



International Criminal Justice in Africa: Neocolonial Agenda or Strengthened Accountability?

Rachel Goodman & Nokukhanya Mncwabe

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By Rachel Goodman¹ & Nokukhanya Mncwabe²

Introduction

The decision to uphold the amnesty conferred upon Thomas Kwoyelo at the International Crimes Division (ICD) of the High Court in Uganda, poses interesting questions for the current international crime regime. Both the Kwoyelo trial and the current ICC Kenya cases beg the question: what are the standards for *complementarity* in Africa, and has the current approach to international criminal justice been sufficiently respectful of sovereignty, focused on victims, and sustainable in the long term? A closer examination of these cases and other international, regional, national and local accountability initiatives on the continent will show political calculations play a disproportionate role in shaping the justice sought for large-scale violations. This article seeks to contribute to the debate on international criminal justice; in particular it advocates that a victim-centered accountability system provides the most effective justice, and further that institutions within Africa must have the legitimate opportunity to achieve accountability for the crimes that take place within the continent.

Background

Complementarity, as popularized by the ICC and outlined in Article 17 of the Rome Statute, refers to the scenario where a national jurisdiction is *unable* or *unwilling* to prosecute crimes of international concern – i.e. crimes against humanity, genocide, war crimes, and the crime of aggression, all of which fall under ICC jurisdiction – such that legal competence is ceded to an institution that is authorized and able to prosecute those crimes. In the current international crime system, the ICC would usually be the institution to step in, as it was created to have a jurisdiction that is complementary to national jurisdictions; however, this complementary role was conceived as one of last resort.

¹ Rachel Goodman is pursuing a Masters degree at the University of Cape Town in the Justice and Transformation Programme, and is an editorial assistance for the Centre for the Study of Violence and Reconciliation's International Journal for Transitional Justice. This upcoming year, she will be completing her thesis on effective service delivery programming for survivors of sexual violence in the Democratic Republic of Congo. She completed her undergraduate studies at the George Washington University in Washington D.C., where she studied Conflict and Security in the GW Elliott School of International Affairs. Her primary research interests are gender and transitional justice, and conflict resolution. Please feel free to contact her with any comments or questions at rachelgoodman5@gmail.com

² Nokukhanya Mncwabe is a Regional Coordinator (Southern Africa) of the African Transitional Justice Research Network in the Centre for the Study of Violence and Reconciliation's Transitional Justice Programme. Comments and queries can be directed to nmncwabe@csvr.org.za

It may be useful to briefly review other relevant ICC principles. In terms of its temporal jurisdiction, the court is only empowered to consider crimes that occurred after its founding instrument, the Rome Statute, entered into force in 2002. There are three ways in which cases can be brought before the ICC: a State Party to the Statute can refer a case in which one or more crimes within the jurisdiction of the Court have been committed; the UN Security Council (UNSC) can make a referral to the Prosecutor; or the Prosecutor can initiate investigations *proprio motu*³. Article 17 of the Rome Statute describes 'inability' to be due to a collapse of the national judicial system, characterized by the State's inability to obtain the accused or the necessary evidence, or is in any other way unable to carry out its proceedings. The Statute outlines the three determinants of 'unwillingness' to be: if the proceedings were/are for the purpose of shielding the accused from criminal responsibility; if there has been an unjustified delay in proceedings; and if the proceedings were/are not conducted independently. As will be explored below, Article 17 stipulates that, among other conditions, the case is inadmissible to the ICC when the case is being investigated or prosecuted by a State that has jurisdiction over it. The ICC has used this condition on multiple occasions to defend the admissibility of certain cases before it, most notably the Uganda and Kenya cases, citing the lack of a substantially similar case in either of these countries to be the reason that the ICC is allowed jurisdiction.

The Politics of International Criminal Justice:

The Case of Uganda, DRC and Kenya

In December 2003, Ugandan President Yoweri Museveni referred the situation in northern Uganda to the ICC. He sought the indictment of senior ranking leaders of the Lord's Resistance Army (LRA): rebels who have been fighting against the Ugandan government for more than twenty years, inflicting brutal violence upon the population in this region. This was the first case undertaken by the newly created ICC. The referral was not because Uganda did not have the judicial capacity to prosecute the LRA, but rather because the Government had been unable to apprehend the top LRA commanders. Many have speculated that Museveni's referral was also a public relations move to improve his image in the international community. It is thought to have deflected attention away from crimes in which state forces would be implicated, most notably the Uganda People's Defense Force's (UPDF) brutal counter-insurgency initiatives against the LRA, and in 1997 and 1998 the invasions of the Democratic Republic of Congo by Ugandan troops who committed a massive degree

³ The prosecutor must conduct a preliminary examination of information received regarding alleged crime(s). If satisfied that there is a reasonable basis to commence an investigation, (s)/he can make a request to the Pre-Trial Chamber to launch an investigation, which will be granted if certain conditions are met.

of violence and destruction upon the local population. ICC Prosecutor Luis Moreno-Ocampo has never indicated an intention to pursue Museveni or those serving under him; instead, he stood at Museveni's side at a January 2004 joint press conference to announce the indictment of five leaders of the LRA, including the infamous first in command, Joseph Kony. Since LRA arrest warrants were issued in October 2005, two of the suspects have died, while the other three remain at large. It is possible that internal political considerations at the ICC—in this case Uganda being the first State Party to refer a case—have led to the exclusive focus on non-state actors, since prosecuting the first leader to use the Court could discourage other States from referring cases.

Exclusive focus on non-state actors is also clear in the ICC DRC case. This case is concerned with the prosecution of four rebel commanders, most notably Thomas Lubanga Dyilo from the Ituri region, argued by the ICC prosecutor to be the area where the gravest crimes were committed. It is also the area where the conflict is most removed from and least affiliated with Kinshasa. Many argue that crimes equally serious have been committed in the Kivu provinces; however, investigations in that region could implicate Congolese government forces in the atrocities, as well as politicians in Kinshasa who may be profiting from the conflict in some way, which may explain why the ICC is shying away from pursuing these cases. In situations where security is a primary concern, and government cooperation is crucial for a successful prosecution, the Prosecutor may overlook state complicity in violations in order to secure a conviction, and thus consolidate the legitimacy and power of the ICC. This focus has fuelled an argument that the ICC can be easily manipulated as a political tool for leaders to rid themselves of opposition.

As peace talks progressed between the Ugandan government and the LRA, Museveni has changed his position on the ICC case. Since the LRA leadership refused to sign any peace deal until the ICC charges were dropped, the Government agreed in June 2007 (as part of the Juba Peace Talks) to approach the ICC or UNSC to request a deferral of the indictments while it sets up a national system to try those accused of crimes under ICC jurisdiction. An objective of establishing a national jurisdiction would be to challenge the admissibility of the cases before the ICC. In July 2008, the Ugandan government established a special War Crimes Division of the High Court now known as the International Crimes Division. Uganda's ICC Bill entered into force in June 2010, allowing Ugandan courts to try international crimes such as crimes against humanity, and genocide.

Although Uganda has taken significant and expeditious steps to create a domestic system that can hold accountable its own perpetrators of the most serious crimes, the ICC has refused to drop the cases until Uganda initiates its own genuine investigations into those indicted by the ICC. The Court

has found that in the absence of national proceedings against the accused, the cases are still admissible before the ICC. This raises a number of issues around standards for complementarity, as well as to what degree the ICC should consider the political implications of its actions, including the potentially destructive effects its initiatives could have on local peace and reconciliation processes. Such implications illustrate the need for standards of complementarity to be flexible in relation to the specific context of that case. If the ICC indictments threaten a sustainable peace, and the government of Uganda has taken legitimate steps to invoke complementarity so that it may reduce that threat to peace, and has explicitly asked both the ICC and UNSC to defer the indictments, the refusal to do so seems to reflect a power struggle rather than any genuine commitment to justice. The ICC was not created to monitor State's compliance with every standard of international justice; rather it is meant to be a court of last resort, which will complement State jurisdictions only when they are unable or unwilling to prosecute the most serious crimes of international concern. This is clearly not the situation in Uganda. The stipulation that the State Party must have a substantially similar investigation of the same persons accused by the ICC already under way may be unreasonable given the amount of time and resources needed to implement new legislation and carry out thorough investigations, especially in delicate post-conflict situations.

The ICC Kenya cases are the first situation in which the Prosecutor has used his *proprio motu* powers to initiate an investigation on the basis that the government of Kenya was unable to prosecute the six men accused of masterminding and funding the 2007-2008 post-election violence. It is true that the Kenyan Parliament failed to pass legislation in 2009 to create a Special Tribunal to prosecute these crimes. Yet in response to this obstacle, the Kenyan government initiated a variety of substantial reforms regarding due process rights, ensuring an independent judiciary and police sector, as well as the incorporation of new laws that would allow the national courts to try crimes from the post-election violence, dispensing with a need for a special tribunal. The Kenyan government appealed the admissibility of the cases in August 2011 on the grounds that these reforms have clearly enabled its national system to prosecute the accused, and thus it has illustrated its willingness to do so. The Appeals Chamber at the ICC rejected the appeal on similar grounds as in the Uganda case. The court held that the Kenya cases would be inadmissible only if a current national investigation of the same accused individuals was under way. The court further held that the government of Kenya had failed to provide sufficient evidence to prove that it was in fact investigating the six suspects for the crimes alleged by the ICC.

Substantial judicial reforms take time and resources, both of which have been limited in the Kenyan case. The current political climate in Kenya is highly polarized and delicate; thus creating and implementing new legislation to meet international justice standards is not something that can be done immediately, especially within such a challenging political context. The question has been raised as to whether the ICC has ever allowed a realistic time period for states to activate their own response? Has there been a clear explanation of what constitutes an ‘unjustified delay’ of proceedings? That the political climate is so delicate should not necessarily prohibit Kenya from prosecuting its own crimes. In this context, it does not seem fair to assume that the only option to prosecute those accused is the *last resort* option, as the State party has explicitly expressed its desire to prosecute the cases itself, and has taken significant steps to do so.

While Kenya was still under preliminary investigation by the ICC, Columbia, Afghanistan, Ivory Coast, Georgia and Palestine were also subject to preliminary investigation by the ICC. Of these countries, only Kenya, and more recently, Ivory Coast have made it to the indictment and investigation stage, respectively. If complementarity is to operate as it was conceived, Kenya should be given a realistic and legitimate time period to allow its reforms to be implemented. While this time period is allowed, the Prosecutor should return to the other countries under examination. This brings up the ICC’s controversial trend to only target African countries. It is important to recall the three ways that cases can be brought before the ICC: UNSC referral, State Party referral, or Prosecutor’s discretion. The politics inherent in this referral system arguably protect powerful Western nations from ever being targeted by the Court. The UNSC is dominated by superpowers that can veto any referral of an accountability investigation that may incriminate Western leaders or institutions. The inherent safeguards of Western power and influence within the referral system to the ICC have led many to accuse it of operating with imperial motivations or of being used as a Western tool to punish its opponents. With this criticism in mind, it seems unjust that prosecutorial discretion—the only referral with the potential to target powerful Western nations—has been used to investigate only African cases, while incidents in nations such as Afghanistan are deemed less urgent. The ICC indictment of Sudanese President Omar al-Bashir for crimes against humanity, war crimes, and genocide in Darfur is illustrative of this trend. When the indictment was announced (investigation began June 2005, prosecution application for a warrant of arrest July 2008) there was controversy in the international arena around allegations of war crimes committed in both Iraq and Afghanistan, which arguably affected the international system far more than those crimes committed in Darfur. This apparent bias towards prosecuting African actors is inevitably being perceived as the ICC defining its jurisdiction as solely African, consequently undermining its legitimacy throughout the

continent, as well as in the international community. Many have interpreted this trend as an illustration of the West's unwillingness to allow African states to demonstrate their ability to pursue [African] accountability internally.

Making the Case for Positive Complementarity

The dialogue around restructuring the African accountability system to be more focused towards victims, and respectful of local context and sovereignty, raises the crucial issue of how to ensure state compliance when regional institutions in Africa do enforce the responsibility to prosecute its own crimes. African countries should not criticize the ICC, and the system it operates within, as neo-colonial and then exhibit reluctance when they are given the opportunity to address the crimes on the continent, which will be discussed in more detail later. Given the legitimate sovereignty concerns raised by ICC activity in the region, yet the simultaneous lack of political will and respect for regional institutions, what is the best way to restructure the international crime regime to better suit African needs for justice and accountability? In order to begin to address this question, regional institutions must first be empowered so that African crimes can be addressed internally, in line with the AU's promotion of 'African solutions for African problems'. In addition, however, regional institutions must have strong mechanisms to ensure state compliance. The concept of 'positive complementarity' is a good starting point for creating an accountability system that is relevant to the African context. Under this notion, the primary focus of international attention should be to strengthen those national jurisdictions that are currently unable to prosecute the most serious crimes, so as to allow them to fulfill their position in the international criminal justice system as they are meant to, instead of pouring money into the ICC to overstretch itself beyond its intended capacity. In such a restructured system, there should be a clear opportunity for regional institutions to step in if a national system is unwilling or unable, *before* the ICC, and there should be opportunities for such regional systems to receive support and assistance, as an encouraged alternative to funding the ICC.

The ICC is currently completely overextended. It is acting as a municipal court with an international jurisdiction. An ideal system of complementarity should function so that local mechanisms are responsible for addressing the preponderance of the perpetrators. This is crucial as there is a significant victim-perpetrator dichotomy in many conflicts on the continent, wherein the line between victim and perpetrator is incredibly blurred; thus in this scenario, the child soldier who burned a farm would be seen by a local court or alternative justice mechanism. Next, a special division of the national High Court, or a specific tribunal, should be responsible for prosecuting those

who masterminded and ordered the crimes of international concern. In cases where States are deemed unwilling or unable to prosecute these masterminds, a regional institution such as a reformed African Court for Human and People's Rights (African Court) could take responsibility for the case, so that sovereignty concerns are diminished, and Africa is still given the responsibility to prosecute its own crimes. Last, the ICC, if absolutely necessary, should try those who funded the perpetrators—the political elite who, because of their positions, are untouchable in their own domestic or regional court system. This kind of complementarity system prioritizes the support and strengthening of domestic systems so that States may address their own crimes. Doing so can help affected states achieve the legitimacy and stability needed to prevent future conflict.

Keeping this framework in mind, it is important to briefly evaluate the state of other accountability institutions on the continent and to identify challenges to a just and effective African accountability system, as well as opportunities to restructure the existing system to better represent the ideal scenario proposed above.

There have been instances of reluctance to prosecute state actors among African institutions and leaders. In its first such case, the African Union (AU) took responsibility for ensuring that the former Chadian dictator, Hissene Habré, faced justice. The AU asked Senegal to undertake the prosecution, as Habré has been living in Senegal for two decades. In 2000, Habré was indicted by a Senegalese judge, but after interference by Senegalese President Abdoulaye Wade, the courts said they had no jurisdiction to try the case. Perceiving reluctance by the Wade government, Belgium indicted Habré in 2005, but Senegal refused to extradite him. In 2006 the AU issued a mandate for Senegal to try Habré “in the name of Africa,” which Wade accepted, and Senegal adopted legislation to allow its national courts to prosecute genocide, war crimes and crimes against humanity (crimes which fall under ICC jurisdiction). However, the next four years saw ineffective deliberations over the trial budget, with Wade maintaining he was not receiving the support and resources that were promised to him to carry out the trial, further stalling prosecution. In November 2010, donors pledged US\$ 11.7 million to cover full trial costs. Soon after, the Court of Justice of the Economic Community of West African States (ECOWAS) issued a ruling that required Senegal to create an international and special ad hoc Tribunal to try Habré, which angered Wade. He reportedly felt it contradicted what the AU had asked of him, and so he threatened to extradite Habré to Chad, where he has been sentenced to death. After heavy lobbying by the human rights community, Wade did not go forth with the extradition, but a trial is yet to begin. Both the AU and Senegalese President Wade have caused complications in the trial's progress; the latter exhibiting signs of reluctance and obstruction,

and the former failing to maintain a consistent position on what kind of accountability process it wanted to address the Hissene Habré case. This also illustrates a State's lack of respect for both sub-regional (ECOWAS Court) and regional (AU) institutional decisions. This longstanding impasse can only be resolved by genuine political will from Senegal and a principled commitment from the African Union.

Inadequate state respect of and compliance with the decisions of regional institutions is also illustrated in the recent decision to dissolve the Southern African Development Community (SADC) Tribunal. The Tribunal passed a judgment that opposed Zimbabwe's constitutional position on land reform in a bid to nullify Zimbabwe's land reform programme commenced in 2000. Zimbabwe's response was to raise a series of objections, making it clear that it was not bound by the rulings of the Tribunal on the ground that the constituting treaty had not been ratified by two-thirds of SADC members as required to give the Tribunal force. SADC leaders came to support Zimbabwe's position and this controversy led to the suspension of the Tribunal in August 2010, and its dissolution in May 2011.

Notwithstanding this, the African Court has the potential to be a key regional institution to step in when African states are unwilling or unable to counter impunity, to ensure that African sovereignty is respected, and also to allow African legal capacity to be strengthened. The AU has expressed an intention to expand the jurisdiction of the African Court to include prosecutions of individuals for genocide, war crimes, and crimes against humanity. It is important to view this as positive not only because it would create another route for accountability, but also because it is the logical move for an international system that is meant to be based on the premise of complementarity. Just as it would not make sense for a murder trial at the domestic level to be brought immediately before the highest court of the state before it has had an opportunity to ascend through the lower courts, so too is there a clear need for a legitimate, strong African Court to allow the ICC to truly be a court of last resort. This is not to imply a hierarchical relationship between the national, regional and international frameworks; but merely to reinforce the idea of a truly complementary system of accountability for the most serious crimes.

Currently, the jurisdiction of the African Court extends to cases of state responsibility for human rights violations and the interpretation of treaties. Many in the international community have been vocal about the challenges involved with expanding this jurisdiction, especially concerning the large amount of resources and training that would be required to ensure the Court has the capacity to

effectively prosecute individuals in accordance with international standards of justice. Thus there is a strong argument that strengthening it should be a higher priority than directing the same kind of resources to the ICC, which is intended as a last resort. International donors committed to seeing a respect for the rule of law and an end to impunity within Africa should understand that such an expanded and legitimate African Court would allow these objectives to be met in a way that is respectful of and natural to the African context.

The most pertinent challenge to the African Court is how to increase and ensure support for the Court among African states. Currently, 26 AU member states have ratified the Protocol establishing the Court, yet only five member states have ratified the Protocol that allows individuals and non-governmental organizations (NGOs) to have direct access to the Court. While the logic and utility of strengthening this Court should be made clear to the international community, African states must realize how crucial their compliance and support of the Court is, and how it would allow them the sovereignty they seek with regard to the neo-colonial criticisms of the ICC.

Centralizing victims

Equally important, but rarely given prominence in the complementarity debate, is the role of victims in accountability initiatives. This article advances that victim-centered justice is the most effective justice; hence it is critical to examine accountability initiatives through this lens. Currently, transitional justice initiatives, especially those undertaken by the international institutions on the continent, are implemented through a very narrow criminal justice lens. Such a lens focuses on the perpetrator, instead of focusing on the healing or compensation of the victim, creating a limited role for the victim. A vital question that should be posed is how to balance standards of criminal justice against a broader social justice agenda for victims?

The Special Court of Sierra Leone (SCSL), a ‘hybrid’ tribunal which was established in January 2002, serves as a good illustrative case of how such a narrow criminal justice lens can create shortcomings of justice for victims. The hybrid nature of the court meant certain key positions within the Court were to be reserved for Sierra Leoneans. It was believed this would strengthen local legal capacity and facilitate legal reforms, while also ensuring international standards of justice were upheld. Yet the intended hybrid nature was never achieved in practice, as almost all managerial and top legal positions in the Court were given to international actors. This was due to the government of Sierra Leone watering down a number of original provisions in the founding law of Court, such that *local consultation* with respect to the filling of key positions sufficed as opposed to the strict requirement

for local incumbents to assume office. Consequently, the failure to achieve true representation, with proportional numbers of international to local staff, meant the general objective of hybrid courts—to strengthen local capacity—was not achieved. The Court also failed to create a hybrid version of international criminal law, as the formal legal jargon used in the proceedings was not accessible for most in the affected population, and outreach programs were weak and ineffective. These missed opportunities meant that a sense of local ownership or participation in this process was never strongly realized within the affected population, giving the trials little meaning among those most victimized.

While failing to achieve its legal reform objectives, the Court also threatened to compromise the entire judicial process in Sierra Leone. The Special Court was meant to try those ‘most responsible’ for the crimes committed throughout the civil war; yet with the removal of Charley Taylor to The Hague, those next in the chain of command (those who devised the campaigns of violence) were to be targeted for prosecutions by the Court; however, most of these commanders had been killed. Those next in the chain of command (those who carried out the attacks) were not prosecuted because they were either processed through the national DDR policy or were immune from prosecution because they were serving the court as ‘insider witnesses.’ Ultimately, therefore, the Court did not prosecute those it was intended to. To date, the Court has completed three cases⁴, with penalties meted out to eight perpetrators. Many question how much justice was then delivered for victims, and to what degree impunity was addressed, if at all. Other critics point out the disproportionate resources that were committed to the Court relative to the reparations received by victims.⁵

The ICC has also faced significant challenges with regard to determining the victims’ role in its cases. In general, the trend of the ICC has been to place standards of justice ahead of justice for victims. The Prosecutor seems most interested in charging the accused for those crimes for which the most reliable evidence can be obtained. Since its creation in 2002, only one case – that of Thomas Lubanga Dyilo – has been successfully completed. Ensuring the process is responsive to victims’ needs has seemingly not been a priority of the Office of the Prosecutor (OTP). The DRC case against Thomas Lubanga is illustrative of this approach. The charges against Lubanga are limited to crimes concerning the recruitment and use of child soldiers. However Lubanga and his militia are implicated

⁴ <http://www.sc-sl.org/>

⁵ Refugee Law Project, ‘Prosecuting Crimes or Righting Wrongs: Where is Uganda Heading To?’ (17 August 2009), [http://www.beyondjuba.org/BJP1/press_releases/Prosecuting Crimes or Righting Wrongs Where is Uganda heading to.pdf](http://www.beyondjuba.org/BJP1/press_releases/Prosecuting_Crimes_or_Righting_Wrongs_Where_is_Uganda_heading_to.pdf) (accessed 20 September 2010)

in a wide array of arguably more vicious and destructive crimes. This preference for a winnable case can lead to a severe denial of justice for those who suffered from the other crimes he committed. The choice of charges also determines whom the ICC will recognize as a victim and who will be eligible for reparations. The Court only recognizes victims who suffered from the crimes being charged. For those who qualify under these terms, the process to apply for victim status is long, difficult and inaccessible for many in the affected communities. Applications are often not translated into local languages and there is significant lack of legal assistance, so applicants are often unaware that they must frame the nature of their victimization clearly in terms of the charges that are being prosecuted.

The ICC, as well as the SCSL, and the International Tribunal for Rwanda (ICTR), have paid insufficient attention to managing the expectations of the affected populations. More often than not, this has led to disappointment. Specifically with regard to the ICC, it is common for many in the affected population to be unaware of any ongoing investigation, or very unfamiliar with a case's progress. With the ICC and ICTR, their respective physical locations in The Hague, and in Arusha, Tanzania, make the process physically inaccessible to those victims for whom justice is being sought. Coupled with the lack of outreach to help explain the nature and content of proceedings in a local context, many of the accountability processes have lacked meaning at the local level, as there is a lack of consciousness or understanding of such processes. Additionally, the detention facilities for ICC, ICTR, and SCSL defendants are luxurious compared with conditions in which petty criminals are held within the respective domestic criminal justice systems. For some victims, these 'international standards' of justice for the most serious criminals, is an injustice in itself, illustrating how international standards of justice can interfere with victims' healing and needs. One might think it more respectful to direct a portion of the money that is allocated toward the maintenance of these facilities toward reform of domestic detention facilities, so that national systems can develop the capacity to provide adequate facilities for the majority of their detainees.

Witness Protection

An important concern of any victim-centered accountability process is the protection of witnesses. The intimidation of witnesses has been a serious issue in the ICC Kenya cases. The outcry around the issue pressured the Government of Kenya to create a Witness Protection Agency, which has been applauded for being a step in the right direction and also as setting a good example for the rest of the continent. However, it has been criticized for being weak and not having the resources or power to adequately provide the protection it is meant to. The need for reliable and effective witness

protection programmes is crucial in both national and regional jurisdictions on the continent, especially if these jurisdictions seek to maintain supremacy over prosecuting crimes within their jurisdiction. International observers say lack of a stronger more substantive witness protection system in Kenya is a major impediment to credible national trials. Internationally funded accountability institutions, such as the SCSL and the ICC, have substantial and effective witness protection and support services. Donors and all those committed to enhancing the rule of law in Africa, should focus funding towards the establishment of robust witness protection mechanisms within national jurisdictions, so that this crucial aspect of legal capacity is achieved in a sustainable fashion.

Cultural & traditional justice approaches:

Are they compatible with international criminal justice?

When considering accountability systems on the continent, it is important to understand the significant victim-perpetrator dichotomy that exists in many conflicts where crimes of international concern have occurred. In cases where the recruitment of child soldiers was widespread, specifically in northern Uganda or in eastern DRC, the children abducted from their villages were forced to commit unspeakable atrocities, often becoming complicit in such acts after extensive abuse and indoctrination. For reconciliation and peace to be possible, accountability mechanisms need to be tailored to address this kind of dichotomy. As formal processes premised upon criminal justice principles do not have the flexibility to fairly address such a context, it has become increasingly popular to advocate for traditional mechanisms as a way to provide accountability that is more relevant to the African context. It is important to look at the challenges posed by accountability systems based on cultural processes, and also to identify the opportunities that are presented, which allow victims to be the focus of any such initiative.

In northern Uganda, a central debate has been around the role of informal conflict resolution mechanisms, which focus on restorative justice, rather than the retributive justice sought by the ICC and the ICD. Because the large number of perpetrators could never be processed through any domestic judicial system, and because so many perpetrators had also been victims, concerns have been raised about whether retributive justice is best suited to achieve accountability in northern Uganda. The Acholi tradition of *mato oput* has been the mechanism most frequently discussed, which is believed to repair individual and community bonds that were broken by the crimes that were committed. This reconciliation is achieved through the perpetrator providing a public apology

and an acknowledgment of wrongdoing, as well as compensation or reparation of some kind to the victim.

The domestic accountability system in Rwanda that is meant to deal with the preponderance of genocide perpetrators is founded on similar principles. Rwanda's system is based on the traditional conflict resolution mechanism of *gacaca*, which in its original form was a system of informal gatherings where respected elder men would settle local conflicts over land, marriage, damage to property, petty theft etc. In its traditional guise, *gacaca* was not focused solely on punishment or the assignation of guilt, but more on restoring social equilibrium and reconciling a community.

While the rationale behind such transitional mechanisms seems appropriate, there are challenges associated with them. With regard to *mato oput* specifically, it is based on traditions specific to the Acholi people, which risks alienating those LRA victims who are not Acholi, a likely scenario given that the other ethno-linguistic groups also comprise the northern population. These implications apply equally to other ethnically heterogeneous societies.

Crucially, many traditional accountability processes were designed to address rare transgressions within an otherwise moral community; these mechanisms were not meant to deal with the crimes under ICC jurisdiction. There are risks associated with taking a mechanism out of its original context. *Gacaca* in Rwanda has been turned into a quasi-judicial mechanism with the authority to issue retributive sentences, a power that never existed in the traditional system. In its traditional use, there was little concern to protect those who testify, both because retributive sentences were not an option, and also because traditional *gacaca* did not deal with the most serious of crimes. Ethnic tensions in Rwanda are still quite strong, and Tutsi victims often testify in front of a community that is primarily Hutu, at times accusing someone in that community of a heinous crime. Witness protection then may possibly be a concern. Furthermore, the relevance of retributive justice within the framework of local accountability initiatives has been controversial. Often underlying the enthusiasm for traditional mechanisms is the assumption that traditional African mechanisms are more inclined to 'forgive,' which some have warned is over-romanticized and possibly a misrepresentation of what local people actually want. Due to a lack of empirical research, the implications of modified traditional mechanisms for those victims of modern 'crimes against humanity' etc. are still widely unknown.

Traditional justice mechanisms, as with more formalized processes, can also be sites of political struggle, wherein particular groups may advocate for their use in order to serve their own interests. *Gacaca* has been criticized for its susceptibility to manipulation by the ruling Tutsi RPF regime, as a way to marginalize the Hutu community and consolidate RPF power. There is also the possibility of such mechanisms reinforcing norms incompatible with international human rights standards. This is also relevant to *gacaca*, which has the power to issue retributive sentences, but does not incorporate international standards of due process, to ensure such punishments are issued fairly.

These challenges pose the need to come up with an option for accountability that is accepted locally and is natural to the context it is meant to function within, but that is not purely premised on 'traditional mechanisms.' This 'ideal' option would still have the flexibility to adapt to complex local dynamics that surround armed conflict, which is not available in strictly formal, criminal justice processes. Creativity is necessary to design such a process, so as to avoid promoting a watered-down, irrelevant traditional mechanism.

Repairing harms

Central to any accountability system that seeks to achieve victim-centered justice is an effective and relevant reparations program. Lessons learned from reparations programs within formal justice institutions show that conventional ideas of [victim] 'compensation,' as small monetary payments, should be re-thought to encompass a more development-focused reparation policy for those accountability processes in Africa. This is something that certain informal processes have greatly achieved. Development-focused reparation policies would seek to provide service and assistance programs to help victims restore their dignity and position within society. In practice, this may be a reparations policy that gives amputees preference for certain jobs, or provides assistance with transportation or child-care, or gives victims increased access to education. Victim-centered reparations programmes could also include medical assistance, reconstructive surgery, and psychological treatment.⁶

A clear failure to deliver a development-focused reparations programme is evident in Sierra Leone. While the Lomé Peace Agreement established a Special Fund for War Victims, it has not been given much attention until recently, and has only been able to give small one-time payments of about \$75 to victims. As of 2008, the Special Court for Sierra Leone (SCSL) had already spent more than \$150

⁶ Roger Duthie "Toward a Development-sensitive Approach to Transitional Justice". *International Journal of Transitional Justice*. 2(3): pp. 292-309

million, and to date has only completed three cases. However, an estimated 75,000 combatants were demobilized through the national DDR policy. It is important to note that the enthusiasm for DDR is inherently perpetrator-focused, and unfortunately there is no equivalent process for victims. Of the 75,000 people who were likely implicated to some degree in mass violence, eight people, most of whom were *not* the ‘most responsible,’ have been held accountable using a budget of \$150 million. This reality, coupled with the failure of the Court to achieve the objective of domestic legal reform, illustrates its miscarriages of justice for the local population. Had victim-centered justice been the objective of the accountability system in Sierra Leone, this kind of budget would have been allocated to a relevant and meaningful reparations policy that sought to heal victims and correct the wrongs they had suffered as much as possible.

Informal processes have often proven to be better equipped to design initiatives that provide meaningful compensation to victims. There are various forms of reparations that have been stressed in many of these accountability processes, such as: restitution, reparations, compensation, assurance that violation will not happen again (either at individual or community level), and legal or institutional reform. *Gacaca* is a process that sought to provide a combination of these. Most relevant to development-focused reparations, *gacaca* uses ‘community service’ as punishment for certain crimes as a way to reintegrate perpetrators more rapidly back into their communities. This often includes the rebuilding of homes and schools, among other relevant public works projects. Importantly, *gacaca* requires perpetrators to provide compensation or reparation to victims for property-damage caused during the genocide, which significantly addresses the priority of improving the living conditions of individual victims of mass crimes.

Conclusion

There is a clear desire for any accountability process to be relevant to the local context, and accepted and supported by the affected population. Hence the call for the African continent to have the opportunity to prosecute its own crimes. The trend is to criticize International Criminal Court (ICC) and UN involvement in justice processes on the continent as imperial, which is an argument that has merit, although there have been instances of reluctance by national leaders to carry out justice processes or to respect the decisions of regional justice systems, especially when state leaders are implicated in violations. There is a clear need for stakeholders, international, national and local policy makers, and civil society, to strengthen accountability initiatives to ensure a more equitable, just, fair and effective human rights system that is responsive to citizens’ needs.

What this implies is that victims should feel satisfied of the following: that: a) perpetrators are held to account—not necessarily through prosecution, it could include public apology, community service etc.—b) that s/he has been adequately compensated for the harm, either through, restitution, reparation at either the individual or community level, the assurance of non-recurrence, and/or legal and institutional reform. Questions arise as actors across the continent debate the best way of achieving this kind of justice, specifically, how is the need for justice balanced against victim's need to be healed and restored to their former position? This article has explored various alternative legal processes, and advocated for a system that supports these various processes as mutually reinforcing and complementary, and which includes the victim in legal processes, to achieve both accountability for the perpetrator as well as directly address the harm the victim has suffered. Ultimately, there is a dire need to divert the significant funding invested in a court intended as a last resort towards strengthening existing domestic justice systems and programs that seek to heal victims. The dual focus on the domestic system and the victim will ensure a more legitimate, just, and effective human rights system that is responsive to citizens' needs.

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African Transitional Justice Research Network

The African Transitional Justice Research Network (ATJRN) was established in 2004 and seeks to promote and encourage transitional justice research in Africa through the development of research capacity, the building of transitional justice content knowledge, and the creation of spaces for practitioners and researchers in Africa to share experiences, expertise, and lessons learned. The goal is to ensure that the transitional justice agenda in Africa is locally informed and owned. It is managed by representatives from four steering committee member organizations: Centre for the Study of Violence and Reconciliation (CSVR), South Africa; the Refugee Law Project (RLP), Uganda; Campaign for Good Governance (CGG), Sierra Leone; and Centre for Democratic Development (CDD), Ghana. The regional representation and continental reach of the network makes it well positioned to drive the African debate on transitional justice.

Website: www.transitionaljustice.org

Email: info@transitionaljustice.org.za

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