**Africa Regional Office International Justice Portfolio Review**

25 November 2015

**Introduction**

The Africa Regional Office (AfRO) started its international justice (IJ) programming in very particular circumstances. There had been deep disagreements among different OSF entities dealing with IJ about the appropriate approach to addressing the many IJ challenges facing Africa. Among the most contentious issues within the network were:

* The role and capacity of the International Criminal Court (ICC) and the extent and manner of articulating OSF’s relationship with its work
* The role and capacity of the African Union (AU) in addressing impunity on the continent and the extent of OSF support to its work
* The most effective approach to domestic prosecutions
* The balance between political and legal means in tackling accountability in Africa.

The inception of AfRO in early 2013, which was part of a broader OSF organizational review, coincided with the celebrations of the 10th anniversary of the International Criminal Court (ICC). This provided the OSF Network a good opportunity to assess its 10 year investment in the ICC and more generally, conduct a thorough review of its over ten-year investment in supporting legal accountability for international crimes globally, especially in Africa. While OSJI took the lead for the assessment of OSF support for the ICC in the form of a convening in June 2013 of the ICC Office of the Prosecutor’s (ICC-OTP) investigations and prosecutions operations, AfRO led the effort to review our IJ work in Africa. This was done through consultations that culminated in a 14-15 May 2013 internal review meeting in London on the OSF work on international justice in Africa (“the London meeting”).

The main outcome of the London meeting was an agreement on the need to identify and implement ways that ensure that future directions for network programming on IJ account for and reflect the concerns of all network entities that might be affected by such work. To that end it was further agreed in London that the Africa Regional Director should designate within AfRO a focal point whose role was to lead internal discussions on how OSF should position itself publicly on issues, such as new developments in IJ in Africa, and ensure that processes were in place to ensure that such positions are broadly reflective of all network views.

AfRO programming in IJ is a direct consequence of, and a follow up to, the London meeting. Its main business is to identify issues, opportunities and possibilities for advancing OSF’s work on IJ in Africa. The raw material it deals in consists of the inevitable contradictions inherent in any effort to address the need for justice in situations of ongoing mass atrocities.

**AfRO’s International Justice Portfolio**

The IJ portfolio of the Africa Regional Office that is currently being reviewed contains three grants, two advocacy activities, and four operational activities. The portfolio reflects a total investment of $615,227 in IJ work, with $509,300 of that total representing investments through grant making. These investments were geared toward achieving the following four objectives: rebuilding an African constituency for international justice; improving relations between the International Criminal Court and the African Union; promoting a common OSF approach to international justice in Africa; and promoting complementarity. The tools employed were chosen to further both external-facing and internal-facing objectives.

AfRO designed the initial IJ portfolio objectives from the most pragmatic approach to be able to respond to the challenges we perceived both within OSF and in relation to the ICC-AU controversy. The following details AfRO’s ambitions, place and work under each of these objectives.

1. **Rebuilding an African constituency for international justice**

Discourse on international justice has often been dominated by large Western-based NGOs. Considering the overwhelming extent of international justice interventions on the African continent, African voices have been highly underrepresented in the discourse on international justice rather than driving the discourse. This has played out alongside a parallel narrative that the International Criminal Court (ICC) and international justice processes are targeting Africans, thus creating skepticism on the continent about the purpose and utility of international justice generally. AfRO sought to help rebuild an African constituency for IJ by giving African stakeholders and institutions greater voice and agency in IJ debates and processes that concern or originate from Africa. This also involved pursuing better coordination with other private foundations and donor agencies who support IJ in Africa.

*AfRO’s Interventions*

AfRO has used grant making as its main tool to support efforts by African scholars and organizations to proactively engage in legal and policy reforms with governments and intergovernmental bodies – particularly the African Union – to create an enabling environment for international justice in Africa. This has involved encouraging the Council for the Development of Social Science Research in Africa (CODESRIA) to use its prestige as the leading research institution on social studies in Africa to provide a platform for dialogue, allowing African civil society organizations to develop home-grown positions on international justice. These discussions resulted in CODESRIA convening a conference in July 2014 under the theme “International Criminal Justice, Reconciliation and Peace in Africa: The ICC and Beyond.” The conference brought together scholars, activists, practitioners and policy makers in the field of transitional justice and international criminal justice (including representatives of major regional and international organisations, such as the Prosecutor of the International Criminal Tribunal for Rwanda, the newly elected President of the East African Court of Justice, The Prosecutor of the Ministry of Justice in Cote d’Ivoire, the Deputy Co-Prosecutor of the Extra Ordinary Chambers in the Courts of Cambodia (ECCC), and representatives of the African Court of Justice and Human and Peoples’ Rights, the ICC and the Extraordinary African Chambers for the Trial of Hissène Habré) to discuss and build on current debates in Africa on the role of the international justice system in advancing Africa’s peace, reconciliation and justice agenda.

It also meant supporting the Pan-African Lawyers Union (PALU) to lead an African civil society effort to strengthen the legal and institutional capacity of the African Court of Justice and Human Rights to be able to deal with mass atrocities on the continent.

As we had hoped, the CODESRIA conference triggered new initiatives, one of which, the African Court Research Initiative (ACRI), we later supported. ACRI is a platform for academic experts on IJ in Africa to offer technical assistance to the Legal Counsel of the African Union Commission to further develop the technical legal aspects of the treaty provisions for the African Court of Justice and Human and People’s Rights and prepare legal instruments to enable implementation of the Protocol. ACRI demonstrates the need to go beyond efforts to adopt the amended African Court protocol, but also extend to working with AU organs and national governments to address potential gaps in the protocol.

*Coordination with other private foundations and donor agencies*

AfRO’s international justice portfolio also includes outward-facing efforts to coordinate with other private foundations and donor agencies who support IJ in Africa. The field has attracted the interest of an increasing number of private foundations in the decade following the inception of the ICC. This, however, did not result in strengthening the field and CSOs advocating for accountability for mass crimes across the continent still struggle to get their voice heard. This paradox could only be addressed through more coordination among foundations aimed at reducing contradictions in grant making strategies and supporting a sustained CSO strategy for advancing international criminal justice in Africa. At the initiative of TrustAfrica, the International Criminal Justice Fund was created in 2012 to pursue this objective.

As a member of the Fund’s Steering Committee, AfRO has encouraged the participation of as many OSF entities as possible to the Fund’s activities and facilitated direct dialogue between the Fund’s management and interested Foundations, particularly to encourage OSF entities to use the Fund as much as possible to leverage their own funding. For instance, in 2014, AfRO successfully submitted to the Fund (at the request of OSIEA) a grant proposal for an OSIEA grantee – Journalists for Justice – whom OSIEA could no longer support but who was a worthy partner. Although the Fund’s total grant-making budget is very limited (about $850,000 annually), the OSIEA experience demonstrates that different OSF entities can make effective use of the Fund.

Additionally, given that the Fund can reach civil society organizations that AfRO does not usually partner with because their work is focused at a local level or they are in countries not covered by OSF foundations, AfRO believes in the importance of relevant OSF entities strengthening the Fund. To this end, AfRO brokered an MOU between HRI and TrustAfrica in 2014, by which HRI contributed $150,000 to the Fund.

Given the composition of the ICJ Fund’s donors and grantees, AfRO saw the Fund not only as a source of funding, but also as a veritable advocacy platform for our NGO partners. In this vein we secured an invitation for PALU to address the Fund’s Steering Committee during its July 2014 meeting and discuss PALU’s AfRO-supported work on the adoption of the Protocol extending the jurisdiction of the African Court to include international crimes.

In addition to serving on the ICJ Fund Steering Committee, AfRO has collaborated with TrustAfrica through regular information sharing and inviting the ICJ Fund Program Manager to participate in certain OSF Africa IJ coordination meetings.

*Assessment of our interventions*

In bringing together various actors (social scientists, lawyers, academics, judges, government officials), AfRO succeeded in helping to form a strengthened African IJ constituency, but also rebuild the confidence of African IJ actors that they have a vital role to play within the constituency. Our support to the field reflects AfRO’s ambition to be a driving force in setting the broader objectives pursued by different IJ grants and activities in Africa. Through our grants and activities, we believed that we could help shift not only the voices engaged in discourse on IJ in Africa, but also the content of the discourse itself. For example, with such a diverse range of actors participating, the July 2014 conference organized by CODESRIA broadened the scope of IJ work to such areas as documentation and political accountability. Applying their informed understanding of the political and social contexts on the continent to IJ legal norms, African CSOs are beginning to gain ownership over IJ debates and processes on the continent. AfRO supported follow-up advocacy activities with the African Union, which illustrates the renewed sense of agency and purpose with which African CSOs have started to approach IJ promotion on the continent. These follow-up advocacy activities also reflect the fact that new actors, such as academics, social scientists and legal professionals have been brought into advocacy on IJ in Africa. We are cognizant of the challenge of sustaining the interest of academics and research institutions in advocacy. The ACRI is a partial response, but will need to be broadened and diversified to ensure that additional African voices speak to IJ challenges on the continent.

Beyond advocacy, AfRO sought in 2015 to support training of legal professionals at the national level to ensure more effective national prosecutions of grave crimes. We believed that as the demand for accountability grew from African voices within the continent, so would the demand for national prosecutions, and it was imperative that African lawyers be prepared to take up this charge. Unfortunately, we were unable to organize these trainings in 2015, mainly owing to poor planning on our part – including lack of proper mapping of training capacity and needs. However, AfRO has continued discussions with continental training institutions and interested African judges to determine whether we can support such trainings in the future.

Working with PALU, AfRO sought to participate in home-grown efforts to strengthen the AU’s capacity to deal with mass atrocity crimes. AfRO’s support to PALU for advocacy and awareness-raising around the adoption of the draft Protocol on Amendments to the Protocol on the Statute of the African Court of Justice and Human Rights successfully contributed to the ultimate adoption of the protocol at the African Union Summit in Malabo, Equatorial Guinea in June 2014. Although aspects of the protocol, such as the provision on head of state immunity, remain controversial and may need to be refined, the extension of the court’s jurisdiction presents a step forward in building the legal and institutional framework for dealing with mass atrocities on the continent. Since the Protocol’s adoption by Heads of State, however, advocacy to get AU Member States to ratify the Protocol has not produced results. The ratification process has been fraught with challenges, including the overwhelming focus of IJ advocates outside of the continent on the controversial provisions of the Protocol to the exclusion of its positive and progressive provisions. The narrative that emerged is that support for the protocol means supporting impunity. This dominant narrative has thus created road blocks for ratification that a more nuanced understanding and messaging around the protocol would avoid.

1. **Improving relations between the African Union and the International Criminal Court**

Although African States represent the largest regional bloc of State Parties to the Rome Statute of the ICC, a strained relationship has developed between the ICC and a growing number of African states, and between the ICC and the African Union as an institution. The growing tension has been marked by a number of AU resolutions calling on member states not to cooperate with the ICC, states like South Africa threatening to withdraw from the Court’s governing body, and Kenya leading campaigns for African states’ to do so.

*AfRO’s Interventions*

AfRO has sought to forge positive and constructive dialogue between the two institutions, mainly through advocacy visits to The Hague and Addis Ababa by African IJ advocates. Our intervention was based on the assumption that restoring African agency in IJ can help reduce the ICC-AU tension. We were also confident that given its presences/entries in The Hague and Addis, OSF is uniquely suited to helping reduce the polarizing ICC-AU tension. A two-prong strategy was developed to enable this constructive dialogue: i) direct contacts with the ICC and AU, and ii) organizing a high-level group of IJ champions to broker dialogue between the ICC and AU organs. In furtherance of the first prong of the strategy, a meeting with ICC officials was held at the ICC in The Hague on 22 April 2014. AfRO staff, other OSF network staff, and AfRO partners – PALU and the Center for Citizens’ Participation in the AU (CCPAU) – participated in the meeting. The meeting highlighted current challenges with the ICC’s legal work in Africa, and offered recommendations for forging a more positive working relationship with the AU.

*Assessment of our Interventions*

The meeting was meant to open the door for future engagement between OSF and the ICC, and between the ICC and the AU on collaborative efforts to achieve international justice complementarity in Africa. Our subsequent assessment has been that a one-off engagement with the ICC is not sufficient to mend the strained relationship between the AU and the ICC. Constant bilateral engagement of both sides and exchanges between the two institutions is needed. Thus, as part of the efforts to sustain this momentum, we also sought to organize a high-level group of IJ champions to broker dialogue between the ICC and AU organs.

In spite of these ambitions and additional planned advocacy visits to the ICC and the AU, the initial momentum has waned because we were not able to carry out these planned follow-up visits nor form the high-level group of IJ champions. A number of challenges have hampered our ability to fully achieve the stated objective. Among them are:

* OSF capacity to contribute to improvement of AU-ICC relations may have been overstated.
* The ICC itself has not recorded any developments as such that can contribute to changing the underlying narrative of the dynamics between it and the AU. If anything, the direction of developments has been in the opposite direction.
* The potential for a change in attitude within OSF vis-à-vis the ICC may have been overestimated. The amount of OSF investment in supporting the ICC as an institution is such that there is reluctance in some OSF quarters to openly criticize the Court for fear of undermining its work.
* General scepticism vis-à-vis the AU has negatively affected advocacy that can be done to advance the Malabo Protocol generally and highlight its positive contributions to IJ efforts in Africa.
* AfRO has faced difficulties in determining the amount of flexibility and time we have to pursue advocacy on our own.

While AfRO still believes that improving AU-ICC relations is important, after assessing our capacity to contribute to these efforts, we no longer believe that we have a unique, defined role in that process and agreed that it was best for us to maximize our efforts elsewhere. Other reasons include: (i) that we are already providing support to organizations such as PALU and CODESRIA that can carry out activities in line with this objective; (ii) OSJI and HRI have more resources, time and expertise (particularly working from the ICC side) to successfully contribute; and (iii) the AU, through its chief legal counsel, and the President of the ICC Assembly of State Parties (Senegalese Minister of Justice Sidiki Kaba) have both added in their respective agendas to work on improving the AU-ICC relations. Our role therefore would be limited to accompanying these efforts either directly through other OSF entities, or indirectly through our usual NGO partners, without having to commit financial resources to this specific objective.

1. **Promoting a common OSF approach to IJ in Africa**

Much of the controversies within the network have been as a result of fundamental but honest disagreements among well-meaning legal experts on different, strong-held views on IJ. As the London meeting clearly demonstrated, however, most contentious issues can be addressed when different OSF entities start listening and talking to each other to discuss different approaches to ending impunity for grave crimes in Africa. Under the IJ portfolio, one of AfRO’s primary roles was to ensure coordination among OSF entities working on international justice. These OSF entities include the Open Society Justice Initiative (OSJI), Human Rights Initiative (HRI), and Africa regional foundations.

*AfRO’s Interventions*

To this end, AfRO initially sought to maintain dialogue among OSF entities through information sharing and informal consultations on our respective IJ related programing in Africa. As a result, we have seen more regular consultation and information sharing on the ICC from OSJI. However, recognizing that the need for a more coherent OSF intervention on IJ in Africa called for a more sustained collaboration that went beyond mere information sharing on our respective programming, AfRO began to facilitate formal dialogues between relevant OSF entities through regular meetings. In early March 2015, AfRO organized a coordination meeting with the ambition of sketching the contours of a collaborative partnership across OSF around specific IJ projects in Africa. AfRO determined relatively early on that it should not aim so much at seeking to forge a common OSF position on the most contentious issues, but rather modestly define areas of agreement and explore possibilities for collaboration. Based on the meeting outcome and desires expressed by OSF colleagues, AfRO determined that such a meeting will take place annually to bring OSF international justice actors together and encourage coordination and collaboration. We also sought to achieve this objective through a series of working group meetings at each of the regional foundations to deeply interrogate OSF’s IJ work in the particular sub-region.

During the March 2015 coordination meeting, we identified justice reform that would facilitate domestic prosecutions as one of the least common denominators around which different OSF entities could come together in a joint programming effort. Thus, the West Africa working group meeting (expanded to include the Democratic Republic of Congo/Central Africa) brought together AfRO, HRI, OSISA, OSIWA, and OSJI to discuss how OSF programming can address the obstacles to, and take advantage of the opportunities for, domestic prosecutions of grave crimes in six countries: Côte d’Ivoire; Guinea; Mali; Nigeria; Senegal; and the Democratic Republic of Congo.

*Assessment of AfRO’s Interventions*

As a result of these efforts to promote collaboration among OSF entities involved in IJ work in Africa, starting in mid-2014, almost all of the activities under AfRO’s international justice portfolio, save for certain grants, were carried out jointly with other OSF network programs or Africa regional foundations. This was largely the case for the complementarity work, which naturally lends itself to collaboration within the network because it deals with national criminal justice systems covered by the regional foundations and issues covered by the national accountability for grave crimes programs of HRI and OSJI. For instance, AfRO, HRI, and OSIEA have begun joint programming to support the Kenya National Commission on Human Rights to promote and give legal support for national prosecutions of post-election violence (PEV) crimes. Likewise, AfRO, HRI, and OSIWA have begun joint programming to support the National Human Rights Commission of Nigeria to document mass atrocities and promote national prosecutions of mass atrocity crimes. Developed through the AfRO-organized planning and coordination meetings, a number of joint programming efforts have already been earmarked for 2016. These include: HRI, OSISA and OSJI working on law reforms in DRC; OSIWA and OSJI initiating a complementarity mapping project in Mali; and AfRO and OSIWA beginning discussions on possible litigation before the ECOWAS Community Court of Justice for the failure to prosecute crimes committed during the September 2009 stadium massacre in Guinea.

However, we have faced a number of challenges that our initial assumptions failed to take on board. These include: difficult alignment of budget processes among the various OSF entities; different approaches to the role of IJ mechanisms among OSF entities; and different priorities. For instance, the establishment of an IJ mechanism may be seen as an end in itself for a thematic program, whereas the regional foundation concerned may view the IJ mechanism as one among many tools to achieve accountability. Likewise, as HRI or OSJI are expected to intervene in a certain country, international justice may not be among the programmatic priorities of the relevant regional foundation working in that country at that particular time. Although the annual Africa IJ coordination meeting in March allowed us to find avenues for joint programming during the current year, the timing of the meeting is not aligned with the budgeting cycle for the next year (June) so as to allow for budget and work plan harmonization for the upcoming year. With ongoing informal consultations between the formal meetings and sharing of draft work plans and budgets with relevant OSF network entities during the budgeting process, we are attempting to address this challenge.

1. **Promoting complementarity**

The Rome Statute system has established the principle of complementarity as one of its cornerstones. This principle underscores that the Court is complementary to national criminal jurisdictions, making it a court of last resort. At the establishment of the ICC there was a widespread recognition that the success of the Court will be measured not just on the number of cases successfully concluded, but also on the number of cases that did not have to go to the Court because complementarity worked. With the limitations of the ICC becoming increasingly evident, AfRO determined that it is in OSF’s and African institutions’ interest to promote and establish the legal and policy environment for international justice complementarity. In line with AfRO’s priority to promote local agency, international justice complementarity has become a major focus of our work.

*AfRO’s Interventions*

AfRO has provided leadership within the OSF network on complementarity programming in Africa by convening the aforementioned regional working group meetings and initiating joint efforts with HRI on how to pool resources to promote complementarity through national and regional human rights institutions. Since June 2014, AfRO has been doing the ground work to interrogate, refine and promote the latter area of work to HRI, OSIEA, OSIWA, and national human rights institutions (NHRIs) themselves. As part of the initial process of interrogating the utility and feasibility of this initiative, AfRO and HRI held a meeting in November 2014 that brought together representatives of five NHRIs and NHRI network secretariats to discuss whether and how they could promote the principle of complementarity in the course of fulfilling their mandates. The outcomes of that convening have culminated in three recent grants to: i) the Kenya National Commission on Human Rights (KNCHR) to assist victims of Kenya’s post-election violence to access retributive and restorative justice through litigation in Kenyan national courts, documentation of PEV crimes for future prosecutions, and advocacy for the proper administration of the reparations fund for victims; ii) the National Human Rights Commission-Nigeria (NHRC-Nigeria) to establish an information and documentation center on mass atrocities committed in Nigeria, train NHRC staff on early warning, monitoring, and reporting mass atrocities across Nigeria, and advocate for the state to pursue prosecutions of persons responsible for mass atrocities; and iii) the Network of African National Human Rights Institutions (NANHRI) to train select NHRIs on the continent on documentation and forensic investigation of grave crimes to assist current and future national prosecutions.

*Assessment of AfRO’s Interventions*

AfRO’s efforts to bring together OSF entities around the issue of complementarity have evolved into a more multi-dimensional approach. That approach now takes into consideration the interests of the various OSF entities and the institutions that they work with on the continent. For instance, recognizing HRI’s desire to fill a gap in its accountability portfolio by engaging more with African institutions and civil society organizations, as well as it willingness to collaborate with AfRO on IJ work, we were able to develop an OSF initiative that furthers complementarity while moving beyond mere support to the field for strengthening the legal framework for national prosecutions of grave crimes.

The grants and operational activities deployed to achieve this objective are still in a nascent phase, and therefore difficult to assess under the current review.

**Questions for discussion**

1. Regular exchanges with regional foundations, thematic programs and other donors have allowed all involved to leverage the expertise that each brings to the table in terms of subject matter and local context. This ensures more informed and appropriate investments and interventions by OSF on IJ in Africa. At the same time, however, it has also faced the challenge of striking the right balance between the need to provide advisory services and technical expertise on IJ issues on the one hand, and the importance of respect for regional foundations’ priority choices on the other hand.
   1. How much of AfRO’s IJ portfolio should reflect its own initiatives and how much should reflect AfRO’s support for regional foundation priorities?
   2. What role can AfRO play in helping network programs to advance their IJ programming in situations of mass atrocities in countries where there is no regional foundation presence, such as Central African Republic?
2. The situation in Kenya is a dramatic display of the extent and risk of politicization of any response to crimes of mass atrocities due to the intimate connection between those crimes and the local political environment in which they are committed.
   1. Rather than focusing only on the aftermath – addressing the mass atrocities committed – should our work also address, or should we be facilitating OSF discussions on, the internal political issues underlying mass atrocities on the continent? If so, how?
   2. Should our support to the field, such as the grants to organizations like CODESRIA, PALU and the ACRI, lay greater emphasis on exploring the intersection of politics and justice?
3. To be an effective and consensual convener on IJ in Africa, AfRO felt the need to steer clear of any particular legal doctrine if it is to help resolve OSF internal tensions on IJ issues.
   1. Given AfRO’s internal IJ expertise and our role in steering OSF’s approach to IJ issues in Africa, should we reconsider this stance and begin engaging in advocacy on particular issues?
   2. If so, how can we do that while maintaining our convenor and advisory roles?
4. Are there tools at our disposal that we could have used to meet our objectives that we did not use or were underutilized: advocacy; research and analysis; litigation?