



International
Refugee
Rights
Initiative



KITUO CHA KATIBA
EASTERN AFRICA CENTER FOR CONSTITUTIONAL DEVELOPMENT

PROMOTING ACCOUNTABILITY FOR INTERNATIONAL CRIMES IN AFRICA

RECOMMENDATIONS

On 10-11 October 2013 a group of more than 20 experts in international and transitional justice and human rights convened in Arusha, Tanzania, hosted by the International Refugee Rights Initiative (IRRI), Kituo Cha Katiba, and the Pan-African Lawyers Union (PALU). The purpose of the meeting was to reflect on the agenda of the Extra-ordinary Summit of the African Union on international justice and the International Criminal Court (ICC), and prepare submissions to contribute a civil society perspective to those deliberations. The meeting built on previous consultations held in Nairobi in June and October 2009. The participants, who were invited and conducted the deliberations in their individual capacities, adopted the following recommendations for the consideration of the African Union (AU), African member states, the ICC and the United Nations Security Council (UNSC).

General Comments

These recommendations were adopted with the recognition that:

- The standards and instruments adopted by African states recognise justice as a legitimate aspiration of African peoples and require all AU member states to ensure effective access for their citizens to capable, independent and effective national, regional, continental and international accountability mechanisms.
- The AU has consistently affirmed its commitment to the fight against impunity in Africa. This is reflected in Article 4(h) of the AU Constitutive Act which authorises the Union to intervene in situations of mass atrocity. This commitment has also been manifested in the following ways:
 - Progress towards the trial of former President Hissène Habré, in the Republic of Senegal, on behalf of the AU;
 - Commencement of cases and decisions emerging from the African Court on Human and Peoples' Rights; which show a commitment to combating impunity and that it will not shy away from handling cases that involve mass atrocities;
 - Progress towards an international crimes jurisdiction for the African Court;
 - Adoption of a Model Law on Universal Jurisdiction; and
 - On 7 July 2012, the ECOWAS Contact Group on Mali called for the referral of the situation in the Republic of Mali to the ICC. Shortly thereafter, the Republic of Mali referred the situation itself.
- The reasons for which thirty-four African states ratified the Rome Statute remain relevant. Since 2011, two African states have referred situations in their countries to the ICC.

- The AU and African states must remain cognisant of the fact that there are millions of African people who are victims of international crimes and mass atrocity. Their need for justice must be the primary concern for African states in all conversations about international justice.
- So far, in the AU discourse on international justice, economic actors and economic crimes have not received sufficient attention.

Recommendations to the African Union (AU) and African Member States

African Union (AU)

- The AU should develop a proactive and comprehensive position on international justice on the continent, which resonates with victims' social, cultural and political environments and extends beyond the current focus on specific country situations.
- We are concerned that the Progress Report of the Commission on the Implementation of the Decision Assembly/AU/Dec.482 (XXI) on International Jurisdiction, Justice and the International Criminal Court (ICC), under consideration at this summit, focuses exclusively on Kenya. We urge that the AU Commission in its preparation of reports to the Summit, ensure that they are more inclusive and encapsulate all aspects of previous decisions of the AU Assembly, which would make them broader in their approach to international justice issues on the continent.
- We note that in its Decision of July 2012, the Assembly directed the African Union Commission (AUC), the African Commission on Human and Peoples' Rights (ACHPR) and the African Court on Human and Peoples' Rights (AfCHPR) to publicise what steps they have taken in cases of international crimes. We recommend the urgent compilation and publication of this report.
- We note the legitimate concerns of the AU about the role of the UNSC in relation to referral and deferral of situations before the ICC and deplore the selective manner in which the UNSC has dealt with situations of mass atrocity. We urge the AU and its member states to utilise the appropriate mechanisms and processes and ensure co-ordination in order to enhance their impact at the international level, including at the Assembly of States Parties (ASP) and the UNSC. An important opportunity which can be leveraged in terms of the Rome Statue is the fact that African states constitute the largest block in ASP. The AU should, in addition, mainstream their concerns in existing initiatives for UN reform.
- It is important that the AU maintain channels of communication and exchange with the ICC even during times of difficult relations. The AU decision on the establishment of an AU-ICC Liaison office should be reconsidered and negotiations on the Cooperation Agreement should be recommenced.

African Member States

- African member states should promote a comprehensive set of mechanisms at continental, regional and national levels which reflect the contextual realities and needs of individuals and communities, to ensure meaningful justice for them. This comprehensive approach would include, but not be limited to:
 - urgently finalising, adopting and ratifying the Protocol extending the jurisdiction of the African Court to include international crimes;

- adopting national policies and legislation on reparations emphasising the primary obligation of states to provide reparations and placing victims at the centre of the process;
- strengthening and safeguarding the independence of regional judicial mechanisms in order to ensure greater protection for, and participation of, victims.
- Any request relying on Article 16 of the Rome Statute to the UNSC must be based on clearly articulated criteria with the onus of proof on the originator of the request.
- Non-state actors, including corporate and commercial actors, in Africa have been complicit in mass atrocities. AU member states have a responsibility to promote reform of mechanisms of accountability for mass atrocities to ensure that such entities are held accountable.

Recommendations to the International Community

International Criminal Court (ICC)

- All actors should be conscious of the fact that international justice takes place within a political, socio-economic and cultural context. The effective deployment of international justice requires supportive diplomatic, strategic, and political assets. The ICC should ensure that it pays due attention to the political, socio-economic and cultural exigencies of each situation in which it intervenes.
- The existence of the ICC has enhanced and deepened the debate on accountability and has encouraged states to respond robustly to addressing impunity at the regional and national levels. However, there are significant challenges in the operation of the court and its constituent parts. Therefore we urge the ICC to acknowledge its own shortcomings and be receptive to constructive criticism.
- The ICC must improve its channels of communication and exchange with the AU and African member states even in times of difficult relations.
- The ICC has an obligation to ensure that the dignity and rights of victims and affected communities, witnesses and intermediaries are respected. This obligation includes duties of care, provision of appropriate protection and assistance, accurate and timely information, facilitation of good faith dealings, and diligent discharge of both legal and ethical responsibilities.
- Members of the Assembly of States Parties (ASP) should ensure that the ICC is adequately resourced in order that it undertakes its functions effectively, particularly with respect to conducting investigations, securing counsel for defence and victims, and outreach programmes to affected communities. This is critical to the credibility of the ICC. Case management and cost saving measures, while laudable, should not compromise due process, and in particular the rights of victims to participate.
- The role of the prosecutor requires significant exercise of necessary and desirable discretion, subject to judicial oversight as provided for by the Rome Statute. Mechanisms exist within the Rome Statute for professional, administrative and judicial checks and balances. Chambers have in several decisions demonstrated the capacity to supervise prosecutorial conduct. However, we recommend a more robust application of these mechanisms and the adoption of additional measures, as appropriate.

- The Office of the Prosecutor should respond seriously to constructive criticism in relation to implementing positive complementarity, strengthening investigations and ensuring the protection of witnesses and intermediaries.

United Nations Security Council (UNSC)

- We call upon China, Russia and the United States of America as permanent members of the UNSC to ratify the Rome Statute. It is impossible for states to effectively call for an end to impunity while attempting to make themselves immune from international justice processes.
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