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Contents



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**Human Rights and Justice Sector Reform in Africa: Contemporary Issues and Responses**

The collection of articles in this issue of *Justice Initiatives* documents some of the principal challenges to justice sector reform in Africa today, and the varied approaches that interested actors are pursuing in response.

# Foreword

**J. 'Kayode Fayemi**†

Many of the articles in the present issue of *Justice Initiatives* will at first confuse and possibly irritate those who hold to a strictly legalistic view of justice, since they are not consistent with that narrow perspective. Whether dealing with media repression in Gambia or citizenship challenges across the continent, police reform in Nigeria or police accountability in South Africa, what this collection of articles demonstrates clearly is the holistic view of justice which guides the work of the Open Society Justice Initiative. They show how we and our partners have worked on localizing universal norms (Tracey Gurd's piece on international tribunals and Chidi Odinkalu's on regional courts), globalizing local principles of access to justice (Vivek Maru) and promoting the link between justice, safety and security through the safeguarding of accountability mechanisms (articles on the police and the media).

As Vivek Maru's article on legal dualism in Sierra Leone explains, elements of customary justice either co-exist with or have been incorporated into formal justice systems in many countries, especially in rural areas where formal justice systems are often not present. Any close watcher of developments in the justice sector in Africa will be familiar with the range of informal justice mechanisms that has developed in urban areas. Some of these mechanisms

are based on modified traditional law structures and procedures and focus on problem solving. Others are established by nongovernmental organizations, and focus on arbitration and conflict resolution. These traditional and informal mechanisms are extremely important because of numerous limitations on formal justice in Africa. Inadequate resources reduce the reach of the formal systems, which are also inaccessible to many Africans due to language problems, poverty, and the absence or inadequacy of legal aid. Equally important, there has been a clear disconnect between African cultural and social practices, which favor restorative and compensatory justice, and the adversarial nature of formal legal justice systems.

In consequence, traditional and informal justice systems are receiving renewed attention, especially efforts to marry them to formal systems such as community service schemes, police-community liaison groups, community safety forums, which now extend beyond the police to other elements of the criminal justice system, and contextual fine payments. While we do not take a romantic view of customary law and recognize that it is not always fully compatible with formal law, or with the principles and norms underlying democratic governance, it is important that these differences are acknowledged openly and that reasons for excluding aspects of customary law are fully explained. The test for good practice ought to be the extent to which justice mechanisms guarantee affordability to ordinary people; proximity to the affected individual's community; simplicity of procedures and their fairness and consistency with cultural expectations. Whether formal or informal, the justice system must eschew historic biases against traditionally marginalized groups—women, youth, and ethnic minorities—dispense justice in local languages, produce outcomes that emphasize community building, skills transfer, restoration and reparation, and ensure that justice is neither delayed nor perceived to be so.

While the above remains the ultimate goal of the Justice Initiative's work, the challenge also remains to globalize good practice and incorporate international instruments that promote access to justice into national laws. The articles on the Special Court, and Tracey Gurd's reflection on international tribunals in particular, if they confirm the suspicion of local people about externally driven mechanisms, also point out the value of outreach work since most communities traumatized by war and genocide still seek justice. The Justice Initiative's work in Sierra Leone has been particularly informed by the need for outreach and adaptation. Between the national and international approaches to justice lie the regional tribunals, which Chidi Odinkalu focuses on in his article. There is demonstrable evidence through the work of the African Commission on Human and Peoples' Rights that there is value in regional mechanisms, especially in our quest to develop and deepen norms and standards in the justice sector.

The challenge remains one of streamlining the raft of regional mechanisms in existence in Africa and ensuring their sustenance over the long term.

If regional mechanisms work especially in the context of Africa's growing democratic governance experience, then the question of clarifying the concept of citizenship as a human rights and justice issue becomes central. Julia Harrington's article on citizenship and discrimination in Africa underscores the full extent of this problem and suggests why citizenship needs to be reconceptualized as a prerequisite for the guarantee of fundamental rights rather than as an administrative nicety. The Justice Initiative is already working with partners in this direction and a full "Citizenship Audit" is being undertaken in a number of countries to seek a fuller understanding of the enormity of the problem.

The media plays a central role in generating and resolving conflict, and its role in the citizenship induced crisis in Côte d'Ivoire is at best mixed, at worst dismal. Even so, the right to freedom of expression and information is one that the Justice Initiative and partners care passionately about—and for this reason we are deeply concerned at recent developments in Gambia as depicted in the piece written by Demba Jawo. Our practical response has been to support freedom of expression and information campaigns in countries like Ghana and Nigeria, as well as our work with CREDO at the continental level.

We know we run the risk of being perceived as doing too much in all these areas, but we believe that by taking a holistic and integrated justice sector reform agenda, incorporating the entire gamut of formal and informal, national, and international justice mechanisms, we can add value and complement the excellent work that others are doing. It is my hope that the practical tools and lessons presented here from a variety of experiences will inspire, support, and assist our justice institutions, public policy actors, academies, research institutions, civil society organizations, and international actors in the critical task of promoting access to justice in Africa.

Notes

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NATIONAL CRIMINAL JUSTICE REFORM

# Donor Assistance to Justice Sector Reform in Africa: Living Up to the New Agenda?

**Laure-Hélène Piron**[†] provides an overview of justice sector aid in Africa, and gives an assessment of its history and future direction at a time when poverty reduction has risen to the top of the donor agenda.

Donor assistance to promote justice sector reform in sub-Saharan Africa[1] has increased significantly over the last 10 years, from an estimated U.S. $17.7 million in 1994 to over $110 million in 2002.[2] As total aid commitments to the region remained stable during the period, this represents a shift in priorities toward legal and judicial reform, reflecting both an acknowledgement of Africa-specific developments—notably democratization and the prevalence of violent conflicts—as well as increasing interest in justice sector work globally. But is donor assistance grounded in an adequate and appropriate understanding of African realities? This article looks at some of the background to, and challenges facing, justice sector work in Africa today.

Donor support for justice sector reform changed focus with the end of the Cold War and the growing trend toward multiparty democracy across the continent.

## From law reform to the rule of law

Donor policy and practice today can be contrasted with past technical approaches, for example, the American "law and development movement" of the 1960s and 1970s, focusing on legal education. In the 1980s, structural adjustment programs were widely implemented and the World Bank engaged in law reform in the economic and commercial realms to help develop legal environments favorable to investment. Typical initiatives in Africa included: supporting a new telecommunications law in Ghana; law revision, updating of case law reports and a review of commercial laws in Tanzania as part of a Financial and Legal Management Upgrading Project; and seminars on the Treaty to Harmonize Commercial Law in Africa, as part of the Togo Public Enterprises Restructuring and Privatization Project.[3]

Donor support for justice sector reform changed focus with the end of the Cold War and the growing trend toward multiparty democracy across the continent in the late 1980s and early 1990s. For example, Swiss government support for "rule of law"

activities began as a late response to apartheid in South Africa and to increased political repression in Rwanda in the years prior to the 1994 genocide, and led to policies on human rights and the rule of law more generally.[4] USAID came to Africa with a "democratization" lens, inherited from its work in Latin America, and attempted to strengthen judicial independence in the face of overpowering executives and to provide assistance in drafting democratic constitutions.

The 1994 genocide in Rwanda marked a turning point. The sheer scale of assistance and the range of international and bilateral donor agencies involved multiplied in the face of the wholesale destruction of the country's justice system and the urgent need to commence genocide trials. Pooling mechanisms were used—the UNDP set up a Trust Fund, for example, and the European Commission and others provided assistance to international NGOs specializing in legal, judicial and penal reform (these included Avocats sans Frontières, Réseau des Citoyens, Penal Reform International, and the Danish Centre for Human Rights). Activities in Rwanda ranged from building courthouses, improving prison conditions, preparing genocide case files, establishing a bar association and a body of paralegals to work with the Ministry of Justice, and reforming the police.

The new approach included support for domestic civil society organizations that demand better justice, monitor human rights, and provide legal assistance. Ford Foundation grantees in South Africa undertook public interest litigation, exploiting loopholes in the apartheid system's rhetorical commitment to the rule of law. These groups later played a major role in creating the country's new constitutional structure and have since established networks to make legal services more accessible to all.[5]

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The 1990s saw the rise in importance of a new concept in aid policy—*governance*—and a concern for building effective state institutions. The *rule of law* was seen as essential for establishing a stable, predictable environment conforming to formal rules rather than patronage. By 2000, the World Bank could write about Africa: "legal reform has become a priority in many countries, and one that Africa's development partners are beginning to assist."[6] Beyond addressing national legal frameworks, the range of institutional development activities funded by donors focused on increasing effectiveness and included improving physical infrastructure, supporting legal and judicial training, making legal information accessible or upgrading management systems in ministries.

In Mozambique, following a diagnostic process in the late 1990s, USAID helped establish a national judicial training center and provided support to improve the efficiency of the Maputo City Court through the provision of equipment, benchbooks, a computerized case-tracking system, and a court administrator.[7]

Human rights issues are not explicitly addressed in the Millennium Development Goals.

### The new poverty reduction agenda and legal reform: complementary or conflicting?

The increased attention by some donors to the accessibility of justice, respect for human rights, and the accountability of institutions to the public—rather than the role of the justice sector in promoting economic growth—coincided with a shift in global donor thinking on aid. With the UN-backed Millennium Development Goals, world poverty reduction has now become the official objective of development policy.[8] This has been associated with a commitment to changing the provision of donor aid, based on a "partnership approach" and the "ownership" of reform by local actors, aiming to improve coordination of aid, moving toward a harmonization of procedures and eventual alignment of donor assistance with national partners' policies and systems.[9]

However, although there is a political commitment to "human rights, democracy and the rule of law" in the Millennium Declaration, human rights issues are not explicitly addressed in its more specific, quantified, and timetabled goals. Challenged to justify how justice sector support can contribute to poverty reduction, donors drew on studies to demonstrate the importance of functioning, fair, and accessible justice institutions in combating poverty. The World Bank's 2000 *Voices of the Poor* report highlighted lawlessness and fear of crime in individual descriptions of the experience of poverty. The negative role played by the police in these accounts —corrupt and politically repressive, harassing small traders and targeting minorities—was striking.[10]

Lesson-learning exercises, including comparative research by the International Council on Human Rights Policy, showed the failings of donors' approaches to date.[11] The council's report set out a strategic approach with clear messages:

- *Start from the beneficiary perspective*, fostering local ownership of reform, using participatory needs assessments.
- *Adopt a rights-based approach*, emphasizing the legal enforcement of human rights claims, the role of institutions in respecting standards, and the positive duties of the police, prosecutors, courts, and others to protect the rights of victims, prisoners, and the general public.

- *Recognize that justice is a sector* and not a set of separate institutions—this requires strengthening links and improving coordination, including with civil society bodies.
- *Give priority to the needs of poor, vulnerable, and marginalized groups,* by enhancing their access to justice, tackling discrimination, ensuring minority participation, recognizing indigenous systems, and paying attention to women's rights.
- *Improve the effectiveness of the aid relationship,* including transparency in donor agendas, recognizing the long term process of justice reform, providing flexible responses, respecting local priorities, and avoiding imported solutions.

In response, most donors are amending their policy orientations. The UK Department for International Development (DFID), with a history of support for policing activities, has radically transformed its policy, putting the experience of insecurity and injustice at the center of its analysis, and highlighting the need for a sector-wide perspective.[12] Two large-scale programs in Africa, designed to conform to this new policy, have been in place for a few years, and more are being designed. The Malawi Safety, Security and Access to Justice Programme (MaSSAJ), which started in 2002 with £35 million (U.S. $67m.) for the first five years, and the Nigeria Access to Justice Programme, with £30 million (U.S. $57m.) approved in 2001 for a period of seven years, are attempting to move away from an institutional approach, emphasizing sector-wide policies and coordination, and paying particular attention to research and the perspective of the poor.

Donors need both to promote national leadership and be politically astute.

The UNDP's "Access to Justice for All" policy also prioritizes people's equal ability to use justice services—regardless of their gender, ethnicity, religion, political views, age, class, disability or other sources of distinction.[13] The World Bank too has adopted "access to justice" as one of three strategic objectives, in addition to legal and judicial reform.[14] This covers improving access to existing services, expanding access by encouraging non-traditional users and the use of new dispute resolution mechanisms, or creating new legal standing. The Bank now explicitly recognizes that member states have human rights obligations and that they can be assisted in fulfilling them—a major change from earlier attitudes to human rights, described as lying outside the Bank's mandate.[15] In programming terms, this new approach is illustrated by grants in 14 African countries to support gender-responsive legal reform processes.

## The new agenda in practice

But how well are donor agencies applying these new policy statements in practice? The fundamental principle of the current "aid effectiveness" agenda is that donors should promote domestic leadership and ownership of reforms. This is not easy to achieve given, first, the vast needs of Africa's chronically under-resourced justice sector; second, the continent's high aid-dependency (in some countries, donor funding accounts for 50 percent or more of public expenditure); and third, the gap between the resources available to donors and those of their national partners. In these circumstances, donors easily become excessively influential in deciding what to support—and governments can just as easily forgo their own responsibilities.

Five key challenges to improve donor support to justice reform in Africa are:

1. *Sustainable interventions.* Some of the pitfalls of current donor projects are illustrated by European and British support for an initiative to address the backlog in homicide cases in Malawi. Court backlogs had increased considerably following the 1995 introduction of a jury trial system. In 1999, donors covered the costs of accommodation, allowances, and transport for all those involved in tackling the problem—judicial, police, and prosecution personnel, legal representatives, jury members, witnesses, and a doctor. This support was to be temporary, but by 2003 an independent evaluation identified an excessive reliance on external resources. Government funding for processing homicide cases had effectively ceased and the donor initiative had not, by then, led to the creation of an improved and sustainable mechanism for continuity after the project's end.

2. *Adopting a sectoral approach.* One challenge in deciding how best to use aid lies in the sheer complexity of justice systems, with a multitude of institutions from both state and civil society keen to preserve their independence and benefit individually from resources that may become available. Initiatives in Uganda have shown the benefits of a sectoral approach to justice work. In the Masaka District, pilot mechanisms for inter-agency coordination between local criminal justice agencies—such as monthly meetings of a "case management committee"—have yielded low-cost improvements, which are now inspiring reform in other countries. A range of Ugandan institutions came together in 1999 to create a Justice Law and Order Sector (JLOS) with a joint strategy and investment plan approved as part of the country's Poverty Eradication Action Plan. Donor assistance is provided in a manner that aims to respect this national leadership: through the national budget to which some donors directly contribute, or by funding only projects that fall within the national strategy. More recently, in Kenya, 11 donors established a group to adopt a similarly coordinated approach.

3. *Understanding the context.* But even if assistance is designed in a manner that backs "sector-wide" initiatives, rather than financially

unsustainable institution-based activities, donors still need to learn to go beyond "technical" solutions and understand the *context* for intended reforms. A particular difficulty lies in the inherent conservatism of justice systems and the politically sensitive changes that might be needed. In many African countries, executives remain dominant, with relatively weaker parliaments or judiciaries charged with upholding checks and balances. Justice sector reform aimed at increasing judicial impartiality or public accountability can pose a threat to the powerful: independent reviews and opinions are not welcomed when, for example, presidents attempt constitutional change to lengthen their terms in office. Police are often called on at election time to serve their political masters rather than the public. Indeed, the courts and police are often identified in surveys as among the most corrupt institutions. Clearly, tackling government-wide corruption requires that these institutions be cleaner and more effective.

Yet too often donors still fail to account for the political aspects of this work and talk of national "ownership" of democratic reform can sound naïve in such environments. Thomas Carothers cites the "politically treacherous" example of constitutional reform assistance in Zambia. Rather than following the recommendations of the (donor-supported) Constitutional Review Commission, President Frederick Chiluba imposed a provision to disqualify his main rival, Kenneth Kaunda, from the 1996 elections, and had the Constitution approved by the National Assembly, which he controlled, thus avoiding the Commission and the need for a referendum.[16] The lesson is that donors need both to promote national leadership and be politically astute.

*4. Involving non-state actors.* National ownership of reform is still often understood to refer to *government* ownership—and the considerable funding required to make significant changes often leads to state-centric assistance.

Rule of law aid providers "tend to underestimate the challenges" and "seem determined to repeat mistakes made in other places."

Yet, any examination of the experience of poor and excluded persons accessing justice in Africa must conclude that formal state institutions may not be the most relevant. More than 80 percent of disputes in Africa are said to be resolved through non-state systems, such as chiefs—but only a few donors (such as the German GTZ) have taken this seriously. Malawi for example has a predominantly rural population of nine million, yet there are only about 300 lawyers, mostly in the urban centers, and only nine of the country's magistrates have had professional training. By contrast, there are at least 24,000 customary justice forums.[17] DFID's MaSSAJ program is now piloting "primary justice" initiatives—improving linkages between

the formal and informal systems, and enhancing skills and accountability of non-state structures.

*5. Improving donor habits and incentives.* Ultimately, few efforts are likely to succeed unless donors pay closer scrutiny to the way in which aid is delivered. In the words of Thomas Carothers, rule of law aid providers "tend to underestimate the challenges" and "seem determined to repeat mistakes made in other places."[18] Examples of bad practice that could easily have been avoided abound, such as, in several West African countries, where training for court stenographers was provided before systems had been established to guarantee their positions and salaries.

Why is this the case? A recent review of Swedish governmental aid concludes that "[m]any actors in the legal arena are unwilling to accept general development co-operation experiences."[19] Even if the tendency to copy laws or attempt the wholesale importation of legal systems from abroad is on the decline, many of the lessons and policy imperatives learned along the way are still undermined in the actual implementation due to the dominance of legal experts from North America or Western Europe who do not necessarily possess either a background in development or experience of Africa. These skills are needed, however, if the challenges listed above are to be met. Even better would be greater reliance on African experts and starting from locally developed initiatives.

Incentive structures within donor agencies too can affect the quality and timeliness of aid. There is often pressure to spend money quickly—sometimes on large conferences or other events viewed as prestigious for senior colleagues at headquarters, or on study tours to the donor country for diplomatic or other political reasons, even when experience from other developing countries might be more relevant. Delays are caused for internal bureaucratic reasons, for example when donor agency staff move on to new assignments at key stages in project development. The broader incentive schema within the aid system too can be counter-productive. Rivalries still arise between different "models" offered by donors based on their own domestic legal and judicial systems. Simple regular sharing of information regarding funded activities with government and other donors does not always happen.

Looking into the future, justice sector reform in Africa must be seen as a pro-poor, long term, developmental endeavor that contributes to the realization of human rights. However, significantly more effort needs to be put into providing aid in a manner that takes into account good development practice, and in elaborating the tricky concept of national ownership, grounded in a proper understanding of African realities. If these approaches were carried out more fully, donors would truly be living up to the new agenda.

## Notes

† Laure-Hélène Piron is a research fellow with the Overseas Development Institute.

1 The term "justice sector" is used here in a broad sense, comprising not just the judiciary, lawyers, and justice and interior ministries, but also police, prosecutors, prisons systems, human rights bodies, non-state mechanisms (e.g. chiefs), and civil society organizations involved in justice work.

2 Source: OECD DAC country commitments for legal and judicial development in Sub-Saharan Africa. These figures should be taken as indicative only.

3 World Bank, *World Bank Initiatives in Legal and Judicial Reform*, 2004 Edition, World Bank, Washington, D.C., 2004.

4 Laure-Hélène Piron and Julius Court, *Independent Evaluation of the Swiss Agency for Development and Cooperation Human Rights and Rule of Law Documents,* Overseas Development Institute, London / Swiss Agency for Development and Cooperation, Berne, November 2003.

5 Stephen Golub, "Battling Apartheid, Building a New South Africa" in Mary McClymont and Stephen Golub (eds.), *Many Roads to Justice: the Law-Related Work of Ford Foundation Grantees Around the World,* Ford Foundation, New York, 2000.

6 World Bank, *Can Africa Claim the 21st Century?,* World Bank, Washington, D.C, 2000, 71.

7 Office of Democracy and Governance, USAID *Achievements in Building and Maintaining the Rule of Law,* Occasional Papers Series, November 2002, 136-8.

8 United Nations, *United Nations Millennium Declaration,* Resolution adopted by the General Assembly, A/Res/55/2, 2000 and United Nations, *Road Map Towards the Implementation of the United Nations Millennium Declaration,* Report of the Secretary General, A/56/326, Annex: Millennium Development Goals, 6 September 2001.

9 United Nations, *Report of the International Conference on Financing for Development,* Monterrey, Mexico, 2002.

10 Deepa Narayan et al., *Voices of the Poor: Can Anyone Hear Us?,* World Bank, Washington, D.C. / Oxford University Press, New York, 2000.

11 International Council on Human Rights Policy, *Local Perspectives: Foreign Aid to the Justice Sector,* Geneva, 2000. See also Harry Blair and Gary Hansen, *Weighing in on the Scales of Justice: Strategic Approaches for Donor-supported Rule of Law Programmes,* USAID Program and Operations Assessment Report no. 7, 1994, and K. Biddle, I. Clegg, and J. Whetton, "Evaluation of ODA/DFID Support to the Police in Developing Countries: Synthesis Study," School of Social Sciences and International Development, University of Wales, Swansea, 1998.

12 Department for International Development, *Justice and Poverty Reduction: Safety, Security and Access to Justice for All,* London, 2000.

13 United Nations Development Programme (UNDP) *Access to Justice for All and Justice Sector Reform,* BDP Policy Note presented at UNDP Access to Justice Workshop, Oslo, March 2002.

14 Legal Vice Presidency, *Legal and Judicial Reform: Strategic Directions,* World Bank, Washington D.C., 2003, 45

15 Legal Vice Presidency, 46.

16 Thomas Carothers, *Aiding Democracy Abroad: the Learning Curve,* Carnegie Endowment for International Peace, Washington, D.C., 1999, 162-3.

17 Wilfred Schärf, "Non-state Justice Systems in Southern Africa: How Should Government Respond," paper prepared for the UK Department for International Development, 2003.

18 Carothers, 176.

19 Swedish International Development Co-operation Agency (Sida), *Swedish Development Cooperation in the Legal Sector,* Sida, 2002, 12.

# The Future of Police Reform in Nigeria

Under the Abacha regime, Nigeria's police had a reputation for corruption and violence. After six years of reform, **Innocent Chukwuma**† examines how much more is needed.

Police corruption and abuse plagued life under General Sani Abacha's tyrannical rule until mid-1998. Almost seven years after Abacha's demise, questions over police accountability and effectiveness continue to linger. Few institutions have a greater impact on the daily life of citizens than law enforcement, yet relations between the police and citizens in Nigeria continue to be characterized by suspicion and mutual hostility.

The inauguration of President Obasanjo's government on May 29, 1999, marked the advent of elected civilian rule in Nigeria. At the time, the Nigeria Police Force numbered about 138,000, servicing a country of over 120 million. Motivation was low: salaries were poor and not paid promptly, and promotions were rare, with officers frequently stuck at the same rank for upwards of 10 years. Internal and external accountability was either weak, ineffective, or nonexistent. Citizens' contact with the police was almost entirely involuntary, restricted to law enforcement encounters. In the midst of all this, violent crime was on the rise across the country.

Under civilian rule, government and police authorities made efforts to boost police morale, enhance accountability and effectiveness, check corruption, and increase community cooperation. Yet five years later, it remains to be seen how far these measures can go in turning the police into an accountable, service-oriented institution.

Among the first efforts was the federal government's adoption of a five year development plan for the police, beginning in 2000. The plan aimed to increase policing capacity through recruitment and improvement of police welfare and powers. Under the plan, a massive recruitment drive was launched, which has increased police ranks to 320,000 in four years. Salaries were increased by over 30 percent and are now paid on time. A Police Service Commission (PSC) has, since November 2001, promoted over a hundred thousand officers—mostly those undeservedly neglected by the Abacha government. The PSC, in collaboration with the Centre for Law Enforcement Education in Nigeria (CLEEN) and the Open Society Justice Initiative, has also developed guidelines on police conduct during elections, and monitored police behavior in the 2003 general elections.

Internally, the police authorities have adopted measures to eliminate corruption in the force and bring the police closer to the community they serve. On assuming office in March 2002, Nigeria's Inspector General of Police, Tafa Balogun, adopted an eight-

point priority agenda for his administration, which included an anticorruption drive and community partnership policing. The police subsequently mounted a vigorous campaign against corruption in the force, which has led to daily arrests and dismissals of patrol officers caught extorting members of the public. Similarly, the Nigeria Police Force has developed a strategic plan for community policing, which is currently being piloted in Enugu State, east Nigeria.

While welcome, these new policies and programs have not significantly altered the behavior of officers on the streets in Nigeria, nor has public perception of the police improved noticeably. On a daily basis, citizens continue to complain of human rights abuses by police, including extortion, brutality, torture, and even extra-judicial killings.

It is therefore imperative that the government and police authorities re-examine the reform policies and strategies implemented in the last five years. A cursory look shows numerous shortcomings. For instance, the five year plan to recruit an average of 40,000 police personnel per year was not preceded by an assessment of the capacity and preparedness of the eight police colleges and training institutions in Nigeria to absorb and effectively train this many recruits. A more careful assessment would have revealed that these institutions did not have the capacity to take on such a task effectively. The schools were stretched to breaking point and adopted a training method described by one college director as "garbage in, garbage out." A new wave of these graduates hits the streets every six months and swells the ranks of human rights abusers on the beat.

Furthermore, with the possible exception of the trial community policing program now underway in Enugu State, reform measures have focused more on the capacity of police to control the citizenry rather than to serve them. This perhaps explains why internal and external accountability mechanisms such as the PSC and a Public Complaints Bureau are underfunded and enjoy little support in the discharge of their functions.

New policies and programs have not significantly altered the behavior of officers on the streets in Nigeria, nor has public perception of the police improved noticeably.

Finally, and more fundamentally, reforms are taking place within the context of a continued government credibility gap ever since the flawed elections of 2003, as well as ongoing uncertainty over the future role of the military, an economic depression that has forced millions out of work, pervasive corruption among top government functionaries, and violent ethnic and religious disputes.

Given the present situation, CLEEN advocates the following steps to improve the process of police reform:

- The government should place a cap on further recruitment and instead immediately launch a program of retraining for all those recruited in the last four years.
- Accountability processes and mechanisms should be given greater political support and a higher priority in police budgeting.
- Investments in social and economic measures for crime prevention should be increased in order to make community policing more effective in building partnerships between the police and the communities they serve in Nigeria.

Notes

† Innocent Chukwuma is executive director of the Centre for Law Enforcement Education in Nigeria (CLEEN).

# Police Transformation and Accountability in South Africa

Ten years into transition, the South African police are still struggling to gain society's confidence. Rising reports of crime and police abuse despite falling figures reflect the mixed results of accountability efforts to date, argue **Cheryl Frank** and **Sean Tait**.†

Democracy was definitively proclaimed in South Africa's 1994 elections, but democratic transition is, by its nature, an ongoing process, often fraught with difficulties. In policing, the primary goal of longer-term democratization was defined early on as the transformation of South Africa's "police force" into a "police service"—shifting their role from that of an organ of state repression into an effective servant of the safety and security needs of the new, reconciled rainbow nation.

During 10 years of transition, many activities, policies, and programs have been employed toward this goal, ranging from new ideas, such as community policing, to large scale retraining initiatives, to the development of entirely new management structures. Yet today South Africans continue to speak of strategies to deepen our democracy and strengthen the structural arrangements of our institutions, notably the police. This objective provides the context for the critical imperative to promote and strengthen police accountability. One scholar characterizes the continuing debate on police accountability in South Africa as a conversation weaving together various perspectives on policing, which serves differing priorities at different stages of South Africa's history.[1]

What function does this ongoing debate serve at this moment in time?

Currently, two central topics of debate stand out: effectiveness—the ability of the police to render the service expected of them; and accountability—the compliance of the police with agreed codes of conduct, the rule of law, and the policies of their own organization. This article briefly explores some of the key issues and questions facing police accountability in South Africa today.

## Challenges for policing and accountability

South Africa is a long way from eliminating the abuse of police powers. These include torture and excessive use of force, both of which persist, albeit on a much reduced scale from the flagrant violations of the apartheid years. An Amnesty International survey on police practice in Southern African countries between 1997–2002 reported that several hundred deaths occur in police custody or "as a result of police action" in South Africa each year. The majority of these deaths resulted from the use of force or torture by police, mostly at the time of arrest.[2]

In an apparent paradox, however, actual instances of police abuse are falling even while complaints of abuse are rising. According to the Institute for Security Studies (ISS), deaths in custody and as a result of police action were lower between April 2001 and March 2002, than during the same period of 2000-01. In 2001-02, 585 people died in police custody or as a result of police action, compared to 687 the previous year, a decline of 15 percent. The figure dropped again in 2002-03, to 217. Nevertheless, complaints against the police rose dramatically from 1,999 in 1997-98 to 5,675 in 2001-02, an increase of 184 percent. This is interpreted by the ISS as a positive indicator, demonstrating a new public confidence in challenging the police.[3] Nevertheless, if this is the case, it has not resulted in an increased sense of public security.

Despite and impressive architecture of oversight agencies, in practice a range of concerns have presented themselves.

## Accountability and oversight architecture in South Africa

Police reforms implemented in South Africa since 1994 have created multiple accountability mechanisms at different levels of government and in local communities. Today, South Africa has a number of structures, both political and bureaucratic, that are formally responsible for policing oversight and accountability. These include the Independent Complaints Directorate (ICD), the national and provincial Secretariats for Safety and Security, and the Parliamentary Portfolio Committee for Safety and Security.

Despite this impressive architecture of oversight agencies, in practice a range of concerns have presented themselves. Limited efforts to coordinate functions and activities have resulted in the duplication of some

services, and little communication and follow-up in relation to referred cases.[4] Capacity limitations within oversight structures also impact the quality and quantity of oversight work. Many of the cases referred to the ICD, with the exception of deaths in custody, are referred back to the police for investigation and there is limited capacity to monitor these investigations.[5] A poor interface between the ICD and the National Prosecutorial Authority (NPA) results in weak feedback concerning cases referred by the ICD to the NPA for prosecution. Nor are the police compelled to report back to oversight agencies on their compliance with recommendations made by these agencies. The result is that there is little scope to evaluate the impact of the work of many of these bodies and little opportunity to build confidence in communities that "bad apples" within the police are being disciplined.

In an apparent paradox, actual instances of police abuse are falling even while complaints of abuse are rising.

The actual impact of this institutional framework of police accountability is increasingly challenged by the need to improve police services and efficiency. One observer identifies the key to democratic reform as, first, reorienting the police toward an understanding of the policing needs of the general public, and then motivating and supporting the police in meeting these needs.[6]

### Crime rates and policing policy choices

South Africa's transition to democracy has been characterized by markedly rising crime rates—a pattern also observed in other transition countries. Media and public pressure on the government to respond has led to a politically-driven tough-on-crime approach. Alongside the state's criminal justice measures, such as minimum mandatory sentencing and stricter bail conditions, the South African Police Service (SAPS) introduced their own controversial crime-combating strategy in 2000, at the expense of more rights-friendly attempts to address crime espoused in earlier policy statements, such as the National Crime Prevention Strategy (1996) and the White Paper on Safety and Security (1999).

The SAPS Crime Combating Strategy, commonly termed "Operation Crackdown" identified those police stations with the highest crime rates and set about stabilizing their catchment areas. The rationale was that once this had been achieved, it would be possible to undertake "normal" crime management. Implementation of the nationally directed strategy involved investigations, surveillance, cordon and search operations, roadblocks, and similar measures. However, this approach is at variance with the principles of community policing—of understanding and responding to local community needs. In fact, this

centrally driven approach is more akin to the old apartheid-style policing of the 1980s. As a result, despite an improvement in crime statistics overall, victim surveys show that South Africans are now more afraid of crime than ever before.

The 2002-03 statistics released by the SAPS seem to indicate a leveling off of crime figures. Since 1994, the incidence of murder has decreased by 30.7 percent, and rape is at its lowest level since the establishment of the SAPS in 1994-95. There has also been a significant decrease in high profile crime such as aggravated robbery, the hijacking of motor vehicles, and bank and cash-in-transit robberies.[7] This is supported by the 2003 ISS Victim Survey, which measures a 2.5 percent drop in the crime rate since 1998. Feelings of safety, however, have also declined and are considered low in comparison with other countries. The ISS points out that this does not correlate with actual crime statistics, although it does reflect the increase in complaints, and highlights the need to work with communities and citizens in identifying safety concerns and seeking to address them.[8]

## Challenges for civil society

During 10 years of transition, the role adopted by civil society organizations has also undergone fundamental change. Just prior to, and in the period after, the first democratic elections in 1994, civil society organizations adopted an optimistic attitude of engagement with government and sought to support and enable the transition process. This engagement assisted in the development of South Africa's oversight infrastructure, and reinforced the range of policies and programs developed to transform policing. More recently, however, civil society organizations have begun to ask whether they need to disengage from this supportive role in order to strengthen their independent capacity to push for accountability. These questions have been raised as civil society has experienced increasing police resistance to external scrutiny, and decreasing access to police-held information. Despite these challenges, the creation and consolidation of effective and accountable state law enforcement capacity remain priorities for civil society groups.

The Open Society Foundation for South Africa and the Open Society Justice Initiative recently established a project to enhance civilian oversight of policing in South Africa. The intervention is unique in that its activities have been constructed on the basis of broad stakeholder input and are being undertaken by organizations already active in the field. The project aims to promote policing in South Africa consistent with the spirit and the provisions of the Constitution of South Africa. This is to be achieved through strengthening the structures and processes for civilian oversight of the police. In part, the project hopes to expand the oversight role from merely reacting to complaints to conducting proactive research and analysis of patterns and practices. The cooperation and interaction between oversight agencies will be improved by concentrating on intervention areas that involve several or all agencies. Ultimately the impact will not only

be a police service protective of the human rights and dignity of all, but a more effective and professional police service that enjoys good relations with the community.

### Further Reading

Legget, T. et al, "Criminal Justice in Review 2001/2002," Monograph 88, November 2003, Institute for Security Studies, Pretoria.

### Notes

† Cheryl Frank and Sean Tait are, respectively, director and senior program officer of the Criminal Justice Initiative at the Open Society Foundation for South Africa.

1 Van Der Spuy, discussion on police accountability, held by the Open Society Foundation for South Africa and the Open Society Justice Initiative, Johannesburg, 2002.

2 Amnesty International, *Policing to Protect Human Rights, A Survey of Police Practice in Countries of the Southern African Development Community, 1997-2002,* Amnesty International Publications, London, 2002.

3 Institute for Security Studies, *National Victim Survey 2003,* Pretoria, 2003. See www.iss.co.za.

4 Open Society Foundation for South Africa and Open Society Justice Initiative, *Report: Civilian Oversight and Monitoring of the Police In South Africa,* June 23-24, 2003. See www.justiceinitiative.org.

5 See Independent Complaints Directorate, *Annual Report 2002/2003,* Ministry of Safety and Security, Pretoria, 2004.

6 David Bruce, *Democratic Reform of the Police – Any lessons for Kenya from South Africa?*, 2003. Paper presented at the Roundtable Conference on Police Reform in East Africa, *Police as a Service Organisation: An Agenda for Change,* Nairobi, April 24-25, 2004.

7 South African Police Services, *Annual Report,* Ministry of Safety and Security, Pretoria, 2004.

8 Institute for Security Studies, 2003.

# The Challenges of African Legal Dualism: an Experiment in Sierra Leone

**Vivek Maru**† examines how a project providing paralegal assistance can help address the colonial legacy of "decentralized despotism" in Africa.

Law in most African countries is bifurcated: formal legal systems inherited from the former colonial powers coexist with "customary" legal regimes derived from traditional approaches to justice. This legal dualism poses challenges for law reform across the continent. I would like to describe a few of those challenges, in particular as they arise in Sierra Leone, and to sketch the way in which a community legal services program there is attempting to grapple with them.

## The dilemmas of African customary law

Customary institutions deserve a degree of autonomy and respect. They have roots in cultural traditions and, for many in rural Africa, are the most accessible institutions. On the other hand, the same institutions are theo-

retically subordinate to national constitutions and—although this is more contentious—international human rights law. The line between autonomy and subordination is difficult to draw.

That said, it would be too simple to conceive of the challenges of legal dualism exclusively in terms of opposition between human rights and African culture. Ugandan political scientist Mahmood Mamdani situates present-day customary law in the history of colonialism. In particular, Mamdani focuses on the colonial strategy of indirect rule. The kernel of that strategy was to rule rural Africa by proxy, first subjecting African chiefs to colonial authority and then enhancing the power of those chiefs over their own people.

Under this system, chiefs became both law-makers and law-enforcers, and they used customary law to carry out colonial demands and to practice exploitation of their own by means of excessive fines, forced labor, and arbitrary decisions. Mamdani argues that the legacy of indirect rule continues to this day in the form of a despotic African countryside, in which too much power is concentrated in the hands of chiefs. According to this view, independent African states—the inheritors of colonial authority—have failed to confront, indeed have often taken advantage of, this legacy of despotism.[1]

## Dualism and justice in Sierra Leone

There is evidence to suggest that Mamdani's analysis is relevant in contemporary Sierra Leone. One scholar, Arthur Abraham, concluded that the transformation of Sierra Leone's Mende chiefs from sovereign but limited kings into colonial agents "put chieftaincy out of the reach of traditional sanctions," such as the right of subjects to depose their chiefs. "[T]he traditional democratic basis of Mende chiefship was radically undermined."[2] The colonialists designated "chiefdoms" as the primary administrative units in the countryside and "paramount chiefs" as their rulers. Since Sierra Leone's political independence in 1961, governments of both major political parties have used paramount chiefs, as they are still called, to consolidate and maintain power. What Abraham wrote in 1978 remains true: "Every government in the post-colonial period has not only pledged itself to uphold the institution of chieftaincy, but has used it as the basis for local support."

The legacy of indirect rule continues to this day in the form of a despotic African countryside.

The 1896 ordinance that first made Sierra Leone a British protectorate established "courts of the native chiefs." The same institutions are legally recognized today—though renamed "local courts"—as arbiters of customary law. Reforms in the late colonial period replaced paramount chiefs with court chairmen as the heads of these courts,[3] but those chairmen are still appointed by paramount chiefs for approval by the

local government ministry. In practice, customary law is also administered by lesser "village" and "section"[4] chiefs although these are not recognized by statute. Customary law varies by ethnic group, and is uncodified.

The formal legal system, meanwhile, is concentrated in Freetown, the nation's capital. Of a total of ten magistrates, five sit in Freetown while the other five rotate among 12 provincial magistrate courts. Of 11 high court judges, 10 presently sit in Freetown while only one is assigned to rotate among the provinces. Most chiefdoms have branch offices of the Sierra Leone national police in addition to "chiefdom" police officers, who serve the customary institutions. Law requires that crimes punishable by more than six months' imprisonment be dealt with by the national police and the formal courts, though such jurisdictional boundaries are not always adhered to. Of the two overlapping legal regimes, customary law has more practical relevance for the vast majority of Sierra Leoneans than the formal legal system.

Of the two overlapping legal regimes, customary law has more practical relevance for the vast majority of Sierra Leoneans than the formal legal system.

Mamdani's structural concern that customary law is controlled by overly powerful chiefs may be related to several other challenges posed by customary law in Sierra Leone. Substantively, customary law sometimes conflicts with human rights. Among certain ethnic groups, a girl can be betrothed without her consent before she reaches puberty.[5] Women are also generally disallowed from inheriting family property.[6] Customary law is supposed to comply with the national constitution and it should not, according to the 1963 Local Courts Act, contradict "enactments of parliament" or "principles of natural justice and equity." But these nominal limitations are seldom, if ever, enforced.

Moreover, customary law is often applied unfairly. Favoritism and excessive fines are common. In Bumpeh-Gao Chiefdom in the Southern Province, I watched as two fines, each for 10,000 Leone (U.S. $3.50), were levied against a witness—someone who was in principle assisting the court in its work—within the course of half an hour. The reason was that the witness spoke a one-word answer to a question asked of him before the court clerk had finished recording the question in his languid handwriting.

Among the causes of both substantive and procedural unfairness is a lack of independent review. Within the chiefdom, few but the paramount chief and elders favored by him have any power over the functioning of local courts. This may be symptomatic of the concentration of power that Mamdani highlights. There is a theoretical right to appeal from local courts to the formal legal system but in practice such appeals are quite rare. There is also one national "customary law officer" with the power to super-

vise local court chairmen and review local court decisions. This form of review may not qualify as independent because the law officer is a member of the executive rather than judicial branch. Even assuming adequate independence, the same person doubles as the only public prosecutor working in the provinces: his time is stretched thin.

The background for all of these problems is severe poverty and lack of infrastructure. Weak education and health care systems, poor roads, paucity of clean water, and substantial unemployment place this post-conflict nation right at the bottom of a list of 177 countries ranked in the United Nations Development Program's human development index.

## Community-based paralegals

Where should law reform begin in this situation? How does one begin to serve the people who live under this system? The Open Society Justice Initiative and the Sierra Leonean National Forum for Human Rights are undertaking an experimental effort to provide basic legal services in five chiefdoms in Sierra Leone. The idea is to work primarily through community-based paralegals—as they are provisionally called—rather than through lawyers. There are only 100 or so lawyers in the country, less than 10 of whom are outside the capital and its vicinity. Moreover, lawyers are not allowed to appear in customary courts. The paralegals come from the chiefdoms where they work and have grown up under customary law, but are given training in (mostly) formal law as well as in the workings of government. Their methods are diverse. For individual justice-related problems, the paralegals provide information on rights and procedures, mediate conflicts, and assist clients in dealing with government and chiefdom authorities. For community-level problems, paralegals advocate for change from above and assist in organizing collective action from below. I am one of two lawyers who supervise, train, and support the paralegal staff.

The project employs three distinct approaches to reforming customary law and the dualist legal structure. First, the formal legal system is sometimes invoked to check unfairness and exploitation in the customary system. Where local court decisions are severely unjust, the project's supervising lawyers will lodge appeals in the formal court system to seek both redress for the client and a precedent-setting ruling. Sometimes, the very fact that paralegals can speak the formal legal language and are associated with formal law is enough to inhibit would-be exploiters in the customary setting. For example, in June 2004, the Sierra Leone Farmers' Association was delaying sending seed-rice to a particular village in Kakua chiefdom. A paralegal went with village leaders to visit the official who, it turned out, had been holding out for a bribe. Our paralegal told us that the official trembled as soon as he saw "human rights" on the paralegal's ID card. The rice was soon delivered.

But we are not legal missionaries, banishing the darkness of customary law with the light of the formal legal system. Customary institutions, as

noted, deserve respect both for their traditional origins and for their greater accessibility and relevance to most Sierra Leoneans. A second reform effort acknowledges this by working to improve the customary system from within. Paralegals identify fair-minded chiefs and elders who can assist with internal advocacy. They hold community meetings to engage people in dialogue on justice issues in the chiefdom. When paralegals mediate local conflicts, they provide an alternative and fine-free process that synthesizes traditional and modern approaches. A paralegal mediating between a delinquent child and a father who has resorted to beating might, for example, begin with something from the Convention on the Rights of the Child and end with the ritual of a child placing his head on his father's feet. We hope that as our paralegals gain respect in their chiefdoms, their presence will decentralize some of the power that is now concentrated in the hands of the chieftaincy.

Finally, paralegals can serve as bridges between the two regimes. One effect of legal dualism is that rural people are marginalized from and fearful of the structures of government and the formal legal system. Paralegals have assisted rape victims, for example, in pursuing prosecution with the Sierra Leone Police (rape is outside the jurisdiction of customary courts). If the government is not paying teachers in a particular community, paralegals will raise the issue with the Ministry of Education.

Our hope is that these piecemeal, grassroots efforts will contribute to a reform of Sierra Leone's dualist legal structure that draws on the experience of ordinary Sierra Leoneans and meets their needs by combining the strengths of the formal and customary legal systems, rather than exalting one over the other.

## Notes

† Vivek Maru is project manager for the Open Society Justice Initiative Paralegal Project in Sierra Leone.

1 Mahmood Mamdani, *Citizen and Subject,* Princeton University Press, 1996.

2 Arthur Abraham, *Mende Government and Politics under Colonial Rule,* Sierra Leone University Press, 1978, 303-11.

3 Paul Richards, *Fighting for the Rainforest: War, Youth & Resources in Sierra Leone,* International African Institute, 1996, 46.

4 The country's 12 districts are each divided into chiefdoms, with an average of 12 chiefdoms per district. Each chiefdom is in turn divided into anywhere between 2 and 15 sections, and each section encompasses tens of villages.

5 Joco Smart, *Sierra Leone Customary Family Law,* Atlantic Printers, 1983, 33. This is the most recent research available, but its conclusions are borne out by experience in the field.

6 Smart, 196.

EQUALITY AND CITIZENSHIP

# Voiding Human Rights: Citizenship and Discrimination in Africa

Recently some African states have manipulated access to citizenship and the rights that follow from it in discriminatory ways, says **Julia Harrington**.† As the right that determines access to most others, citizenship is in need of special monitoring.

Alassane Outtara and Kenneth Kaunda were once heads of state. Judith Todd's father was once prime minister of Rhodesia. Thousands of farmers in Mauritania and Côte d'Ivoire used to own their own land. Now the politicians are barred from standing for office, Judith Todd has lost her right to vote in the country of her birth, and the smallholders are landless refugees and displaced persons.[1] The rights lost are diverse, as are the parties who suffer them, but the losses flow from a single legal disability: deprivation of citizenship.

In many states in Africa, citizenship is being manipulated and restricted to deny rights to those whom the state wishes to marginalize. The problem is widespread, affecting over a dozen countries in all parts of the continent,[2] yet few recognize that the same scenario is being played out over and over. States are learning—many by example—that a few simple legal moves, unregulated by international human rights law, can dramatically shift power and stifle democracy. Human rights advocates, concentrating on single countries or issues, often miss a common thread connecting numerous different rights violations: access to citizenship.

How and why has citizenship in Africa now become so hotly contested—a vehicle for exclusion and a cause of wars? Perversely, among the roots of this dynamic are democratization and the greater pressures on states to respect human rights and provide social services.

In many states in Africa, citizenship is being manipulated and restricted to deny rights to those whom the state wishes to marginalize.

## The emergence of citizenship norms in postcolonial Africa

Historically in Africa, "citizenship"—the guarantee of reciprocal rights between an individual and a state—has been more a tool of politics than a vehicle for individual rights. Few precolonial African states had legal notions of citizenship.[3] In the colonial period, citizenship was still irrelevant for most: individuals were subject to colonial states, but not as citizens.[4] In some territories, classes of citizenship were created and political

participation granted to a very few. Employing indigenous leaders to maintain control over the population, colonial rulers attempted to codify ethnic identities and assert the conceit that each ethnic group had a territorial "homeland" or land of origin. But individuals still moved freely within the vast swathes of colonial territory governed by a single authority, and sometimes even between different colonial territories.[5]

The obligation to provide even the most basic social services turns citizens into financial liabilities, walking bundles of potential entitlements.

At independence, most new states granted citizenship to those living in the territory and followed their former colonizers in their policies for those yet to be born. Thus, the constitutions of former British colonies generally provided that those born within the territory would receive citizenship (*jus soli*). Civil law states usually provided for citizenship to be granted by descent (*jus sanguinis*).[6]

Although legal citizenship was thereby established, and African constitutions guaranteed the equality of citizens, few states conveyed to their people the political rights generally regarded as inherent in citizenship today, such as to vote or to stand for election.[7] Nor did citizenship in most countries guarantee the right to many public and social services. Thus states had little political or financial incentive to deny individuals citizenship. Postcolonial states made little effort to police the possession of citizenship through registration of births or other documentation. Indeed, UNICEF found that 70 percent of all births in sub-Saharan Africa, and nearly one third of all births in North Africa went unregistered in 2000.[8]

In the past decade, however, the significance of citizenship has changed profoundly, due to democratization, growing respect for human rights, and greater pressure on African states to provide basic social services.[9] Citizens now have, at least in principle, considerable rights and power. The majority of African states hold multiparty elections and the collective will of citizens, muted as it may be by flawed elections, is important in determining who controls the mechanisms of the state.[10] State authorities are now legally committed to protecting a wide range of citizens' rights, set out in international and regional human rights treaties.[11] However, the obligation to provide even the most basic social services turns citizens into financial liabilities, walking bundles of potential entitlements that can lay claim to state resources.

So was the current situation born: states can no longer legally deprive their citizens of rights, but they can shortcut their obligations by limiting the very existence of citizens. Because international norms on the granting and deprivation of citizenship and those defining the rights of noncitizens are weak or nonexistent, states

can legally limit the number of individuals to whom they guarantee key rights. Remarkably, state actions to lift or limit citizenship are not prohibited by human rights law, despite their decisive impact on individual human rights.[12] Legal arguments to counter restrictive citizenship laws must therefore focus instead on their discriminatory intent or effect.

### Discrimination in access to citizenship and denationalization

Citizenship is one of the few grounds upon which arbitrary distinctions between individuals are not inherently prohibited under international law.[13] Conditions for gaining citizenship are still almost entirely a matter for state discretion.[14] Additionally, when turning individuals into noncitizens, or preventing their access to citizenship, states routinely claim that these persons' core right to have citizenship in at least one country is not thereby violated.[15] For example, the government of Côte d'Ivoire, when it stripped citizenship from individuals and forbade noncitizens to own land, defended these moves on the basis that the persons affected could simply go "back where they came from."[16] This notion of a "homeland" in another country is usually fictive, and makes discrimination perpetrated against disfavored groups no less severe. In Rwanda, the fact that Banyamulenge refugees from the Democratic Republic of Congo can theoretically get Rwandan citizenship is of no use or comfort to hundreds of thousands who are increasingly insecure and disenfranchised in the DRC, where they have lived for generations.[17]

Even where the *de facto* stateless are not expelled, denationalization creates profound marginalization and insecurity: it deprives individuals of the right to reside permanently within their country and to political participation. Loss of citizenship may also restrict access to education and the right to enter certain professions.[18] The attendant fear of deportation closes off vocal or legal protest for all but the most courageous. Those who take the fight to the courts are unlikely to have the resources to complete the process, if they are not expelled in the meantime.[19]

Even where the *de facto* stateless are not expelled, denationalization creates profound marginalization and insecurity.

In a continent with such a long history of ethnically plural societies, any attempt to restrict citizenship according to ethnic affiliation is already suspect. This suspicion is generally confirmed on examination: in practice, the vast majority of new policy changes target a specific, disfavored group for further marginalization. While most new citizenship legislation and regulations appear nondiscriminatory, they often disproportionately affect specific populations. The Congolese requirement that individuals be able to trace their ancestors' residence in the territory of present-day DRC as far back as 1885 targets Kinyarwanda speakers, who generally

arrived after that date.[20] The Ivoirian requirement that one's pedigree of "Ivoirité" be "validated" by village elders disproportionately excludes ethnic Dioullas.[21]

Alternatively, discrimination can be effected through the implementation of laws, as in the case of Zimbabwe's requirement that individuals renounce all other possible citizenship claims before getting Zimbabwean citizenship (usually applied only to whites and those with "foreign" surnames).[22] In Mauritania, those who lost their citizenship during forced expulsion from the country in 1989-90 were overwhelmingly black.[23]

Citizenship needs to be reconceptualized as a prerequisite for the guarantee of fundamental rights rather than as an administrative nicety.

### What can be done?

Through legal and political action, Alassane Outtara and Kenneth Kaunda have now regained their nationality. Judith Todd, after losing in the Zimbabwean Supreme Court, is appealing to the African Commission on Human and Peoples' Rights. But for millions not as wealthy, lucky, or powerful, second-class citizenship or statelessness and the attendant disabilities are a permanent condition.

To stop human rights violations being perpetrated through citizenship policy, a few simple steps will suffice—although states are sure to fight hard against them. Long-term success will require coordinated efforts on the part of human rights activists and the affected populations.

First, citizenship needs to be reconceptualized as a prerequisite for the guarantee of fundamental rights rather than as an administrative nicety. Its current status as an administrative determination belies its critical importance. Consider that an individual cannot be imprisoned until the state overcomes a burden of proof "beyond reasonable doubt." Yet although deprivation of citizenship may entail an equally severe loss of rights, the burden of proof in contested citizenship cases is placed entirely on the individual, notwithstanding that states have far greater (if not exclusive) access to the bureaucratic records often required to prove citizenship under new laws.

A second step is to recognize citizenship policy as a critical mechanism in perpetrating discrimination and undermining a wide range of rights. As such, it should be subject to scrutiny by international human rights mechanisms and international courts. The norms of antidiscrimination are well entrenched in numerous international instruments and provide a basis for scrutiny of citizenship policy. In individual cases, it is easy to see how deprivation of citizenship directly violates a wide range of an individual's protected rights. The African Commission on Human and Peoples' Rights has three times condemned deprivation of citizenship,

twice in individual cases and once in the context of mass deprivation and expulsion.[24]

If these steps are taken—recognizing the fundamental importance of citizenship in guaranteeing essential rights, and opening up national citizenship policies to international scrutiny—existing human rights mechanisms and advocacy can be brought to bear. In court, victim-plaintiffs might argue that the legal burden of proof in cases of individual deprivation of citizenship should be shifted to the state, given the administrative difficulties faced by individuals trying to prove their citizenship.[25]

Full recognition of the importance of citizenship might include advocating that the administration of citizenship be handled by a body independent of the executive branch of the state, analogous to an independent electoral commission. There are as yet no NGOs specializing in citizenship advocacy, as there are for women's rights, freedom of expression, and other human rights violations. While individual instances of deprivation of citizenship do sometimes make their way to the courts, this is a costly and time-consuming process. An independent body to administer citizenship would not be immune to state manipulation, but it might be more accessible than the courts.

International advocacy organizations can respond to the manipulation of citizenship by giving citizenship issues higher priority, recognizing that attacks on land ownership, livelihoods, political participation, and other human rights often lie behind citizenship policies. Most citizenship cases concern discrimination at some level, and should be recognized and litigated as such through the national courts, with international resources and expertise brought to bear.

Where national-level mechanisms fail, regional and international ones should be employed to the fullest. The most far-reaching decision of the African Commission was in the case of Mauritania, where the commission recognized in 2000 that thousands had been deprived of their citizenship in a discriminatory way in 1989.[26] But the Mauritanian government has yet to re-issue identity documents to the individuals affected in accordance with the decision. Nonetheless, all current cases similar to the one in Mauritania should be promptly brought before the commission, and advocacy must continue until its decisions are implemented.

Manipulation of the citizenship policies in Africa began quite recently but has mushroomed in the past decade to affect millions of individuals.

Regional organizations, particularly the African Union with its clear mandate and multiple mechanisms for conflict prevention, resolution, and peacekeeping, should recognize the fundamental role that citizenship policies play in creating the conditions for conflict.

Manipulation of citizenship policies in Africa began quite recently but has mushroomed in the past decade to affect millions of individuals. Its popularity must be partly attributed to the fact that citizenship falls outside the realm of existing human rights law and advocacy and so escapes scrutiny and legal challenge. The human rights legal and political communities must remedy this neglect and help bring this innovative and pernicious form of rights violation to an end as quickly as it has developed.

Notes

† Julia Harrington is senior legal officer, equality and citizenship, with the Open Society Justice Initiative.

1 Basildon Peta, "Activist Dodges Mugabe Travel Ban," *The Independent*, January 1, 2004, 11; Howard W. French, "Dagana Journal; Where Proud Moors Rule, Blacks Are Outcasts," *New York Times*, January 11, 1996, A4; Somini Sengupta, "Land Quarrels Unsettle Ivory Coast's Cocoa Belt," *New York Times*, May 26, 2004, A3.

2 The Open Society Justice Initiative's Africa Citizenship & Discrimination Audit has identified discrimination in access to citizenship or discriminatory denationalizations in the following countries: Botswana, Côte d'Ivoire, the Democratic Republic of Congo, Egypt, Eritrea, Ethiopia, Kenya, Mauritania, Morocco, Nigeria, Sudan, Tanzania, Uganda, Zambia, and Zimbabwe.

3 Jeffrey Herbst, "The Role of Citizenship Laws in Multiethnic Societies: Evidence from Africa," in Richard Joseph (ed.), *State, Conflict, and Democracy in Africa*, Boulder: Lynne Rienner Publishers, 1999, 268.

4 See Mahmood Mamdani, *Citizen and Subject*, Princeton: Princeton University Press, 1996.

5 John Iliffe, *Africans: The History of a Continent*, Cambridge: University Press, 1995, 207.

6 Herbst, 271-273.

7 See T. Alexander Aleinikoff and Douglas Klusmeyer, *Citizenship Policies for an Age of Migration*, Washington, D.C.: Carnegie Endowment for International Peace, 2002, 45.

8 United Nations Children's Fund (UNICEF), "Factsheet: Birth Registration, "www.unicef.org/newsline/2003/03fsbirthregistration.htm.

9 A goal of 20 percent of state spending on social services was set for developing countries at the Copenhagen Social Summit in 1995. See Julia Harrington, Catherine Porter, and Sanjay Reddy, "Financing Basic Social Services," in UNDP, *Choices for the Poor*, March 2001, 173-174. www.undp.org/dpa/publications/choicesforpoor/ENGLISH/CHAP07.PDF.

10 Lise Rakner and Lars Svåsand, *Multiparty Elections in Africa's New Democracies*, Norway: Chr. Michelsen Institute, 2002, 1. www.cmi.no/publications/2002/rep/r2002-7.pdf.

11 The African Charter on Human and Peoples' Rights has been ratified by all African Union member states.

12 The 1961 Convention on the Reduction of Statelessness lays out permissible circumstances in which a person may be deprived of a nationality, even if doing so would render him stateless; see Convention of the Reduction of Statelessness (1961), art. 8.

13 International Convention on the Elimination of All Forms of Racial Discrimination (CERD), 1965, art. I(2).

14 Johannes M. M. Chan, "The Right to a Nationality as a Human Right: The Current Trend Towards Recognition," 12 *Human Rights Law Journal* 1991 12, 14.

15 Universal Declaration of Human Rights, 1948, Article 15(1).

16 See Sengupta.

17 Human Rights Watch, "Human Rights Overview: Democratic Republic of Congo," January 1, 2004, www.hrw.org/english/docs/2003/12/31/congo7003.htm.

18 See for example "Gambia Bars Foreigners from Commercial Driving," *Panafrican News Agency (PANA) Daily Newswire*, February 10, 2004.

19 See for example *John K. Modise v. Botswana*, AfCmHPR, no. 97/93 and *Amnesty International v. Zambia*, AfCmHPR, no. 212/98, brought on behalf of John Lyson Chinula and William Steven Banda.

20 Human Rights Watch, *Democratic Republic of Congo: What Kabila is Hiding*, October 1997, Section III, http://www.hrw.org/reports97/congo/Congo1.htm.

21 Conversation with Ibrahima Doumbia, formerly of the Mouvement Ivoirien de droits de l'homme, January 28, 2004.

22 Conversations with staff of the Zimbabwe Legal Resources Foundation, November 2003.

23 See Human Rights Watch/Africa, *Mauritania's Campaign of Terror*, April 1994.

24 *John K. Modise v. Botswana*, AfCmHPR, no. 97/93; *Amnesty International v. Zambia*, AfCmHPR, no. 212/98; *Malawi African Association v. Mauritania*, no. 54/91, *Amnesty International v. Mauritania*, no. 61/91, *Ms. Sarr Diop, Union Interafricaine des Droits de l'Homme and RADDHO v. Mauritania*, no. 98/93, *Collectif des Veuves et Ayants-droit v. Mauritania*, no. 164/97 à 196/97, *Association Mauritanienne des Droits de l'Homme v. Mauritania*, no. 210/98, AfCmHPR Judgment of May 11, 2000.

25 See *Nachova and Others v. Bulgaria*, ECtHR Judgment of February 26, 2004, nos. 43577/98 and no. 43579/98, para. 169 ("[The Court] may... shift the burden of proof to the respondent Government, as it has previously done in situations involving evidential difficulties.").

26 *Malawi African Association v. Mauritania*, no. 54/91, *Amnesty International v. Mauritania*, no. 61/91, *Ms. Sarr Diop, Union Interafricaine des Droits de l'Homme and RADDHO v. Mauritania*, no. 98/93, *Collectif des Veuves et Ayants-droit v. Mauritania*, no. 164/97 à 196/97, *Association Mauritanienne des Droits de l'Homme v. Mauritania*, no. 210/98, AfCmHPR Judgment of May 11, 2000.

# A Precedent for Darfur

In 1989, the Mauritanian authorities expelled or murdered thousands of the country's black population. **Stephen Humphreys**† visited four of the many camps housing the refugees to this day in neighboring Senegal.

For a precursor to the ongoing exodus from Darfur, look west across the Sahara to the Senegal River, the long border between Mauritania and Senegal. There, for the past 15 years, refugee camps dot the landscape at irregular intervals along an 800-kilometer stretch of desert to the south of the river. These displaced villages are the result of a racial expulsion program that resonates hauntingly with events in Darfur, Sudan, today.

In a matter of weeks in April-May 1989, Mauritania systematically disposed of thousands of its black population. In the cities, civil servants and laborers were killed in the streets, or gathered in police stations and deported by airplane. In rural areas, housing and livestock were seized or burned. Farmers and herders were packed into trucks, driven to the river, and ferried across to the Senegalese side in pirogues, the picturesque fishing boats used throughout the region. Many died. Between 50-75,000 were settled in camps, often within sight of their former homes across the river. Most are still there today.

Mauritania, on the far side of the Sahara from Sudan, attracts little international attention. The events of 1989 caused ripples outside Africa at the time, but there was neither time nor proper understanding for meaningful action. Yet the situation in

Mauritania resembles Darfur in three respects. First, both share a distinct if complex basis in ethnic/linguistic discrimination. In Mauritania, as in Darfur, the victims are all black Africans—yet they do not constitute the totality of the country's black population. Nor do they comprise a homogenous ethnic group. In Sudan, Fur, Masalit, and Zaghawa are the victims; in Mauritania, Peul, Soninké, and Wolof persons were killed and expelled. What these disparate groups do share is the trait of not being native speakers of the state language—al-Hasaniya in Mauritania, Arabic in Sudan. Indeed, Mauritania's Haratines—blacks who speak al-Hasaniya like the lighter-skinned Moors—were often the attackers, not the attacked, in 1989.

In Mauritania, ethnic and linguistic discrimination was formalized as an attack on "noncitizens"

In Mauritania, ethnic and linguistic discrimination was formalized as an attack on "noncitizens." The country claimed to be deporting "only" its Senegalese population in response to reported attacks on Mauritanians in Senegal. To reinforce the notion that Mauritanian blacks were in fact foreigners, their identity cards were often seized and destroyed. The message was: "You are no longer citizens. You have no rights."

The second reason Sudan should stir memories of Mauritania is the nature of the violence. In Mauritania, expulsion methods varied between the city and the countryside. But in the South, where concentrated populations of black Africans lived, a pogrom of torching villages, slaughtering livestock, and relocating black Africans across the border took place. The parallels with Darfur are evident. In both countries, the policy was largely executed by proxy. In Mauritania, the Haratines, generally freed slaves who remain close to their former Moorish masters, attacked Peul and Soninké villages, apparently believing they would inherit the land. The gendarmes generally remained in the background, sometimes overseeing operations in civilian clothes, sometimes intervening after the initial raids were done to collect IDs and transport people. The Sudanese state originally kept greater distance from the janjaweed militias, Darfur's armed persecutors on horseback, although their support is increasingly transparent.

Third, and most chillingly, Darfur reminds us that the Mauritanian government acted with impunity. Virtually nothing has been done to rehabilitate the refugees, punish the actions of the state, or articulate and advertise the unacceptability of the events of 1989. A visible international reprimand to Mauritania did not come until 2000, in the form of a ruling of the African Commission on Human and Peoples' Rights in a set of cases brought by African and international NGOs. A host of human rights violations were identified. Mauritania was

told to "take diligent measures" to restore the refugees' identity documents and pave the way for their return, including through restitution of their belongings and payment of reparations.[1] Almost five years on, Mauritania has not acted. The commission's ruling has languished without effective support or action by other international bodies.

In effect, Mauritania perpetrated a textbook case of population cleansing without consequence. In the years since the purge, discriminatory violence by states against sections of the populace demonized as "foreign" has become increasingly common in Africa. The reconstitution and penalization of great swathes of the population as "noncitizens" has fuelled wars in Rwanda, the Democratic Republic of Congo, and Côte d'Ivoire. The years since 1989 have been catastrophic for millions of Africans from these and other countries.

Determined international condemnation of the cleansing of the citizenry on one side of the Sahara in 1989 would likely not have forestalled its repetition in Darfur, on the far side, in 2004. But with the crisis in Darfur still seething despite a year of international attention, and with hundreds of thousands of refugees settling "temporarily" in Chad today as they did in Senegal 15 years ago, the paralysis of observers is dismaying. One might justifiably ask what the African political landscape will look like 15 years hence if citizenship stripping and cleansing continue to gain legitimacy by precedent.

## Notes

† Stephen Humphreys is senior officer, publications and communications, with the Open Society Justice Initiative. The situation in Darfur is discussed in more detail in articles by Chidi Anselm Odinkalu and Kelly Dawn Askin on pages 65 and 67 of the present publication.

1 *Malawi African Association vs. Mauritania*, Communication no. 54/91, *Amnesty International vs. Mauritania*, Communication no. 61/91, Ms. *Sarr Diop, Union Interafricaine des Droits de l'Homme and RADDHO vs. Mauritania*, Communication no. 98/93, *Collectif des Veuves et Ayants-droit vs. Mauritania*, Communications nos. 164/97 to 196/97, *Association Mauritanienne des Droits de l'Homme vs. Mauritania*, Communication no. 210/98, African Commission on Human and Peoples' Rights, May 11, 2000. The judgment is available online: http://www1.umn.edu/humanrts/africa/comcases/54-91.html

INTERNATIONAL JUSTICE AND TRANSNATIONAL REMEDIES

# Regional Courts in Africa: A Promise in Search of Fulfillment

A range of regional courts has been established in Africa in recent years. **Chidi Anselm Odinkalu**† examines their needs and aspirations.

The challenge of creating accessible justice mechanisms in Africa transcends national boundaries. All African countries face it; few, if any, have been able to make any progress on the road to overcoming it. Across the continent, national judiciaries, like other departments and arms of government, are weak and lack credibility. The judiciary is under-funded, its independence is routinely undermined by the other branches of government, and it is called upon to apply outdated laws and rules of evidence and procedure that are long overdue for reform. Legal services are largely limited to urban areas and unaffordable for a majority of the continent's population. At the national level, a range of factors, including poverty, low legal literacy, inadequate legal services, and rampant corruption sustain legal institutions that lack public credibility and are inaccessible to the vast majority of Africa's people. National remedies for rights violations are, as a result, nonexistent or, where they nominally exist, problematic.

## In the beginning

In the immediate aftermath of independence, a new generation of leaders in Africa, preoccupied with nation-building projects, glorified sovereignty and regime survival above that of ordinary persons, and even above the institutional credibility of their own regimes. Early attempts to establish a regional court of human rights for Africa, as suggested at a 1961 meeting of justice ministers from newly independent African states in Lagos, Nigeria, were disregarded or resisted by the continent's rulers. Meanwhile, post-independence bills of rights were subverted or consigned to irrelevance. In the first two decades after African countries acceded to independence from the late 1950s, a world entranced by the Cold War looked on indifferent to both the systematic denial of basic human rights by the continent's rulers and the dismantling of the institutions empowered to provide remedies for such wrongdoing. African rulers asserted domestic jurisdiction in order to preclude advocacy for remedies where such existed.

Attitudes began to change in 1981 with the adoption of the African Charter on Human and Peoples' Rights. Instead of a human rights court, which many had advocated, the charter created an African Commission on Human and Peoples' Rights to oversee the implementation of the rights recognized. The commission was to be made up of 11 persons elected by the college of Africa's

rulers—the same rulers who had committed the worst violations. The charter gave the commission merely advisory powers, which the commission has subsequently sought to optimize in cases brought before it. But in a significant break with the then dominant tendency of simple (and negative) assertion of sovereignty by African governments, the charter empowered the commission to receive and issue considered advice on complaints of wrongdoing or violations of human rights against African governments from anyone with evidence of such violations. In terms of Article 56(5) of the charter, such complaints could only be made after their authors had "exhausted local remedies, if any," a grudging admission by the rulers that adopted the charter that all was not well with access to legal remedies in Africa. In the 17 years since it became operational in 1987, the commission has recognized that victims can approach regional courts and tribunals directly, without exhausting local remedies, if such remedies are unavailable, inaccessible or unduly prolonged.

### Regional courts in Africa

The precedent of the African Commission on Human and Peoples' Rights inspired the establishment of other regional and sub-regional judicial mechanisms of remedy and governmental accountability. These courts fall into three broad types.

First, there are the courts of justice of the various regional economic communities in Africa. These include the Court of Justice of the Economic Community of West African States (ECOWAS), based in Abuja, Nigeria; the Court of Justice of the West African Economic and Monetary Union in Ouagadougou, Burkina Faso; the Court of Justice of the Common Market of East and Southern Africa in Lusaka, Zambia; the Court of Justice of the East African Community in Arusha, Tanzania; and the Tribunal of the Southern African Development Community, in Windhoek, Namibia. Although nominally created by treaty, the Courts of Justice of both the Arab Maghreb Union and the Economic and Monetary Union of Central Africa do not yet exist.

These regional courts of justice have powers to hear and give binding decisions on cases brought by individuals, including companies and NGOs, against governments in Africa on a wide variety of issues including discrimination, citizenship, regulation of the movement of persons across international and regional boundaries in Africa, regional trade and transactions, and compliance with national and regional rule of law. In July 2004, the 15 countries of ECOWAS brought themselves in line with the other regions of Africa by agreeing at the ministerial level to grant individuals and companies the right to sue the governments of the region before the ECOWAS Court of Justice in Abuja.

Second, there is the African Court on Human and Peoples' Rights established by a Protocol to the African Charter on Human and Peoples' Rights in 1998, to overcome the limitations of the African Commission on

Human and Peoples' Rights as merely an advisory body. The protocol establishing the court gives it all the powers of a court and makes its decisions binding on all African countries and governments. The court will hear cases of violations of human and peoples' rights and issue decisions as it sees fit, which will be enforceable against African governments and institutions. The Protocol came into force in January 2004 and the process of constituting the judges of the court was proceeding as the year ended.

Another regional court emerged in July 2003, with the establishment of the Court of Justice of the African Union by the leaders of Africa, to decide on cases arising from the operation of the Constitutive Act of the African Union.

The existence of these regional courts increases avenues within the continent for holding African governments accountable. With the vast powers the new courts enjoy, it should no longer be possible for African governments to say that whatever decisions or condemnation these bodies may hand down was produced or procured by non-Africans or by people who do not understand Africa's realities. Nor will it be sufficient anymore to preclude accountability by denying national remedies and dismantling legal and judicial institutions at the national level.

### Realizing the promise for ourselves

But if these goals are to be achieved, many obstacles will have to be overcome. First, all of these regional courts and tribunals in Africa are new and will have to earn the trust of the people through their decisions. Created as they are by the governments of the continent, they will have to overcome the widespread public distrust of the African states that made them. Second, very little is known about these courts, which indicates a need for the courts and their personnel to develop and conduct outreach programs. Third, the existence of these courts does not necessarily address the absence of effective legal remedies and institutions at the national level. In some ways, it emphasizes the need for effective responses to this lack. How can states that do not even respect their own courts credibly sustain regional courts?

Furthermore, the multiplicity of regional courts raises questions of sustainability and funding. Can Africa afford so many regional courts? In recognition of this problem, the Third Summit of the African Union in Addis Ababa in July 2004 adopted a decision requiring the African Union to integrate the African Court on Human and Peoples' Rights and the Court of Justice of the African Union into one court. Work on merging the two courts is currently underway.

Regional and international litigation is resource, time, and technique intensive. A pool of skilled advocates and litigators will have to be established around the workings of these courts to identify the best cases, find the resources to conduct them, ensure compliance with the decisions, and disseminate the outcomes of the legal work. This will take time and investment from different sources. In May

2003, a group of African and international NGOs formed a Coalition on the African Court on Human and Peoples' Rights, to advance the creation and functioning of an effective African court. The promise of regional courts in Africa requires focused attention of this kind if it is to stand the chance of fulfillment.

Notes

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# Individualizing International Justice in Africa: Focusing on the Victims

Africa is host to three generations of international criminal tribunals, with the ICC's engagement with Uganda and Congo following the Rwandan tribunal in Arusha, Tanzania, and Sierra Leone's Special Court. **Tracey Gurd**† outlines the lessons learned.

> *Some two years after delivery of the Akayesu rape judgment, a journalist described to me the fate of women survivors in Rwanda, and in particular, that of witness "JJ" [who] was living in conditions far worse than those of the other survivors—in a ramshackle hut on bare ground amidst sparse provisions, rejected by and rejecting the society of others.*[1]

Witness testimony from "JJ" in the *Akayesu* case before the International Criminal Tribunal for Rwanda (ICTR) was, according to former ICTR President Navanethem Pillay, crucial in changing "the law's perception of women's experience of sexual violence during armed conflict."[2] But "JJ"'s personal situation deteriorated markedly following her engagement with the ICTR. She received death threats as a result of her testimony. Originally from a middle-class background, she barely subsisted from day to day after the war. The U.S. $1,000 that observers had raised for "JJ" after hearing her heartbreaking testimony had long been spent, and she still had four young children to feed. And yet she told one journalist that she felt some degree of justice had been achieved through her participation in the *Akayesu* case. She found it empowering to testify—but she was left wanting more.[3]

Her experience raises an important question: how does "international justice" become, and remain, more meaningful to the thousands of victims of international crimes? International criminal law has been instrumental in shifting the parameters of responsibility for mass atrocity to individual perpetrators in order to avoid laying collective blame on entire

national, ethnic, racial, or religious groups. Yet it is still struggling to allow for a similar sense of individual importance for victims.

Africa provides a perfect case study for this discussion. Three generations of international criminal justice mechanisms currently operate on the continent—an ad-hoc UN-supported international tribunal (the ICTR), a "hybrid" tribunal (the Special Court for Sierra Leone) created by an agreement between the UN and the government of Sierra Leone, and the permanent International Criminal Court (ICC), which began investigations in Uganda and the Democratic Republic of Congo in 2004. Given the newness of the ICC to the continent, what can it learn from its international justice predecessors to help ensure that victims, as individuals, feel that justice has been rendered to them?

Individual concepts of justice, of course, are by definition fluid and shifting, highly contextualized and personalized. Yet three points of convergence have arisen for victims in the Sierra Leonean and Rwandan context that are worth contemplating for the ICC: the need for meaningful outreach initiatives; compensation and reparations; and adequate attention to local conceptions of justice.

## The importance of outreach

Since its inception, the ICTR has struggled to find ways to make its work relevant and meaningful to the Rwandan populace—particularly the victimized. This has been made all the more difficult by location of the institution in neighboring Tanzania.

Recent studies indicate that knowledge about the tribunal among the Rwandan population is extremely low. Most Rwandans surveyed believed the court existed for two purposes: to prosecute individuals who lived outside of Rwanda and thus were beyond the reach of local courts, and for the international community to take stock of what happened in Rwanda.[4] In other words, the concept that the tribunal could be used as a tool for victimized Rwandans to come to terms with what happened during the genocide was practically absent from local discourse. These perceptions have prompted civil society to take up the cause of informing Rwandans of the tribunal's work. The media NGO *Internews*, for example, travels from village to village to show updated newsreels of the tribunal's operations in fields or town halls.

The need for this localized and intensive outreach campaign in Rwanda has helped inform the development of the Special Court for Sierra Leone. Not only is this institution located *within* the victimized country, but outreach has been a priority for the court from the start. David Crane, the Special Court's chief prosecutor, has told a number of audiences that the court would be more successful than its predecessors because "victims will see justice start and finish before their eyes."[5] In 2003, local Sierra Leoneans made up 38 percent of the court's professional staff, including six of the prosecutor's attorneys,[6] though some note that local hires still tend to be concentrated in less powerful roles.[7]

Crane has stressed the importance of outreach. Prior to preparing indictments, he spent six months holding town hall meetings in every district of Sierra Leone. At each of these, Crane and his staff would define the purpose of the Special Court and, after asking locals which individuals bore the greatest responsibility for the crimes committed, listen to the multitude of horrific personal stories.[8] While this type of connection to locals is to be applauded, it has been greatly criticized by a number of NGOs and academic commentators. Many have argued that such meetings actually taint the evidence that the prosecutor could later collect about the atrocities. The joint sessions held in victimized towns meant that, in effect, both the prosecutor and the community had already heard testimony on crimes allegedly committed—which might, in theory at least, be viewed as prejudicing later proceedings. This example serves to highlight the difficulties in trying to mediate between local engagement in the international criminal justice process and concerns about due process for defendants.

The lessons learned from the Sierra Leone outreach programs will take on particular importance for the operations of the ICC in Africa. Local participation in shaping ICC engagement on the continent will be crucial to its success and its perceived utility among victimized communities. As Mark Drumbl has noted, "there must be room to involve locals in the adjudication of international processes. One way that international interventions can apply is not by dictating norms, but by opening up procedural space so that more members of local communities can come forth and define what they understand the cultural norms of that community to be."[9] The willingness of the ICC to take on board local sensitivities will be crucial to the perceived and real success of the court's operations on the continent. However, as the Sierra Leone example demonstrates, the ICC will need to be alert to its responsibility to ensure due process when it does so.

### Compensation and reparations

The security risks for victims and witnesses who contemplate cooperating with international criminal justice mechanisms are well documented. For many, little incentive exists to come forward to testify against their victimizers when promises of long term protection are impossible to secure. On top of security and safety concerns, many victims are in similar situations to witness "JJ"—struggling simply to survive each day. In this context, the important goals of international justice may not have a great deal of practical meaning for countless individual victims, yet these are the circumstances in which international and hybrid tribunals necessarily have to operate.

Tim Longman, who undertook a three-year study of Rwandan attitudes toward the ICTR, found that survivors "feel that some form of reparation is essential for rebuilding society, and they believe that trials should play a role in arranging compensation, whether material or symbolic." Unfortunately, the issue of reparations falls entirely outside

the ICTR mandate.[10] In Sierra Leone, financial considerations dictate some victims' willingness to cooperate. According to An Michels, staff counselor at the Special Court's Victims and Witnesses Unit, there are many conflicting reasons that people choose to cooperate with the court, ranging from a desire to tell their stories to the strictly financial: "The first thing people ask is: What can we pay them? I have to tell them that it's not really possible, although we can pay for things like medical care or school fees."[11] According to a member of a local women's NGO, "most girls are happy to testify if it will get them something like schooling and medical services. The focus for people here is: 'How am I going to eat today? How am I going to pay school charges for my children?' With all that, justice seems farfetched."[12]

The Rome Statute governing the operation of the ICC does allow for reparations to be paid to victims, under Article 75. While this development represents an enormous leap forward for victims' rights, it cannot be understood as an end in itself or as something that all victims will necessarily desire. As Martha Minow has pointed out, "although individual survivors may lack the power to design the response they most want, it is their prerogative, as individuals, to accept, or to reject, specific offers of reparations or apologies directed to them....Restoring dignity to victims after atrocities should, at a minimum, involve respecting their own response."[13] Ideally, the ICC process would provide space for victims to voice their desires and make their own choices as to what kinds of compensation or reparation they will accept, as well as provide scope for them to pursue remedies in other complementary legal fora. In theory, at least, these options seem available under Article 75(3), which states that the ICC shall invite representations from victims, among other parties, before making an order on reparations. Article 75(6) also ensures that the operation of this provision does not prejudice the rights of victims under national or international law.

If victims do choose reparations, the money could come from the coffers of the indicted war criminals themselves. Under Article 93(1)(k) of the Rome Statute, state parties to the ICC are obliged to comply with requests by the ICC regarding the "identification, tracing and freezing or seizure of proceeds, property and assets and instrumentalities of crimes" of indicted war criminals "for the purpose of eventual forfeiture." If successful, these assets can then potentially be used to fund reparation payments to victims. This is a positive step forward for a victim-centered approach to international justice and it is being bolstered by efforts within civil society. The Open Society Justice Initiative and the Coalition for International Justice are both working to ensure that this provision becomes a reality for people who have suffered from international crimes by tracking the assets of indicted war criminals in Africa and tying these assets to the perpetration of specific international crimes. The aim is to strengthen the indictments issued by the Special Court for Sierra Leone and the ICC, while also providing a reasonable basis for the courts to

request cooperation from states in freezing such assets to make the proceeds available to victims.

This does not take care of the immediate needs of victims and witnesses who are currently coming forward to testify at the Special Court for Sierra Leone, for example, and hoping for compensation to repair their shattered lives and build a better future for themselves and their children. However, it does suggest that the international community is slowly inching its way toward recognition and financial compensation of the victims of crimes committed during armed conflict.

### International meets local justice

Longman's Rwandan study also found that "survivors, in particular, had a vision of justice that differed substantially from the classical retributive model that has shaped the ICTR."[14] According to his interdisciplinary research, survivors believed punishing perpetrators was less important than encouraging those who committed crimes to admit their error and seek forgiveness. This led him to conclude that if "trials were designed with greater sensitivity to local conceptions of justice and with greater coordination with other mechanisms for social reconstruction, they could have a much greater impact on societies like Rwanda that are seeking to move on from a violent past."

In Sierra Leone there may be more potential for this goal to be achieved. In addition to its physical proximity for survivors and active outreach, the court has also operated in tandem with another potentially complementary justice mechanism—a Truth and Reconciliation Commission. Prosecutorial choices and outcomes, however, have been somewhat controversial. As it happens, the first case to come before the court—that of Sam Hinga Norman—concerns a man regarded as a hero by many among the local population for helping to stop atrocities during the war.[15] Meanwhile, people still ask at local outreach sessions why the mandate is so narrow, prosecuting only leaders who bear the "greatest responsibility" for crimes, when, for example, the person down the road who killed their family remains free. In this sense, international tribunals may always be somewhat at odds with local conceptions of justice, since only high level war criminals can be tried in hybrid courts while many "lower level" perpetrators may remain at liberty, given the incapacity of local courts to deal with their crimes.

Yet despite this and the other problems the court has encountered, commentators including J. 'Kayode Fayemi have noted that "there remains a groundswell of support for a truth telling and reconciliation process, one that is linked to the reform of the judicial system and restoration of basic human rights in the conduct of government and other stakeholders in Sierra Leone and the region."[16] This suggests that many Sierra Leoneans still have faith that the justice process is capable of helping them move on with their lives in the wake of mass violence. The challenge is how the international community should respond.

The ICC is likely to have an even more challenging time ensuring that local conceptions of justice are incorporated and respected within its operations—particularly as it will be operating in different countries simultaneously and with limited resources, and will maintain a base in The Hague, inevitably far from places of conflict. For the ICC to work effectively in Africa and to bring meaningful and individualized justice to victims like witness "JJ", it needs to contextualize itself within communities and think creatively of ways in which its operations can be integrated with local needs, norms, and sensitivities. One way to do this would be to place a high importance on its outreach activities and ensuring that its investigators find and use techniques that are sensitive to local conceptions of justice in each given country.

As the ICC moves forward in Africa, it will be important for the international community to contemplate how it can impact the court's operations to ensure that international justice becomes meaningful to the thousands of individuals who have suffered during armed conflict. Innovative initiatives are already being undertaken by civil society groups. It is time we worked collectively to ensure that victims such as witness "JJ" assume greater prominence in the process and are treated with the utmost dignity, respect, and care.

Notes

† Tracey Gurd is program coordinator, international justice, with the Open Society Justice Initiative.

1 Navanethem Pillay, "Foreword" in Helen Durham and Tracey Gurd (eds), *Listening to the Silences: Women and War*, Leiden, Kluwer Academic Publishing (forthcoming 2005).

2 See Pillay.

3 See the discussion of "JJ"'s experiences in Elizabeth Neuffer, *The Key to My Neighbor's House: Seeking Justice in Bosnia and Rwanda*, New York, Picador, 2001.

4 Tim Longman, quoted in Steven R. Ratner and James L. Bischoff (eds), *International War Crimes Trials: Making A Difference? Proceedings of an International Conference Held at the University of Texas School of Law, November 6-7, 2003* Austin, University of Texas Law School, 2004, 39.

5 David Crane, *Dancing with the Devil: Prosecuting West Africa's Warlords for International Crimes*, Address at the Yale Law School, April 7, 2004.

6 *"This is Your Court": Prosecutor Addresses FBC Students*, Special Court Press Release, May 5, 2003, available at www.sc-sl.org.

7 See article by Zainab Bangura in this issue, page 54.

8 Crane, *Dancing with the Devil*.

9 Mark Drumbl, quoted in Ratner and Bischoff, 45-46.

10 Longman in Ratner and Bischoff, 40.

11 Interview with An Michels, Special Court for Sierra Leone Victims and Witnesses Unit staff psychologist (March 2004) quoted in Doug Merlino "Hybrid Justice: Exploring the Origins and Functions of the Special Court for Sierra Leone" Berkeley, University of California masters thesis, 2004 (copy on file with author).

12 Interview with Valnora Edwin, human rights officer, Campaign for Good Governance, March 2004, cited in Merlino.

13 Martha Minow, *Between Vengeance and Forgiveness: Facing History After Genocide and Mass Violence*, Boston, Beacon Press, 1998, 135.

14 Longman in Ratner and Bischoff, 40-41.

15 Sam Hinga Norman is being tried jointly with other leaders of the government-backed Civil Defense Force (CDF), Moinina Fofana and Allieu Kondewa.

16 J.'Kayode Fayemi, "Governing Insecurity in Post-Conflict States—The Case of Sierra Leone and Liberia," in Alan Bryden and Heiner Hänggi (eds), *Reform and Reconstruction of the Security Sector*, Münster, Lit Verlag, 2004.

# Sierra Leone: Ordinary Courts and the Special Court

Sierra Leone's judiciary was implicated in the origins of the country's long civil war and devastated by its consequences. **Zainab Bangura**[†] examines whether the UN-backed Special Court is helping or hindering Sierra Leone's judicial system back on its feet.

The twelve year conflict in Sierra Leone that ended in January 2002 was characterized by massive human rights abuses unprecedented in the history of Sierra Leone and the Mano River Union subregion of West Africa. Violations and atrocities were committed against all sectors of society, transcending gender, age, religion, and ethnicity. This was a war against ordinary civilians, regardless of who we were or where we came from. It was a war that broke all the rules of warfare, and ignored international conventions. It had no friends. Everybody was the enemy.

Atrocities were committed by all sides. They included the amputation of the body-parts of people, including even babies as young as three months old. The eyes, arms, legs and extremities of men and women, children, and babies were mutilated. The country has still to recover from the trauma of this barbaric behavior. Amputations became the trademark of the rebels. Today, we are left with the legacy of entire communities reduced to begging for income for the rest of their lives. This in a country where 70 percent of the people have been farmers.

Women and girls were especially vulnerable—thousands were abducted, gang-raped and used sometimes as sex slaves or as the "bush wives" of rebel commanders. Rape was institutionalized and became an instrument of the war. Both young girls and grandmothers were selected as victims. Some rebels specialized in raping very old women who had been widows for years, as they were claimed to be "almost virgin." This undermined the moral values in a society where old age has not only been treated with respect, but revered, adored, and protected.

Our young children, especially boys, became instruments of war too. They were abducted, torn away from their families and homes, drugged, trained in armed combatant, and unleashed on their communities. Children became robot killing machines and left a trail of destroyed lives and property in their wake.

The world was slow to intervene in the Sierra Leonean civil war and when it did,[1] in the Abidjan peace agreement of November 1996 and the Lome accord of July 1999—a blanket amnesty was offered to the rebels and all other actors in the conflict. However, the abduction of over 500 UN peacekeepers the following year, and the shooting of 22 Sierra Leoneans in front of the house of rebel leader Foday Sankoh, following an attack on the house by more than 200,000 Sierra Leoneans in May 2000, finally led the government to request, in June 2000, the creation of a special court to try the worst offenders.

### Why Sierra Leone could not host the Special Court alone

With Resolution 1315 of August 2000, authorizing the UN Secretary General to establish the Special Court to try those "who bear the greatest responsibility" for the atrocities in Sierra Leone, the United Nations Security Council was addressing two immediate problems in the country. First was the imperative for justice. Second, Sierra Leone's own judicial system had ceased to function years before the war. A decade of civil war and military coups had rendered this already compromised edifice a hollow shell. The Sierra Leonean judiciary had neither the human capacity nor the physical infrastructure to host a war crimes tribunal, a vast, complex, and expensive undertaking. Consider the needs. Massive amounts of evidence must be collected, analyzed, and classified according to the type of crime, the scene where it occurred, and who the alleged perpetrators were. This, together with the military background of the accused (the rebels were generally trained in armed combat), requires a sophisticated prosecution strategy. In addition, to be legitimate and credible, a war crimes trial must meet international human rights standards. This was certainly not going to be possible in any court established by Sierra Leone at this time.

A report by the Commonwealth Human Rights Initiative in 2002 described Sierra Leone's justice system as a "rump-judiciary," and observed that despite "an elaborate judicial structure, Sierra Leone's judicial system can barely function—even in Freetown—rendering justice inaccessible for the average citizen. Three decades of patrimonial politics starved the judicial system of the resources necessary for its independence and led to the politicization of justice."[2]

At the time of the 2002 report, Sierra Leone—a country of five million people—had only 15 magistrates and 18 judges. A magistrate court in Freetown, the capital city, faced 100 cases a day but could only hear about 20 and adjourned the rest. These backlogs have caused delays for years to come. Most of the courts are still understaffed—both the Appeal and Supreme Courts lack the required number of judges and are therefore overloaded. In addition to the problem of capacity, there were formal issues stemming from the fact that Sierra Leone's penal code did not incorporate violations of international humanitarian law, such as crimes against humanity and war crimes.

Today, we are left with the legacy of entire communities reduced to begging for income for the rest of their lives.

All these problems and challenges meant that Sierra Leone's judicial system could not take the front line role in punishing and combating impunity for the massive atrocities and human rights abuses that had characterized the war. The end result was the creation of a hybrid court under joint Sierra Leonean and United Nations jurisdiction, staffed by both local and international judges and prosecutors. The reason for this was not only to

allow the war crimes prosecutions to go ahead, but also, according to Security Council Resolution 1315, to address the "negative impact of the security situation on the administration of justice in Sierra Leone and the pressing need for international cooperation to assist in strengthening the judicial system of Sierra Leone."[3] Strengthening Sierra Leone's national judiciary was, it seems, desired by everybody everywhere.

Despite an elaborate structure, Sierra Leone's judicial system can barely function.

### How the court was received by Sierra Leoneans

At the start of the negotiation process, it was expected that the creation of the Special Court would help diffuse legal knowledge from international to local judicial officials, and thus assist in rebuilding the judicial system. Basing the war crimes tribunal in Sierra Leone had other advantages as well, such as providing prosecutorial officials with easy access to the crime scenes for the collection and collation of evidence, and locating courts within easy reach for victims to giving testimony. The trials are also highly visible to the citizenry, which is especially important in a conflict like Sierra Leone's, that touched and affected each Sierra Leonean individually. And the location allows for the familiarization of the court with the cultural and historical milieu in which the trials are taking place.

So despite endless debate about its cost and legitimacy, both within and outside the country and among people and groups working on transitional justice, Sierra Leoneans welcomed the court. We saw it not only as a mechanism for transitional justice but also as an instrument to transform our judicial system. We, like the United Nations, saw the potential future benefit of the court on the judicial system of Sierra Leone. Nobody therefore challenged the court's existence.

On the other hand, most Sierra Leoneans have been disappointed by developments since the court's inception—by the deaths of Foday Sankoh and Sam Bockari, two leading indictees, the disappearance of Johnny Paul Koroma, a third, and the failure of Nigeria to hand over Charles Taylor, the exiled former Liberian president and a major backer of the Sierra Leonean rebels. The failure to see these individuals tried and made to answer to the people of Sierra Leone has dampened enthusiasm for the court.

Nevertheless, Sierra Leoneans are amazed at the revelations coming out of the court. I attended the first session, where Prosecutor David Crane gave an opening statement, and called on victims of the war to give testimony on specific crimes in the trials to follow. I left in tears after listening to the details of the horrors ordinary and innocent Sierra Leoneans were subjected to by their own brothers and sisters. I am yet to recover from that shock. A friend told me that she had never believed in the Special Court, but now she is convinced it is worth every cent.

### The impact of the Special Court on the domestic judicial system

As the court sits in earnest, most Sierra Leoneons are asking what the Special Court will contribute to Sierra Leone's judicial system. While it is still too early to give a definitive answer, four issues must make us cautious about reaching a prematurely positive assessment.

First, there has never been any direct relationship between the Special Court and the judicial system either in theory or practice. The Special Court was created as an entity separate from Sierra Leone's judicial system. The two were meant to be and have been distinct and separate entities. The treaty between the United Nations and the government of Sierra Leone gave the Special Court supremacy over the national Supreme Court.[4] Whatever impact the court may have is likely to be indirect, even distant.

Second, there have been no active or sitting judges from our judiciary in either chamber of the Special Court, who might facilitate the transfer of knowledge and skills that will be acquired over the three years of the court's existence to members of the bench. In setting up the Special Court, Resolution 1315 gave the government the opportunity to appoint a deputy prosecutor from Sierra Leone as well as Sierra Leonean judges to the trial and appellate chambers. After signing the agreement, however, the government negotiated an amendment to allow instead nationals of any commonwealth country to be appointed deputy prosecutor. There are of course individual Sierra Leoneans lawyers in both the Prosecutor and Defense offices and in the Registry, but this experience will have more impact on their personal skills than on the institutional experience of the bench.

Third, it is true that the judiciary in Sierra Leone is to inherit the entire infrastructure and machinery of the Special Court once it closes down. Naturally, the country needs a good generator, for example, but resources are still needed to run, repair and maintain it. It will likewise be good to have hundreds of computers and printers, but they too will need repairs, replacements and a servicing once in a while. The present judicial system, with its scarce resources and understaffed structure, will have a monumental task before it to run and maintain these inherited structures. Physical infrastructure alone cannot bring justice to a people so desperate to see real and true justice. Buildings on their own will not transform the judicial system in Sierra Leone.

Fourth, the impact of the court in terms of substantive law has been limited to date. To this day, international humanitarian law is not part of our municipal laws. And unless and until war crime legislation is domesticated and enacted under our municipal law, it cannot be used in our court system. Nevertheless, there is no obstacle to doing so. Likewise, although the rules of procedure created by the Special Court could, in theory, be modified and used in our country, this has not yet been the case.

These caveats aside, every aspect of the Special Court system has the potential to benefit the country

provided there is a genuine desire to reform and transform the judicial system. In addition, the Special Court has accumulated extensive materials in law and has substantial human and other resources at its disposal that could be utilized at no cost, provided a functioning judiciary is genuinely desired. Yet so far, the opportunity to utilize these materials to overhaul our judicial system and amend our laws has not been seized.

There is still over a year before the mandate of the court ends.[5] We are praying that before that date comes, Sierra Leone will take full advantage of the court's presence in the country to strengthen its laws, increase its judicial capacity, improve its infrastructure, and learn more about modern rules of procedure for criminal law. A recent internship program established by the Special Court indicates that the court knows it must play a role in revitalizing Sierra Leone's judiciary. Yet if it is truly to contribute to judicial reform in Sierra Leone, the Special Court must fully appreciate its distance from local mechanisms and take further steps to bridge it.

Notes

† Zainab Hawa Bangura is executive director of the National Accountability Group (NAG) in Sierra Leone (www.accountability-sl.org).

1 The war started in 1991. A fully operational UN mission came into office only in 1997-8. Large scale peacekeeping only began after the 1999 invasion of Freetown, when nearly 60 percent of the city was already destroyed.

2 Niobe Thompson, *In Pursuit of Justice*, Commonwealth Human Rights Initiative, 2002, 10.

3 S/Res/1315 (2000) Adopted by the Security Council at its 4186th meeting, on August 14, 2000.

4 The defense counsel for one of the accused has asked the Supreme Court for an interpretation of certain sections of the Constitution with a view to declaring specific articles of the Special Court agreement, especially the preamble, null and void, and the Special Court itself unconstitutional as contravening the supremacy of the Supreme Court.

5 The Special Court for Sierra Leone was created in 2002, originally intended to run for a three year period.

# Why Congo Needs the International Criminal Court

The ICC's agreement to take cases from the Democratic Republic of Congo throws a spotlight on the challenges facing the judiciary in that country, writes **Marcel Wetsh'okonda Koso.**†

The prosecutor for the International Criminal Court (ICC) is now undertaking investigations into war crimes and crimes against humanity committed in the Democratic Republic of Congo (DRC), following a request from the DRC government. The time is thus right to take a closer look at the Congolese justice system to understand why it is not "able or willing," in the language of the ICC Statute,

to investigate and prosecute these crimes. The state, after all, has the right and responsibility to pursue justice throughout its territorial jurisdiction.[1] Additionally, the state in which a crime is committed often has greater access to the perpetrators, victims, witnesses, and evidence.

States are tasked with the primary responsibility for ensuring that justice is served. Yet, a whole range of factors—including armed conflict, corruption, nepotism, political calculation, tribalism, or incapacity—can lead to inaction or ineffective action on the part of a state. Conscious of the failures, gaps, or inadequacies of national justice systems, and of the need to pursue persons responsible for serious violations of international law wherever they are, the international community has promoted an alternative approach: international criminal justice.

## The limits of international justice

Since its earliest incarnations in the Nuremberg and Tokyo tribunals up to the recent entry into force of the ICC, as well as the ad hoc international criminal tribunals of Yugoslavia and Rwanda, international criminal justice has cast itself in a subsidiary role. International jurisdiction is limited to crimes that are deemed a threat to international peace and security, namely genocide, crimes against humanity, and war crimes. Impunity is not an option for these crimes. If the state where the crimes are perpetrated does not address them, it falls to others, including the ICC, to prosecute them.

The ICC is the first permanent international criminal court, and its statute is governed by the principle of *complementarity*. In other words, the court defers to states to pursue and prosecute those accused of the international crimes within their jurisdiction. It is only when states lack either the will or the capacity to take on the responsibility and obligation to prosecute that the ICC has the possibility of taking the case. Its function, therefore, is to fill gaps in national judicial systems. In the case of the DRC, the gaps motivating the ICC's intervention are readily identifiable.

## The state of the Congolese judiciary

Following the genocide in Rwanda, the judiciary collapsed even where the state itself did not: court infrastructure was destroyed, magistrates and other judicial personnel were massacred, and documentation of the crimes was nonexistent or rare. The DRC, however, has not yet reached that point, at least in the areas still under governmental control. Here, justice faces problems of a different order. Where infrastructure does exist, it is inadequate and in a state of advanced decay. Office furniture and equipment either do not exist or are barely functional. Staff, who are in short supply, live and work in miserable conditions, with inadequate training to address contemporary justice issues. Corruption, tribalism, and nepotism are ubiquitous.

Numerous Congolese laws in force, inherited from colonial authoritarian regimes, actually contradict the international instruments signed by the DRC. The 1886 criminal code was last revised in 1940. It no longer bears any resemblance to the French

criminal code on which it was modeled—indeed, France has since adopted an entirely new code. The 1959 Criminal Procedure Code was likewise passed before the adoption of the international human rights instruments. Decrees on juvenile delinquency adopted in 1950 and still in force, fail to protect numerous rights guaranteed in the 1989 International Convention on the Rights of the Child and the African Charter on the Rights and Welfare of the Child.

The existence of inequitable judicial processes is less astonishing than would be their absence.

Under these conditions, the existence of inequitable judicial processes is less astonishing than would be their absence. A number of different forums and studies spotlight the multiple failings of Congolese justice.[2] Concrete proposals for improving Congo's judiciary, despite numerous promises, have yet to be taken up by the government.

On the other hand, a number of international interventions are underway. A European Union initiative to rebuild Congo's judicial infrastructure gradually, and improve the quality of the official journal, is to be welcomed, as is the Belgian government's distribution of the respected Belgian Larcier codes to magistrates.[3] The UN has employed—and is thereby providing experience to—Congolese judicial personnel. The OHCHR has supported Congo's Ministry of Human Rights in organizing seminars for military judges. The United Nations Mission in Congo (MONUC) has organized human rights training sessions for police and judicial officers; helped create a tribunal for trying serious crimes in Ituri, which is already in operation; and offers logistical assistance and training for a military court in Katanga.

But these efforts will come to nothing unless they are followed through. Already Congolese magistrates and other judicial personnel are dissatisfied that so much is spent on buildings, documentation, and training while little or nothing has gone toward improving their salaries. It is difficult to assess what impact these various initiatives can have without the more comprehensive reform of the judiciary announced long ago.

### Complementarity in practice

The need for greater judicial capacity across the board is vital if the Congolese judiciary is to take any responsibility for addressing war crimes and crimes against humanity committed in the country, which it must do sooner or later, because the ICC cannot possibly cover them all. Additionally, the DRC will need to take steps to institute the following reforms.

First, define international crimes uniformly in national law. Where genocide, crimes against humanity, and war crimes are included in domestic law, their definitions diverge from those in international treaties. For example, the crimes referred to in

article 166 of the 2002 military criminal code as *crimes against humanity* confusingly reflect those laid down in the Rome Statute (article 6) as *war crimes*. There is likewise no recognition in the Congolese code of the specificity of crimes committed during a widespread or systematic attack upon a civilian population. The Rome Statute can serve as a source text to dispel possible confusion between national law and international obligations.

Second, resolve the question of competent jurisdiction. United Nations and international or regional human rights instruments—including those of the African Union—generally require civil, rather than military, jurisdiction over international crimes. However, in Congo, both the 2002 military criminal code and the military judicial code of 1972 opt instead for military jurisdiction over these crimes. Clearly this difference must first be addressed, which will open the way for tackling the larger issue of whether the appropriate courts are able and willing genuinely to prosecute international crimes.

Third, institute credible protections for the rights of defendants. Apart from exposure to the generally inadequate judicial processes, the rights of the accused are further undermined by the overarching jurisdiction of military tribunals. One improvement would be to establish the control of the ordinary courts over pretrial detention. While judicial review of pretrial detention is recognized by international human rights instruments, it is unknown in the DRC's military judicial code. A second reform would be to secure the right to be represented by counsel of one's choice. The military judicial code expressly prohibits detainees from being represented by foreign lawyers—a clear violation of their rights. And, third, the rights of defendants in death penalty cases require greater protection. Following the example of international human rights standards, the ICC does not allow the death penalty to be imposed. If not actually required to abolish it, states are nevertheless encouraged to apply the death penalty only under conditions of strict protection of the rights of the accused. However, the protections available to defendants in the DRC are inadequate.

It is in view of these and other problems, such as the ongoing debate surrounding judicial independence,[4] that the president decided that the DRC is not in a position to carry out its international obligation to punish international crimes committed within its borders, and referred the situation to the ICC. Nevertheless, the court must be regarded as a provisional solution until the day when the Congolese judiciary can securely take on the role of prosecuting international crimes that take place within its own jurisdiction.

Notes

† Marcel Wetsh'okonda Koso is executive director of Campagne pour les droits de l'homme au Congo (CDHC–ASBL).

1 See Gerard de Pradelle, "La compétence universelle," in Hervé Ascensio, Emmanuel Decaux and Alain Pellet, *Droit international pénal,* Pedone, 2000, 913; Angelos Yokaris, "Les critères de compétence des juridictions nationales," *ibid,* 899.

2 For example: a seminar on the administration of justice and human rights was held in 1999, a national conference on human rights in 2001, and workshops in 2003 on the theme "What Justice for the Democratic Republic of Congo," and on torture and cruel, inhuman and degrading treatment.

3 Larcier, a respected publisher of the Belgian code, has recently undertaken to publish a compilation of Congolese codes.

4 In October 2003, the country's judges went on strike to demand greater independence, claiming in particular that low salaries weaken their institutional independence, allowing for manipulation both by government and nongovernmental actors. Almost three months later, they returned to work with no concessions made by the government.

# Challenging Charles Taylor's Political Asylum in Nigeria

**Babatunde Fagbohunlu**,† one of a team of lawyers representing the plaintiffs in the case of *David Anyaele and Emmanuel Egbuna v. Charles Taylor, the President of the Federal Republic of Nigeria and Three Others*, describes progress to date.

Whatever moral or political justification the Nigerian government may believe exists for its decision to grant political asylum to former President of Liberia Charles Taylor, the action is highly questionable from a legal perspective. The decision is also now being challenged in court by Nigerian victims of the atrocities committed against civilian populations during the civil war in Sierra Leone. The war crime victims want Taylor to face trial on an indictment issued by the prosecutor of the UN-backed Special Court for Sierra Leone, which accuses him of bearing the "greatest responsibility" for atrocities committed by the Revolutionary United Front (RUF) of Sierra Leone, a rebel movement that Taylor is believed to have sponsored and encouraged.

## The case against Taylor

The charges against Charles Taylor are extremely grave: war crimes, crimes against humanity, and serious violations of international humanitarian law. Nigeria's grant of refugee status in August 2003, which has prevented enforcement of the warrant to compel his attendance at the proceedings in Freetown, Sierra Leone, has become increasingly controversial. Human rights groups and international organizations have flooded Nigerian President Olusegun Obasanjo with petitions to have the former Liberian leader arrested and his asylum status reviewed or rescinded. In this context, the initiation of legal proceedings to nullify the asylum grant, brought by two surviving Nigerian victims of RUF atrocities, is timely.

David Anyaele and Emmanuel Egbuna were tortured and mutilated in 1999 by rebel groups in Freetown. Both were subjected to amputations, which led, in Anyaele's case, to the permanent loss of both hands. Their quest for legal redress is at the heart of the litigation commenced in Nigeria's

Federal High Court in Abuja. The litigation challenges not only Charles Taylor, but also the Government of the Federal Republic of Nigeria and the National Commission for Refugees.[1] Anyaele and Egbuna are represented on a *pro bono* basis by the Nigerian law firm, Aluko & Oyebode. I am leading the team of lawyers representing the victims.

Our objective is to establish that the grant of political asylum to Charles Taylor contravenes both domestic statutory provisions and Nigeria's international legal obligations, notably under the United Nations Convention on the Status of Refugees.[2] The challenge takes the form of a judicial review application, a procedure that enables the court to strike down acts or decisions of the government which are found to have been made illegally, or exercised for an extraneous purpose. The review procedure also allows the court to act against decisions taken or made on inappropriate grounds without regard to relevant considerations and in violation of the fundamental rights of the citizenry as protected by Nigeria's 1999 Constitution and the African Charter on Human and Peoples' Rights.[3]

Should Taylor's asylum be struck down in Nigeria's courts, the decision would open the way for him to face war crimes charges in the Special Court for Sierra Leone, where Anayaele's and Egbuna's grievances can be addressed directly.

## Small steps forward

On May 31, 2004, the Federal High Court of Nigeria, presided over by Justice Steven Adah, ruled that the court must accept the applications—thereby effectively granting leave to each applicant to pursue judicial review. This was the first important hurdle the applicants had to clear in the pursuit of their claims.

The second obstacle was establishing an effective and inexpensive procedure for serving the court processes on Charles Taylor—that is, for informing him that proceedings are underway against him. Ordinarily, defendants should be informed in person, but it was apparent from the start that this would be impossible in Taylor's case because of the heavy retinue of Nigerian security personnel protecting him. Therefore, the court directed that the processes be delivered to the office of the Governor of Cross Rivers State in Calabar, where Taylor is said to be taking refuge. However, the Governor, Donald Duke, declined to cooperate, citing immunity provisions in the Nigerian Constitution. The court considered the arguments ill-founded, but granted the victims' request to simplify the procedure. On June 13, 2004, the court allowed that Taylor could be served by advertisements in two daily newspapers, together with notices put up in the premises

The case invokes the duty of states to refuse indicted war criminals refugee status.

of the Abuja and Calabar Judicial Divisions of the Federal High Court.

Another remarkable milestone was achieved in the proceedings when the Federal High Court granted the victims' request to issue a subpoena commanding the Nigerian Refugee Commission to attend the proceedings and to produce all documents relating to the grant of Taylor's political asylum.[4] Willful disobedience or neglect to comply with an order of this nature is deemed to be contempt of court. As of the end of 2004, there had been no compliance with the court's order and the victims' lawyers were contemplating contempt proceedings against the Refugee Commissioner in order to enforce the court's subpoena.

## The defense

All the respondents in the suit except Charles Taylor are represented by the office of the Federal Attorney General. A preliminary objection to the suit has been raised by the Attorney General's lawyer, challenging the jurisdiction of the court to entertain the victims' claims on three grounds: that (1) the victims lack standing before the court; (2) they have "disclosed no cause of action known to law" to entitle them to the relief sought; and (3) any challenge should have been made within three months of the grant of asylum to comply with the statute of limitations, a time limit long since passed.[5] In response to these objections, the victims' lawyers shall contend that the acts challenged constitute a "gross abuse of office" and were done *mala fide* and therefore not susceptible to the kind of objections raised by the government. The reply shall be on points of law and where necessary, will be supported by the averments contained in the processes already filed in this suit on behalf of the victims. So far, Charles Taylor has ignored the court proceedings.

Ultimately, if the court is persuaded that the grant of political asylum to Taylor by the Nigerian government was an "abuse of office" or was made illegally, exercised for an extraneous purpose and/or taken or made on irrelevant grounds without regard to relevant considerations and in violation of the fundamental rights of the citizenry, there is a likelihood that the court will declare Taylor's asylum illegal. The court may also make an injunctive order against the Nigerian government to preclude it from maintaining the asylum, thus removing any legal justification that the Nigerian government may have for refusing to deliver Taylor for trial at the Special Court for Sierra Leone.

The case is of wider significance to international law, as it invokes the duty of states to refuse refugee status to indicted war criminals and make every effort to facilitate their prosecution, both arguments put forward in a recent *amicus curiae* brief submitted by the Justice Initiative to the Abuja court in November 2004.[6] If successful, the case will mark a significant victory in the struggle to end impunity for war criminals.

### Notes

† Babatunde Fagbohunlu is a partner at the law firm of Aluko & Oyebode.

1 *Suit No FHC/ABJ/M/216/04* and *Suit No FHC/ABJ/M/217/04* commenced by way of Originating Summons, were filed by

David Anyaele and Emmanuel Egbuna against Charles Taylor, the Federal Commissioner for Refugees, the Eligibility Committee for Refugees, the National Commission for Refugees, the President of the Federal Republic of Nigeria, and the Attorney-General of the Federal Republic of Nigeria, all sued as the 1st to the 6th Respondents in the action.

2 National Commission for Refugees, etc. Act, cap 244 Laws of the Federation of Nigeria 1990, 1951 United Nations Refugee Convention, African Charter on Human and Peoples' Rights (Ratification & Enforcement) cap 10 Laws of the Federation of Nigeria 1990.

3 Enacted in the Federal Republic of Nigeria by the African Charter on Human and Peoples' Rights (Ratification and Enforcement) Act, Cap. 10, LFN 1990. See also Chapter IV of the Constitution of the Federal Republic of Nigeria and the Articles of the ACHPR.

4 The *Subpoena Duces Tecum* was signed on June 28, 2004.

5 The Public Officers Protection Act Cap. 379, LFN 1990 requires that any action or proceedings commenced against any person for any act done in pursuance or execution of any law or act or of any public duty or authority shall be instituted within three months of the act.

6 The *amicus curiae* brief and other materials relating to the Taylor case are available online at www.justiceinitiative.org.

# Sudan's Government Does Not Hide its Atrocities

**Kelly Dawn Askin**† visited refugees from Darfur, Sudan, camped across the border in Chad.

As Bill Frist, the majority leader of the U.S. Senate, was interviewing refugees from Darfur in Chad earlier this month, the Sudanese government and Arab janjaweed forces attacked a number of black Darfurian villages just a few miles away, over the Sudanese border. Frist was in Chad because Sudan had refused to grant him a visa, even though Khartoum had done so on earlier occasions. The timing and location of the attacks demonstrated the Sudanese government's confidence that it could act with impunity.

I was in Chad at the same time to provide parallel assistance to a U.S. government-funded mission led by the Coalition for International Justice, to interview refugees about why they fled Darfur, and to participate in documenting and assessing the crimes they endured or witnessed before leaving. According to witnesses I interviewed, since its independence from Britain and Egypt in 1956, Sudan has systematically discriminated against its black citizens, amounting to crimes against humanity of persecution and apartheid. It has now reached the scale of genocide—executed through violence, starvation, and other means of destroying the black Africans in the Darfur region.

After interviewing five boys aged 10 to 18 who had escaped from janjaweed or Sudanese government forces that had captured and tortured them, I then spoke with a Sudanese refugee-camp leader who had just received information that several Darfurian villages were being attacked by government and janjaweed troops.

Traveling to the border the next morning, I met dozens of men, women, and children who had managed to escape the ambush and were now trickling into Chad.

I met with survivors from nine different villages that had been attacked, although exactly how many villages were involved is unclear. I spoke with one survivor after another who told a strikingly similar story of the most recent attacks: government planes flew overhead to view the villages, and then government vehicles attacked from the hillsides while thousands of janjaweed simultaneously set in on horseback. Most of the villages had been attacked before, and survivors had sought safety in the nearby mountains. But Sudanese policemen had gone to the mountains and used megaphones to lure the civilians back to the villages, saying it was safe and offering protection.

While on the border, we could hear planes and bombing to the north. Survivors told us that a UN camp for internally displaced persons had also been attacked that Saturday and, ominously, that UN staff members had been evacuated from the camp on July 29, a week and a half before the attack. There were also reports that some 20,000 men, women, and children were trapped in the Jabal Moon Mountains near Chad. Soldiers had sealed off the area to prevent their escape and to stop aid from getting through in what was apparently an attempt to starve them to death.

The type of violence I observed and heard described indicate that genocide is occurring in Darfur. The definition of genocide is not limited to mass killing, although that is the means that generates the most attention and outrage. In addition, the Genocide Convention of the United Nations also requires states to prevent and punish other acts committed with an intent to destroy, even partially, a racial, ethnic, national or religious group. The most common form of genocide committed in Darfur is the infliction of "slow death" through starvation and disease—an act covered under subarticle C of the Genocide Convention, which prohibits inflicting on a group "conditions of life" calculated to result in that group's demise.

The government of Sudan, far from being a helpless bystander, is a leading participant in these crimes, and its soldiers and its air force are openly working hand in hand with the janjaweed. The slaughter, rape, and massive destruction over the past several months were preceded by decades of systematic discrimination by Khartoum in all areas of life against black Darfurians. The government cannot be trusted to protect civilians, much less assist them. The African Union, with the logistical and, if necessary, military support of Western democracies, must act before tens of thousands more innocent lives are lost. And justice must be pursued in order for Sudan to have any chance for a real and lasting peace.

Notes

† Kelly Dawn Askin is senior legal officer, international justice, at the Open Society Justice Initiative. This article was first published in the *International Herald Tribune* on September 7, 2004.

# Darfur: the New Name of Genocide

**Chidi Anselm Odinkalu**† describes regional institutional inactivity in the face of continuing slaughter.

> *They came on their horses and killed the people of our village who started to resist them. When I heard the machine guns, I started to collect my kids, trying to escape from the agony. But they captured me, killed my three kids, and six of them raped me. Then they went away. The rest of the villagers collected together and fled the area, and now I am staying at a refugee camp looking for something secure. I do not know how to say it, I am really afraid of even being killed by my relatives because of the janjaweed baby that I am bearing.*

This is the testimony of a female survivor of the ongoing genocide in Darfur, Western Sudan. In 1944, Polish Philosopher, Ralph Lemkin, coined the word "genocide" to describe crimes such as the Nazi-led attempt to eliminate a specific race of people, in this case, the Jewish race. During the First World War, the Armenians suffered a similar fate. By 1949, a world appalled by the crimes of the Nazis adopted the Convention on the Prevention and Punishment of the Crime of Genocide, otherwise known as the Genocide Convention.

The Genocide Convention entered into force on January 12, 1951. Article II of the convention defines genocide as:

> any of the following acts committed with intent to destroy, in whole or in part, a national, ethnical, racial or religious group, as such:
>
> Killing members of the group;
>
> Causing serious bodily or mental harm to members of the group;
>
> Deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part;
>
> Imposing measures intended to prevent births within the group;
>
> Forcibly transferring children of the group to another group.

This definition makes genocide a crime of very specific intent. It is adopted completely by Article VI of the Rome Statute of the International Criminal Court. One or a mixture of these elements can constitute the crime of genocide. Article VIII of the Genocide Convention establishes perhaps the most important obligation contained in that treaty. It obliges all contracting parties to "call upon the competent organs of the United Nations to take such action under the Charter of the United Nations as they consider appropriate for the prevention and suppression of acts of genocide or any other acts enumerated in Article III of the Convention." These enumerated acts are genocide, conspiracy to commit genocide, incitement to genocide, attempt to commit genocide, and complicity in genocide.

The obligations to prevent, suppress, and punish the crime of genocide are both customary and peremptory norms of international law. Thus, the notable failure of Sudan to ratify the Genocide Convention does not shield it from the obligations of other

states/actors to prevent, suppress, and punish the crime of genocide. Moreover, as the United Nations Security Council noted in Resolution 1556 of July 30, 2004, "the Government of Sudan bears the primary responsibility to respect human rights while maintaining law and order and protecting its population within its territory." The government has not just manifestly failed to do this; it is actively involved in the most brutal violations of these obligations.

While bureaucratic rigmarole goes on, the people of Darfur are being savaged.

The survivor testimony that opened this article is not isolated. The numbers available indicate a harrowing and widespread level of violence in Darfur. International agencies estimate that over 50,000 have been killed in the region since the beginning of February 2003; over 200,000 have been forcibly displaced into refugee camps in neighboring Chad; over 1.7 million people are internally displaced and mostly encamped within Sudan itself: 600 are estimated to have died in these camps, which, until recently, were denied access to humanitarian assistance by the Sudanese government. This adds up to a genocidal campaign that is producing a monthly average of about 18,000 deaths. Sexual violence and rape of women and young girls, including victims eight years old and younger, is employed as an instrument of war and ethnic cleansing.

In a recent survey of the Darfurian refugee population conducted by the Coalition for International Justice for the U.S. State Department, 67 percent of the refugees had witnessed the killing of a nonfamily member; 61 percent had seen their own family members killed; 44 percent had survived being shot at; 28 percent had suffered forced displacement; 25 percent had been abducted; and 16 percent of the population had been raped.

To put these numbers in perspective, Darfur, comprises three states of the Republic of Sudan that when combined are geographically bigger than France and host about 7 million people. Nearly one-third of this population has either been killed, displaced, abducted, raped, or is gradually being starved to death. On any reading, violations on this scale must qualify, in the language of Article II(c) of the Genocide Convention, as "deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part." Faced with this evidence, both the European Union and the United States have determined that the situation in Darfur amounts to genocide.

The African Union (AU), however, acknowledged only that the situation in Darfur presents a "grave humanitarian crisis," during the 5th Session of its Peace and Security Council in April 2004. The AU requested an investigation of the situation in Darfur by the continental human rights body, the African Commission on Human

and Peoples' Rights. But just as the commission's five-person team was deployed on its mission in Darfur in July, the summit meeting of the 3rd Ordinary Session of the Assembly of Heads of State and Government of the African Union, presided over by Nigeria's President Olusegun Obasanjo, prejudged the outcome of the investigation by deciding on July 8 that "even though the humanitarian situation in Darfur is serious, it cannot be defined as a genocide."

Article IV of the Constitutive Act of the African Union requires African States to actively intervene in the affairs of other member states when those other states are involved in committing war crimes, crimes against humanity or genocide.

Africa's leaders persist in minimizing the international crimes being committed in Darfur as "a humanitarian crisis," as if it were similar to acts of nature like a flood, earthquake or hurricane. But Darfur is not an act of nature. It is caused by human actors, exercising political authority. They must be halted and brought to account. One point of view within the leadership of the African Union is that unlike the case of Rwanda, a genocide in terms of both the quantity (nearly 1 million killed) and quality (mass murder) of the acts perpetrated, "a mere" 50,000 have been killed in Darfur. Apparently, in the arithmetic of the African Union, genocide will have occurred in Darfur only after the janjaweed militias kill, rape, and abuse the 2 million forcibly displaced people living in deadly conditions in refugee camps.

The African Commission on Human and Peoples' Rights met on September 19, 2004, in Pretoria, South Africa, to adopt the report of its investigation mission to Darfur. The commission's report is yet to be published, but authoritative sources close to the commission indicate that it determined that in Darfur, the government of Sudan had been involved in "war crimes and crimes against humanity, and massive human rights violations by members of the security forces." The African Commission on Human and Peoples' Rights endorsed the establishment of an independent international commission to investigate the international crimes in Darfur. While this bureaucratic rigmarole goes on, the people of Darfur are being savaged and the continent's rulers shrink from their moral and legal duty to call the crime by its proper name: genocide.

Notes

† Chidi Anselm Odinkalu is senior legal officer, Africa, with the Open Society Justice Initiative. This article first appeared in the Nigerian paper *Vanguard* on September 24, 2004.

FREEDOM OF EXPRESSION AND INFORMATION

# Attacks on Media Freedom in Gambia

Shortly after a failed government attempt to impose a state watchdog on the media, Gambia's press are under greater pressure than ever to toe the line, writes **Demba Jawo.**†

Recent attempts to establish a "national media commission" in Gambia must be seen against a backdrop of steadily growing intimidation of the press since 1994, when the military took power. At first, the military rulers cultivated a relationship with the media, frequently calling press conferences to "expose" one bad deed or another committed by the former regime—apparently to convince the world that their predecessors were corrupt and deserved to be removed in a coup. The honeymoon, however, did not last. The military soon banned political parties and their newspapers, and barely two months after the coup, the editors of *Foroyaa*, the political organ of the opposition People's Democratic Organization for Independence and Socialism, were arrested. The two editors, Halifa Sallah and Sidia Jatta, were tried in court, cautioned, and let go.

Shortly afterward, Kenneth Best, a Liberian refugee and editor and proprietor of the *Daily Observer*—the only national daily paper in the country—was arrested and deported back to war-torn Liberia, supposedly for violating immigration laws. Although the paper endured, it and other private media houses were subjected to frequent visits by tax inspectors, customs and immigration officials and the National Immigration Authority (NIA), looking for "illegal" immigrants. At one time, immigration personnel were regularly stationed at the gate of the *Daily Observer*, checking the credentials of anyone entering or leaving. As a result, many non-Gambian journalists were deported or simply left the country.

Despite a return to nominal civilian democratic rule in 1997, the intimidation and harassment of journalists continued unabated. In February 1998, for instance, the NIA forcibly closed down *Citizen FM*, a private radio station, and detained its proprietor Baboucarr Gaye for several days for operating without a license. He was convicted and fined and the radio station's equipment was confiscated. That judgment was subsequently overturned, but in October 2001 the station was finally closed down following charges of tax evasion. *Citizen FM*'s problems started when the station began broadcasting its own news bulletins and giving airtime to the public, including members of the opposition. The program that seems to have particularly angered the authorities was the station's daily review of English-language newspapers in Wolof and Mandinka, the two most widely spoken languages in the country.

After 2000, fire became the weapon of choice against the media. In August 2001, arsonists attacked the premises of *Radio One FM*, and the proprietor, George Christensen, was hospitalized with serious burns. In September 2003, and more seriously in April 2004, the printing premises of the bi-weekly *Independent* were torched by gunmen whose identities remain unknown. On August 15, 2004, the house of the Banjul BBC correspondent, Ebrima Sillah, was set alight while he slept inside. He escaped but lost his house and possessions. None of these incidents has been investigated.

### The National Media Commission

In 2002, the National Media Commission Act was passed, as required by Section 210 of the 1997 Constitution, to "establish a code of conduct for the media of mass communication and information and to ensure the impartiality, independence and professionalism of the media, which is necessary in a democratic society." Although Gambia's journalists declared, through the Gambia Press Union (GPU), that self-regulation was the most desirable form of governance, particularly for the print media, they were nevertheless ready to cooperate with the authorities in the formation of the commission.

The Ministry of Information included the GPU in a task force to prepare a draft bill for enactment by parliament. However, practically all the task force's recommendations were rejected. The ministry instead drafted its own bill, turning the commission into a virtual tribunal, with powers to impose heavy fines and even imprisonment for journalists who violated the act's provisions, as well as compel them to reveal their sources. In their analysis of the bill, the Accra-based Media Foundation for West Africa said that "the thrust of the bill is to control, sanction, penalize, fine, even suspend and close down media houses and organizations, and in some cases sentence journalists to terms of imprisonment, and not to protect, support, and promote the pluralistic and vibrant media, as ought to have been the case."

After 2000, fire became the weapon of choice against the media.

Although the GPU and other media and human rights organizations urged the government to drop the bill, the National Assembly nevertheless passed it and President Jammeh signed it into law in August 2002. The GPU, with assistance and support from the Open Society Justice Initiative and other media rights organizations, decided to challenge the constitutionality of the Media Commission Act in the Supreme Court. In October 2003, the chief justice dismissed an application for an interim injunction against the bill's enforcement without giving a reason.

### Fighting the media commission

Adjudication of the challenge to the act's constitutionality was delayed

because Gambia's Supreme Court lacked its full complement of judges, itself largely an outcome of government-forced resignations and a failure to appoint replacements. The Court finally sat in February 2004 to hear the case and review the chief justice's decision on the injunction. The lawyer for the Gambia Press Union, Hawa Sisay-Sabally, argued that in its present form the act breaches international freedom of expression guarantees. She said it fails to promote the independence, impartiality, and professionalism of the media. Instead, she argued, it gives too much power to a commission subject only to government control.

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The commission was to register and license journalists and media houses, with the power to place substantive restrictions on entry to the journalistic profession and on the establishment of media outlets. The act also provided for harsh sanctions, including banning journalists from practicing for 12 months, and banning media houses from operating for 18 months, for breaches of a code of conduct to be set by the commission. Sisay-Sabally argued in court that the whole regulatory system envisioned by the act is unconstitutional and contrary to international law.

The state's attorney requested more time to reply to the GPU submission, and so the case was adjourned until the next sitting of the Supreme Court. The court dismissed the application for an injunction on the commission's establishment, stating that there was no need to disturb the status quo. This ambiguous decision was interpreted by the government to mean the commission should have power to operate while the case is still pending. The GPU interpreted the ruling to mean the reverse—that no steps to establish the commission should be taken pending a full decision—and so they wrote to the court for clarification. The next hearing was scheduled for November 2004.

In April 2004, a newly constituted commission wrote to all independent media houses asking them to register by mid-May, or risk being closed down. Rather than comply, most independent media houses protested the ultimatum by voluntarily suspending operations for one week. With the judicial vacuum continuing, representatives of the government and the media reached an agreement to observe a three-month moratorium during which time the various stakeholders would discuss possible ways to amend the act. That moratorium expired on August 14 and was extended another three months.

On October 20, the government succumbed to the pressure of national and international civil society and moved to abolish the commission in its current form. However, victory celebrations were short-lived. On November 19, the government

proposed two new laws aimed at restricting and intimidating journalists—the Criminal Code (Amendment) Bill, 2004 in addition to a Newspaper (Amendment) Bill, 2004. The first makes defamation a criminal offense, carrying a minimum sentence of six months. The bill specifies that ignorance of the falsehood of allegations is no defense. The second increases the cost of registering a newspaper or a broadcasting station from 100,000 dalasis to 500,000 dalasis (approx. U.S.$ 20,000). The bills were passed by Gambia's National Assembly on December 13 and 14, 2004, respectively, and will enter into force once they receive presidential assent. In the words of Madi Ceesay of the Gambia Press Union, the amendments effectively put Gambian journalists in "deeper trouble than they would have been under the national media commission." The current Banjul government, still unwilling to shed its authoritarian habits, has again demonstrated it is no friend of media freedom. Strong and sustained domestic and international pressure might help force them to allow the media to operate freely.

Notes

† Demba Jawo is president of the Gambia Press Union. The author would like to dedicate this article to the late Deyda Hydara, a Gambian independent journalist and uncompromising defender of press freedom, who was murdered on December 16, 2004.

# Freedom of Information Progresses in Nigeria

More than five years after its first submission to the parliament, Nigeria's access to information bill has finally reached the parliament's upper chamber and appears close to adoption. **Maxwell Kadiri**† writes about its progress.

Sustained legislative momentum following the election of a new national assembly in 2003, the second under President Olusegun Obasanjo, looks set to increase freedom of information (FOI) in Nigeria. The Freedom of Access to Information Bill, which has been before the parliament since July 1999, has already undergone three required readings (debates) in the lower chamber (the House of Representatives), and the first of three in the Senate of Nigeria's bicameral National Assembly. Presidential objections have been addressed, and, at this writing, most observers see no further obstacles to passage.

It has been a long journey. The FOI Bill was originally put forward by the Freedom of Information Coalition, an umbrella group of civil society organizations including the Civil Liberties Organisation and Nigerian Union of Journalists and led by the Media Rights Agenda. The time seemed auspicious, with a new president publicly committed to fighting corruption, and a fresh set of faces in

parliament. However, after two readings in the House of Representatives in 2000, an ongoing dispute between the president and parliament about the leadership of the House delayed the next reading for over a year. Despite widespread cross-party support, a further obstacle arose when President Obasanjo objected to some of the draft bill's content, particularly its inclusion of access to information for noncitizens. Legislative work on the bill effectively ground to a halt through the remainder of the parliamentary term, which ended in May 2003.

Then, following the June 2003 parliamentary elections, the FOI Bill again reached the top of the legislative agenda. Sponsored by Jerry Sunny Ugokwe, the only one of its three original supporters to continue into the new assembly, the bill sailed successfully through its first and second readings in the House of Representatives in quick succession. On July 30, 2003, members of the House of Representatives referred it to a tripartite parliamentary committee, made up of the information, justice, and human rights committees, for their opinion. The Information Committee took the lead, reading the bill and referring it to a subcommittee of nine members, three from each committee.[1]

This subcommittee analyzed the bill in detail and wrote a fresh review for the tripartite committee. Throughout this process, members of the subcommittee worked closely with civil society groups, notably the Freedom of Information Coalition and the Open Society Justice Initiative. In its final report, submitted on November 6, 2003, the subcommittee proposed amendments to four of the 34 sections of the bill, and recommended that one section be deleted. The report was endorsed by all the members of the tripartite committee.

The amendments to the bill proposed in the report, and later accepted, were as follows:

a) The definition of bodies covered by the bill (section 2) was altered to indicate all those supported by "public funds," rather than the previous "tax revenue," which was considered by legislators to be narrow and potentially misleading. Private bodies carrying out public functions are also covered by the bill.

b) The clause providing for a public interest test to be applied in cases of possible exemptions on national security grounds (section 14(2)) was amended to ensure that the determination of an overriding public interest be made by a court of law.

c) A separate public interest test in cases of exemptions on grounds of individual privacy (section 17(3)) was similarly amended to require judicial review.

d) A clause in the draft bill that had covered communications between tax authorities and any taxpayer was expunged in its entirety. It was thought the clause might encourage, rather than check, corruption, by permitting the manipulation of tax policies by both government officials and taxpayers.

e) Committee members also renamed the bill from "Freedom of Information Bill" to its present title.

The chair of the Information Committee, Alaba Lad-Ojomo, presented the tripartite committee's report to the Committee of the Whole House on November 6, 2003. But it was not until August 5, 2004, that the House reviewed the committee report, and initiated the bill's third reading. After extensive deliberations, the Committee of the Whole House made a number of additional amendments to the bill. Significantly, the right of access to information was restricted to Nigerian citizens only (in section 3), thereby reducing the bill's scope in line with the president's original objections.

The House also extended the time limit, from three to seven days, within which public bodies that receive misdirected requests must transfer them to the appropriate body (section 6(1)). On August 25, 2004, the House adopted the remaining provisions in their entirety and passed the bill. Due to sustained efforts from the FOI Coalition, the Justice Initiative and other civil society groups, a clean final draft of the bill was made speedily available to the Senate, where it passed its first reading on November 23, 2004. Support in the Senate now appears to be building.

The remaining challenges are, first, to ensure that momentum is maintained through the two final Senate readings, and second, to secure the eventual assent of President Obasanjo. While the president can veto any bill passed by both chambers, the National Assembly can, by a majority vote of two-thirds of both chambers, override this veto. The FOI Bill is one of two key legislative efforts prioritized by the Obasanjo administration in its National Economic Empowerment Development Strategy (NEEDS) document, earmarked for passage in 2004, because of their "ability to improve transparency and accountability in government fiscal operations and check unproductive public expenditures by all tiers of government."[2] With Obasanjo's primary objection concerning access to noncitizens addressed, the bill should now receive presidential approval.

Civil society is already preparing to put the bill to work. One eagerly awaited document is the May 2004 report of the Human Rights Investigation Panel set up by the Obasanjo administration and led by Justice Chukwudifu Oputa, which reviewed rights violations perpetrated by previous regimes. Increasing public availability of thousands of government records like this marks a new era of openness in Nigeria about the country's recent past, still often shrouded in secrecy. The bill is also a first step toward instituting a culture of transparency and accountability in government.

Notes

† Maxwell Kadiri is program coordinator, Africa, with the Open Society Justice Initiative.

1 The members were: Frank Ineke, KGB Oguaka and Femi Gbajabiamila from the Justice Committee, Abdul Oroh, Edward Ogon, and Jumoke Okoya Thomas from the Human Rights Committee, and Francis Amadiegwu, Gbenga Makanjuola, and Sani Buhari from the Information Committee. The Honourable Alaba Lad-Ojomo, who also chairs the Information Committee, chaired the subcommittee.

2 The second is a Fiscal Responsibility Bill, currently being drafted by the office of Budget Monitoring and Price Intelligence Unit (BMPIU) of the Presidency.

# Justice Initiatives

The Open Society Justice Initiative, an operational program of the Open Society Institute, pursues law reform activities grounded in the protection of human rights, and contributes to the development of legal capacity for open societies worldwide. The Justice Initiative combines litigation, legal advocacy, technical assistance, and the dissemination of knowledge to secure advances in five priority areas: national criminal justice, international justice, freedom of information and expression, equality and citizenship, and anticorruption. Its offices are in Abuja, Budapest, and New York.

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