvement. Already, a number of CSO initiatives and advocacy campaigns have been launched in respect of the AU's relationship with the ICC. It is, however, essential that CSOs do not under-advocate in other areas.

Preoccupation at the intra-institutional level, while necessary, should not detract from the promotion of international criminal justice initiatives at the domestic level. Targeted action must occur at both the institutional and regional level (**top down**) but also within the states that constitute the institutions and regional organisations. Greater advocacy within countries for support for the Rome Statute is needed (**bottom up**) and will inevitably inform and possibly influence the debate within the deliberations of the bodies and institutions concerned.

Bottom Up – Bringing International Criminal Justice Home

Although the ICC has been in operation for over ten years, there still appears to be little awareness of it within African societies. Support for the ICC requires the buy-in of governments and civil society but building this support base requires educating all sectors of society on the basics of international criminal law. Ibrahim Tommy, the director of the Centre for Accountability and Rule of Law (CARL) in Sierra Leone, noted that international criminal justice, “is still a fairly new concept and will require time to get wider public acceptance. The uneven application of [international criminal justice], in the views of many, is also a reason for the general sense of suspicion that characterises our efforts.”¹²

There is clearly a need for outreach in countries that are emerging from conflict but perhaps even more pressing is ensuring that the general African public appreciates and understands the importance of the international criminal justice project, even if they themselves are not victims. Tommy, who has been involved in international criminal justice issues in Sierra Leone since the end of the conflict that led to the establishment of the SCSL, has worked extensively with government officials, CSOs and the general public.

He cogently explains why international criminal justice has not been embraced:

*“Their views can be summed up in three expressions: **inadequate knowledge, suspicion and irrelevance**. Ordinary citizens and civil society need more education, while government officials are plainly suspicious of efforts to promote [international criminal justice] on the continent. Their suspicion has led them to even question its relevance, arguing that it’s more important to focus on the ‘serious economic challenges’ facing the continent.”¹³*

The principle of complementarity envisages a system in which national jurisdictions take the lead in the investigation and prosecution of international crimes. Analysis of international criminal justice must also take place at the national level and there is a need to foster domestic debate. Obby Chilumba from the Southern African Centre for the Constructive Resolution of Disputes (SACCORD) in Zambia, and Luke Tembo of the Centre for Human Rights and Rehabilitation (CHRR) in Malawi, observed that because Zambians and Malawians were not the victims of international crimes, the international criminal justice project was not seen as an issue that warranted national concern. The belief that

only countries in which international crimes are being committed need concern themselves with international criminal justice, has resulted in many countries not engaging with these issues.

This view is shared by Georges Kapiamba, the director of the Congolese Association for Access to Justice (CAAJ). He is of that opinion that:

*“The difficulty, I think, is convincing those countries – their governments, their people and civil society – that think that they do not need to focus on international criminal justice because they live in relative peace. They must remember that peace today is no guarantee for peace tomorrow. What happened in Kenya, Syria, Mali and the Ivory Coast was not predicted. **A national appreciation for international criminal justice can guarantee some form of protection and justice for future generations that may fall victim to instability and civil unrest. It is a safety net, one which I hope no country ever has to use.**”¹⁴*

Tembo noted that without an acceptance of and appreciation for international criminal law, when a country’s obligations were triggered, civil society was not prepared to handle the situation. He said that this became starkly apparent when the CHRR learnt that indicted Sudanese president, Bashir, was due to visit Malawi:

*“There were a lot of challenges that we faced but prime amongst them **was capacity of most civil society organisations in Malawi, both technical and financial**. The issue of the ICC and how it operates in Malawi is still not well comprehended within the CSO and government machinery. There is a need to have CSO efforts consolidated in Malawi.”¹⁵*

The result is that international criminal justice only features if and when the need arises and the work in relation to international criminal justice has been intermittent and lacking comprehensive recourse and skills capacitation.

According to Kapiamba, in post-conflict states such as the DRC, there is perhaps a greater appreciation for institutions like the ICC (and the same can be said of the SCSL and the ICTR), and in his work he has found “that people are interested in the role of [international criminal justice] in the promotion and protection of human rights, instead of using violent means, but victims believe that only the ICC can respond to their claims”,¹⁶ underscoring the need for a credible domestic

process. But even when there is an appreciation of international criminal justice, capacity related challenges and political willingness hamper tangible progress.¹⁷

International Criminal Justice in Africa – Problems of Perception and Political Unwillingness

In SALC’s discussions with civil society, it is clear that anti-ICC rhetoric has been used to justify states’ refusal to adhere to their obligations under the Rome Statute.

Tembo believes that:

“The most important thing about international criminal justice in the African context is that it still faces resistance because of the ‘western driven aimed at African leaders’ tag. There is a need to deal with this tag before it is fully embraced in Africa. There is a need to scale up projects and programmes to reach out to as many people as possible so they can start appreciating how it works and why Africa needs it.”¹⁸

Tommy of CARL in Sierra Leone agreed, noting that:

“African civil society should help ‘heal’ the deep-seated distrust between African governments and the ICC. This should be priority number one. There’s massive need for public education in order to bring the rest of the peoples of the continent onboard the ICJ wagon.”¹⁹

The DRC’s Kapiamba believes that this can be overcome and that civil society should “**strengthen legislative advocacy**”. Outreach and sensitisation must extend to “**political actors**” because they too should “**be educated on the benefits of the domestication of the ICC Statute**”.

Nicole Fritz, the executive director of SALC, believes that these challenges can, to an extent, be addressed by ensuring that domestic jurisdictions are the primary forum for dispensing international criminal justice.

“The primary realisation of international criminal justice must be domestically based – through complementary initiatives – upholding and strengthening domestic legal systems to the advantage not only of the international criminal justice system but rule of law generally.”²⁰

The key challenges facing civil society actors are:

Political unwillingness as a result of:

- A lack of understanding of international criminal law;
- Acceptance of arguments that the ICC is biased against Africa;
- The belief that other priorities are more pressing for African states;
- The general public is unaware of international criminal justice and its importance; and
- Civil society does not have the technical or financial capacity to communicate and advocate for greater support of international criminal justice nationally.

This **Report** will hopefully be a starting point for organisations working on issues of international criminal justice in Africa. It is intended that this Report will assist CSOs in communicating the value of international criminal justice in their work and to highlight and demonstrate that they are not alone on this journey.

Specifically, the Report aims to capacitate civil society (to **create awareness, combat political unwillingness, involve citizens and affected persons and inform both government actors and citizens** of the benefits of embracing and supporting the international criminal justice project) so that they might strengthen individual states’ support for international criminal justice which, in turn, will ensure that African countries:

- Are able and willing to cooperate with the ICC when called upon to do so, and
- Give effect to the principle of complementarity through the investigation and prosecution of international crimes in domestic courts.

WHAT CAN CIVIL SOCIETY DO?



“Instead of just focusing on the leaders, as has so often been the case, we need to bring the public along through extensive public education and advocacy efforts.”
Ibrahim Tommy, Centre for Accountability and the Rule of Law, Sierra Leone

“Communities are not informed about the ICC and ICJ - awareness levels are very poor.”
Obby Chibuluma, SACCORD, Zambia

“Priorities of African civil society for the next two years should be public awareness of the activities of the ICC and of the role of political leaders on strengthening domestic justice to fight impunity at the local level. The ICC will not take care of all cases. We need to strengthen legislative advocacy. Political actors and society should be educated on the benefits of the domestication of the ICC Statute.”
Georges Kapiamba, Congolese Association for Access to Justice, DRC

“Currently in Malawi there are no initiatives directed at public awareness of international criminal justice. The importance of community education on international criminal justice cannot be overemphasised as it will greatly help in bringing the court to the people. There is need to bring international criminal justice to the people and let them relate to it first-hand.”
Luke Tembo, Centre for Human Rights and Rehabilitation, Malawi

“Effective awareness raising, advocacy and support initiatives to the general public and relevant stakeholders are fundamental to ensure meaningful realisation of international criminal justice in Tanzania.”
Richard Shilamba, Children Education Society, Tanzania

The African Network on International Criminal Justice – Strength in Numbers

Who Can Help?

African CSOs have been at the coalface insofar as enforcing international criminal justice is concerned. The vanguard of this movement has been the African Network on International Criminal Justice (ANICJ), an “informal network comprising African and international civil society organisations dealing with human rights, the rule of law and international criminal justice” founded in order to “improve the ability of civil society to help end impunity and to protect human rights by promoting accountability for international crimes at national, regional and international level”.

The ANICJ was established at the instigation of the Institute for Security Studies (ISS) in 2009. The initial meeting was attended by representatives from: Advocates for Public and International Law (Uganda), Africa Legal Aid (Ghana), Association Africaine de Defense de Droits de l’Homme (DRC), Central African Republic Coalition of the International Criminal Court, East African Law Society, Human Rights Watch, ISS, Southern African Development Community (SADC) Lawyers Association, SALC and the West African Bar Association.

The ANICJ aims to raise awareness about international criminal justice and its role in promoting peace, stability and the rule of law in Africa among the public, the media, criminal justice officials, policy makers and political leaders. It also aims to encourage decision makers to support the principles of international criminal justice and to take steps to enable its functioning at national, regional and international level.

To date, the ANICJ has been a success both in terms of securing support for the Court generally, and in responding to specific challenges to the Court’s work. These include preventing President Bashir of Sudan – the subject of an ICC arrest warrant – from visiting states parties when such states are under an obligation to arrest him.

In addition, the ANICJ plays a secretariat function, through the ad hoc exchange of information and documents as well as advocacy and lobbying initiatives.²¹

Endnotes

1. UN Press Release SG/SM/6973 “Secretary-General Calls Partnership of NGOs, Private Sector, International Organizations and Governments Powerful Partnership for Future” (29 April 1999).
2. C Barnes “Agents for Change: Civil Society Roles in Preventing War and Building Peace” European Centre for Conflict Prevention available at <http://www.gppac.net/documents/130221585/0/Agents+for+Change.pdf>.
3. W Pace & J Schense, “The Role of Non-Governmental Organisations’ in Cassese, Gaeta & Jones (eds) *The Rome Statute of the International Criminal Court: A Commentary-Volume 1* (2002), 113.
4. Id 114.
5. Id 115.
6. Id 124.
7. Id 125.
8. Id.
9. UN Press Release supra note 1.
10. Open Society Foundation “International Crimes, Local Justice: A Handbook for Rule-of-Law Policymakers, Donors and Implementers” (2011), 17 available at <http://www.opensocietyfoundations.org/sites/default/files/international-crimes-local-justice-20111128.pdf>.
11. Based on questionnaires SALC (SALC Questionnaire) sent to CSOs in Southern, East and West Africa.
12. SALC Questionnaire, CARL, 22 November 2012, transcript on file with the author.
13. Id.
14. SALC Questionnaire, CAAJ, 27 November 2012, transcript on file with the author.
15. SALC Questionnaire, CHRR, 12 January 2013, transcript on file with the author.
16. CAAJ Interview supra note 14.
17. Id.
18. CHRR Interview supra note 15.
19. CARL Interview supra note 12.
20. Interview with Nicole Fritz, 10 November 2012, transcript on file with the author.
21. Details about the ANICJ and its members can be found at <http://www.issafrica.org/anicj/>.