



# Workshop Report

# Promoting the rule of law in Africa



Compiled by Eric Scheye

2 and 8 March 2011, Zevenwacht Wine Estate, Cape Town

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# Promoting the rule of law in Africa

## INTRODUCTION

The Rule of Law Workshop, *Promoting the Rule of Law in Africa*, raised a number of issues that can be explored productively by donors, governments and practitioners in the future. Each of these issues could not only stimulate and encourage modifications in relation to the direction in which rule of law (RoL) development has been conducted in Africa, but also improve the performance of donor support programming. The issues and suggestions include the following:

- Recognise that RoL development is primarily about power and politics, and not a technical practice to be left to lawyers, police officers, prison wardens, etc. It requires political acumen and development knowledge.
- Mould support for RoL development to existing configurations of power and politics, rather than in accordance with the desires of donors or practitioners, which occurs all too often when it comes to donor-supported RoL initiatives.
- Accept that in many instances significant elements of a recipient government and the domestic elite are political inclined not to engage in RoL development. This then requires the adoption of a different type of RoL support programming.
- Expand programming beyond the narrow confines of the criminal justice system into other areas of RoL that are of particular relevance to gender equality, such as family law, administrative law, juvenile justice and property/land rights.
- Initiate programming that goes beyond the institutional capacity development model, which primarily includes the provision of technical assistance,

training, capital equipment and infrastructure to the agencies of the state.

- Adopt greater service delivery and problem-solving approaches that assume experience with the RoL perspective. The approaches adopted should have greater relevance and applicability to communities and neighbourhoods, and may entail support to projects such as mobile courts, paralegal organisations, youth/community groups and emerging trade unions.
- Acknowledge and programme support for those local providers of justice and security that are legally authorised to deliver services, but are not state ministries and agencies.
- Conduct detailed empirical analyses as often as possible and base RoL support programming upon such analyses.
- Recognise that sustainability can be promoted if community-driven development projects are integrated into justice and security programming.

## OPENING PRESENTATION

### **Dr Jakkie Cilliers**

Executive Director, Institute for Security Studies

In setting the stage for the workshop's exploration of RoL in Africa and donor support for such development, Dr Jakkie Cilliers described his vision for a vibrant continent that would house 25 per cent of the world's population by 2050. Such demographic potential was an untapped resource and should not be underestimated. Already Africa had ten countries in the league of the world's fastest growing economies. Their average return on capital was higher than that of India, China and



Indonesia, and the continent's commodity boom was expected to take off in the coming years.

Dr Cilliers contrasted this optimistic economic scenario with the political reality of African state boundaries. Imposed during the colonial era and having remained unchanged during the subsequent Cold War period, state boundaries had not contributed positively to, and might in fact have hindered state formation. This was significant not only with regard to questions of governance, but also to issues of nationalism. It had been argued, he said, that productive nationalism, i.e. one that was not employed aggressively against neighbouring countries or domestic ethnic minorities, could be a precursor to and a driving force of development. Dr Cilliers suggested that nationalism had regrettably become a taboo subject within development circles, even though it could support the process of strengthening RoL regimes. This attitude could have more to do with Western discourses about states, state formation and nationalism than it did with African realities.

In the discussion following the presentation, one of the points raised in support of the argument about the potential benefits of nationalism was that 'Africans may sometimes not believe in Africa'. It was also alleged that in Africa much of the public and private monies pilfered through corruption left the continent, which was perhaps different from what occurred in other developing countries, e.g. Indonesia. This comment was not made in support of corruption, the speaker said, but to indicate that different types of corruption had varying consequences depending upon the circumstances. The implications and ramifications of these claims in relation to development, nationalism and RoL were not explored further.

However, the importance of more effective governance with respect to accountability, transparency, tax collection and efficient local government was emphasised. Similarly, the need for the media throughout the continent to have greater freedom so that citizens could be better informed about public issues and rights was noted. Finally, the drive for greater regional cooperation, e.g. by the Economic Community of West African States (ECOWAS) and the Southern African Development Community (SADC), was lauded, while it was also recognised that donor support and development aid could only be a stepping stone toward bettering the lives and livelihoods of Africa's citizenry. It could never be considered a solution.

### **Cheryl Frank**

Director, Pretoria Office, Institute for Security Studies

Ms Cheryl Frank said that the idea for the RoL workshop originated two years ago, having been sparked by a Department for International Development – United

Nations (DFID – UN) conference at which RoL issues were debated. At that conference, however, there had been limited contribution by African representatives or government officials. Furthermore, there had been minimal discussion of the parameters of how to implement RoL development in general, let alone in Africa. Because of this the ISS workshop on RoL was narrowly focused on blending conceptual ideas of RoL development into their practical application in such a way as to propose a direction for adoption by African governments, civil society organisations, donors and practitioners.

The workshop would provide an opportunity for the ISS to engage fully in this debate and to begin defining what role it could and would assume in Africa. It was important, Ms Frank noted, for African civil society organisations to be represented and to take their rightful seat at the table when RoL development in Africa was discussed and debated, particularly within the UN.

During the discussion, it was recognised that there is a degree of donor fatigue when it comes to abstract discussions on RoL and related issues, such as security system reform (SSR) and justice development. It was now time to propose concrete practical approaches and to initiate programming that could effectively improve the lives and livelihoods of those who had limited access to justice and security. Instead of having academic debates, it was also the right moment to strengthen the ability of civil society organisations in order for them to play an active role in the delivery of justice and security. RoL development and associated governance issues were not the sole prerogative of governments, especially in Africa where there appeared to be an absence of political leadership in this respect.

### **Eric Scheye**

Consultant

Mr Eric Scheye argued that effective RoL development was a political activity that depended upon building political alliances with a constituency or constituencies within the ministries and agencies of state institutions responsible for providing justice and security, as well as with the country's political elite(s) and/or civil society that perceive it to be in their interest to support progressive improvement in the delivery of justice and security as a public good and service. Consequently, RoL development was not primarily a 'technical' activity in which international practitioners – typically lawyers, police officers, prison wardens and the like – imparted their 'expertise' to partner country colleagues to strengthen institutional 'capacities' while 'reforming' organisational policies and operations.

While these technical experts might be the tools by which justice and security service delivery could be strengthened, they were not the flesh and blood of RoL support development. Rather, Mr Scheye claimed, politics, defined by him as working with, within and through the partner country's dynamic and fungible balances of power, was the means to enliven RoL and give life to its tools. At best, effective RoL support was an uncertain endeavour undertaken in the interstices and at the interfaces between the differing factions and layers of power and authority, and was dependent on a donor and a practitioner's skill to tolerate, weigh and manage risk. Among the primary risks was that governments who received RoL support might have little appetite to develop their RoL regimes. In fact, he argued, powerful elements within governments and elites had an active political interest in not undertaking RoL development.

Spelling out the challenges of RoL development, Mr Scheye observed that there was no agreed understanding of RoL other than the foundational notion that all RoL activities, including human rights, embody cultural values and beliefs that reside 'in the minds of the citizens of a country'. This suggested that a reasonable approach to supporting and strengthening RoL in a particular country was to observe and analyse the 'experience of RoL' of those living and working in that country. The benefits of using an experience-of-RoL model, he argued, included adopting service delivery and problem-solving methodologies that expanded the field of RoL support programming beyond criminal justice into areas of jurisprudence, including family, administrative, civil, commercial, juvenile, labour and customary law. With regard to the latter, he argued that it resembled, if not paralleled, common law as understood in the Anglo-Saxon jurisprudence tradition and should be supported accordingly through the augmentation of precedence and casebooks.

Mr Scheye suggested that within Africa the delivery of justice and security by ministries and agencies of state was meagre at best. The track record of donor-supported RoL programming had been poor, in part because of the programme's reliance on an institutional capacity development approach that emphasised 'deficits, resource scarcities and inputs'. This approach, he suggested, had proved to result in largely unsustainable development. He recommended, therefore, that a more empirical and evidence-based approach be introduced, one that based RoL support on 'what exists and works', as well as on the 'outputs' service providers produce, particularly those generated by local providers who had constitutional and legal authority to deliver justice and security. Mr Scheye observed that in Africa it could be the situation that these local providers delivered most

of Africa's justice and security, and did so according to jurisprudence that differed from those of the ministries and agencies of state. As a result, legal pluralism was vibrant in Africa and practitioners had to take that fact into account when supporting RoL programming.

### **Janine Rauch**

African Security Sector Network

Ms Janine Rauch raised a number of crucial issues, thereby amplifying how RoL development could be undertaken effectively in Africa. For example, she pointed out that it was difficult, if not inappropriate to discuss RoL in Africa as if there were just one Africa. Rather, there were many Africas, not only across the continent, but within individual countries as well, each of which had to have its own version of RoL development tailored to its circumstances and balances of power. The need to mould RoL development carefully to the existing power and political circumstances, and not according to how donors or practitioners would like them to be, had been one of the elements often lacking in donor-supported RoL initiatives.

For example, for a myriad of reasons, donors had focused much of their programming in the Democratic Republic of Congo (DRC) on the eastern part of that country and, more specifically, on the Gordian knot of military armed groups, sexual violence as a weapon of war and demilitarisation. Factually, however, Ms Rauch said, sexual violence was a much greater problem in western Congo. This was not to suggest that donor support was misplaced, but rather to be aware that greater attention had to be given to cold truths. Similarly, though on a different and more mundane level, donor support for South Africa's RoL development had included the supply of computers to police stations in the Eastern Cape, even though many of the stations had no electricity. The challenge that had to be overcome was the frequent disconnect between donor intentions and knowledge, and the political and empirical realities on the ground, despite all donor-speak and hallowed truisms about context-specific development support.

The employment of more national staff, Ms Rauch observed, was one way to surmount the challenge. In that context, it would also be prudent and beneficial for donors to accept programmatic failure and come to terms with the expeditious termination of ineffective programming. Similarly, it was often necessary to reconfigure a RoL programme and accept the added costs and bureaucratic hurdles that came with it. To know when to pull the plug or reorganise a programme, greater attention had to be given to defining results and measuring performance. Fortunately, this was increasingly



becoming a donor priority, but the highlighting of best practices and the passing along of insights about and methods for achieving success remained difficult.

Recognising that RoL development is primarily about power and politics, and not a technical exercise or the preserve of lawyers, police officers and prison wardens, Ms Rauch emphasised the need for donors to learn how to identify legitimate actors and partners. After that the challenge was to stick steadfastly to the support programme for an extended period of time. She admitted that the identification of legitimate actors was one of the thornier challenges of RoL development. There should be no presupposition that the ministries and agencies of the state were the only or primary legitimate players in the delivery of justice and security. In many instances there were other actors such as customary courts, village elders and trade associations that possessed legal authority to provide justice and security, and who were seen to be legitimate in the eyes of their constituents and the beneficiaries of their service delivery. In yet other circumstances, non-state actors, which could include civil society organisations, had legitimacy conferred onto them even if they did not possess the legal authority to deliver justice and security services. The challenge was to ascertain which actors were considered to be legitimate by the beneficiaries whose lives the donor-supported programme was seeking to enhance.

According to Rauch, the reality of conferring legitimacy is a challenge to donors. Above and beyond the requirement for donor personnel to speak the languages of the areas in which they work so as to be able to appreciate the nuances of the RoL experience, the need for donors to work with local justice and security providers, i.e. those legally authorised to deliver justice and security, as well as those who have no legal standing but nevertheless continue to provide a service, was a new challenge. Donor personnel were not accustomed to doing so and it might require a different skills set, such as political acumen, from that which RoL practitioners typically possessed, she said. It might also necessitate the creation of different and more flexible financial vehicles for donors to fund their initiatives. It was a higher risk endeavour than the traditional institutional development-capacity approach currently employed by donors, but it was one whose rewards could be commensurate with the risk, given the poor track record of existing donor RoL programming.

Ms Rauch closed with a number of concrete suggestions. The most important of these was for donors to cease fooling themselves by the belief that the majority of recipient governments and their associated elites wanted RoL development and were committed to implementing it. It was foolhardy for donors to continue

believing that accountability and good governance were perceived to be of inherent value for conflict-affected and post-conflict governments. It was simply not the case in the DRC, Sierra Leone and Sudan, to name a few examples. The question in such instances was how to balance support for national policies and priorities in those countries, while conceding to their political will to thwart RoL development.

In the discussion that followed the presentations by Eric Scheye and Janine Rauch, the difficulty of identifying legitimate actors was reiterated and amplified. In addition, the importance of the experience of potential beneficiaries and those who were providing real services was underscored by youth and youth groups, women and women's organisations, market and trade associations, and neighbourhood watch groups. To acquire the relevant local knowledge and experience was a challenge as it was necessary to determine the needs, roles, functions and balances of power among the various actors within communities and neighbourhoods. It was recognised that this presented a difficulty for donors, particularly if local NGOs were to be used as channels for linking community-driven development into justice and security initiatives. Nevertheless, bringing these different endeavours together might be a route that donors should explore further.

Participants also noted that more attention and donor support for local providers, as well as more conscientious RoL programming analysis, would strengthen the linkages between and among these providers and the ministries and agencies of the state. A greater focus on such linkages might be required to forge the requisite political alliances for effective RoL programming in light of the tendency by recipient governments and elites not to undertake RoL development. The role of the media was also raised as an accountability mechanism for donors to complement the standard RoL practice of assisting the institutions of the state to build their oversight functions.

### **Peter Cross**

UNDP Rule of Law Programme, Somalia

Reiterating that Africa cannot be discussed as a single entity, Mr Peter Cross of the United Nations Development Programme (UNDP) delved into the complexities of supporting RoL in Somalia. He listed the myriad of challenges and the seeming impossibilities of supporting justice and security development in Somalia, where the state could not even be characterised as being a 'minimal one', while international organisations had very limited access to south-central Somalia. Even so, he argued, donor assistance was not

only necessary, but could be effective in selected geographic areas. The way to proceed, he claimed, was to mix and match short- and long-term initiatives, and to be adept at working with the various legal systems that characterised the country's jurisprudence.

For example, the UNDP sought to build the country's human capital in Puntland by invigorating its law faculty in the hope of significantly increasing the number of lawyers working in the public sector. This, however, was an exceedingly slow process, given the current dearth of skilled legal human capital. In addition, the need existed to speed up the execution of justice in the formal court processes and to expand physical access to the courts. The establishment of mobile courts were one effective method of achieving this and was being supported by the UNDP. Simultaneously, specific assistance was being directed at supporting displaced persons through women's groups and paralegal organisations. The latter did, however, face the difficulty of gaining access to prisons and police facilities. An additional challenge in Somalia was that no legal framework currently existed for the provision of legal aid, even though Somali law states that all citizens are entitled to legal representation from the moment of their detention.

### **Martin Schönteich**

Senior Legal Officer, Open Society Justice Initiative

According to Mr Martin Schönteich, pre-trial detention is a global challenge as there are between 10 and 20 million awaiting-trial prisoners around the world. In Africa the absolute number of pre-trial detainees may not be excessive, if for no other reason that the number of individuals arrested on the continent is low. On the other hand, the relative numbers are extreme because of judicial blockages. In Mali, for instance, 90 per cent of all incarcerated persons are awaiting trial. In Angola, the figure is 60 per cent. Individuals in Nigeria can expect to wait upwards of four years before their trials commence. The consequence of this situation throughout the continent is that justice provided by centralised state courts remains inaccessible to victims and alleged perpetrators, with an average of 65 per cent of those arrested never standing trial because of missing and incomplete files, missing witnesses and the death of prisoners before trial.

There are more than a host of RoL challenges given the magnitude of the pre-trial detention problem, not least of which is ignorance of appropriate legal protocols, minimal access to state justice in rural areas and the occurrence of corruption. Typically, according to Mr Schönteich, corruption takes place during the initial stages of detention. The same pertains to abuse

and torture, particularly as obtaining a 'confession' is the hallmark of the African criminal justice system and abuse/torture is often employed to elicit confessions. Consequently, RoL support of paralegals is of paramount importance, especially when intervention is able to occur before prosecution commences. Paralegals tend to prevent the worst abuse, are able to offer advice on the right to bail, can explain the charges and provide contact with relatives. They are also able to bridge the parallel legal system that is prevalent in Africa, namely the formal court system and the more 'customary' local mediation and restorative justice processes. Paralegals can furthermore create an implicit mechanism of accountability by virtue of their collection of data aimed at changing laws and/or by ensuring that prosecutors and judges adhere to them.

The discussion following the presentations of Messrs Cross and Schönteich centred on questions of sustainability and on how to stimulate ways in which local service providers can work alongside those of state ministries and agencies. It was noted that when donor support for paralegal organisations ceases, these groups had few, if any, financial base. One way of maintaining paralegal groups was to support the establishment of community-owned businesses, created in the name of paralegal organisations that had proven to be successful, and ensuring that a percentage of the profits of such businesses supported the sustainability of the paralegals in question. Beyond recognising the political difficulties of working with tribal/clan/village leaders and elders, it was suggested that these 'customary forms of jurisprudence' were variations of common law where the jurisprudence might be unwritten and developed organically through accretion and precedence, in much the same way as the Anglo-Saxon legal tradition had developed over time.

### **Eric Pelser**

Security and Policing Consultant

Mr Eric Pelser, who is currently engaged in police development in South Sudan, reiterated the need for greater community engagement with the police and addressed the form that engagement ought to take and how international donors might be able to shape it. Once again, the issue of legitimacy and its political complexities loomed large. For example, donors could support networks of civil society groups and NGOs tackling specific problems such as gender violence, juvenile justice, police accountability, etc. While this might support awareness-raising efforts, a thin layer of community participation might have little long-term effect on the actual delivery of better justice and security. A case in point was Sierra

Leone. On the other hand, donor assistance could be effective in supporting and promoting a 'champion' civil society organisation or local NGO engaged in a particular problem area, enabling it to develop a powerful voice that could, in turn, spawn enhanced community activities. He said that this was not an either/or choice for donors, but rather a different vision on how to support community engagement, strengthen accountability and improve service delivery.

### **Sean Tait**

African Police Civilian Oversight Forum

Mr Sean Tait briefed the workshop on the activities and operations of the African Policing Civilian Oversight Forum (APCOF), a network focusing on police oversight in South Africa and the African continent as a whole. He emphasised the important role of civil society organisations in maintaining oversight of police services and illustrated the need for such organisations to lobby, advocate and promote human rights compliance by security services. Among the network's functions was the promotion and adoption of skills and appropriate technologies for engaging in police oversight among member organisations. Of particular relevance was the development and dissemination of practical guidelines for pre-trial detention and the auditing/assessing of police performance. Another endeavour of note was the drafting and promulgation of a 'code of conduct' for policing in Africa.

Discussion on Eric Pelser and Sean Tait's briefings addressed the role of private security and how middle class communities and neighbourhoods had turned to private organisations to look after their safety needs because of the inadequacies and failures of state services. One of the issues raised was that communities and neighbourhoods, regardless of their wealth or status, had little trust and confidence in the police services. A key need was therefore for donors to support the efforts of police services to develop and foster public trust, possibly for the first time. Such an initiative could be a fundamental and complex challenge requiring both cultural and normative transformation, beginning with the improvement of communication skills by a police services and individual staff members. From that point onwards, different models for community/neighbourhood interaction could be attempted, ranging from community safety forums to varying forms of community policing experiments. However, concern was raised about a potential difficulty, namely the absence of social cohesion within and across communities/neighbourhoods, a vital element for police-community interaction. The issue then became one of rebuilding social cohesion within communities or neighbourhoods in preparation for closer police-community interaction.

The legitimacy of civil society organisations and local non-government organisations (NGOs) was also discussed. It was noted that more than such groups frequently not representing local interests, the problem was one of their being 'donor darlings', designed primarily to siphon international funds into private hands. Donors should also not immediately assume that civil society organisations were 'civil', or that they necessarily promoted the interests of any identifiable community. In Somalia, for instance, local NGOs functioned as little more than subcontractors and competed for tenders and donor funding. A similar situation seemed to have occurred in Sierra Leone. In such cases it was debatable whether these organisations were legitimate and or could serve an effective role in RoL development. This led to a discussion on how the international community could assess the situation and respond appropriately. This was a dilemma no different from determining the legitimacy of either state ministries and agencies or local providers.

### **Advocate Thoko Majokweni**

Special Director: Sexual Offences and Community Affairs,  
National Prosecuting Authority of South Africa

Advocate Thoko Majokweni briefed the workshop on the work of Thuthuzela Centres, which operate throughout South Africa. This was one of the principal ways in which South Africa was trying to tackle the challenge of sexual and gender violence. She stressed that if success was to be achieved every government department, from health to policing and education to labour, needed to be involved. Such collaboration was not readily achievable, but could be improved progressively. The issue was not one of undertaking a 'whole-of-government' approach, but rather of concentrating on service delivery and problem-solving, thereby engineering a response-prevention-support continuum that paid close attention to the victim. This was one of the reasons why Thuthuzela Centres were located within hospitals and clinics rather than elsewhere. Location within health facilities was the most appropriate way of concentrating on the victim and addressing an acute problem.

Even though the South African government had integrated the cost of operating the Thuthuzela Centres into the national budget, which was an advance that could not be underestimated and one based on a meticulous cost/benefit analysis of the work of the centres to prove their effectiveness, there were a number of hurdles still to be overcome. Among these were the backlog of gender violence cases in the court system, a low conviction rate, a lack of rural access to the centres, a dearth of paid social workers and a need

for additional safe houses. She also noted the need to integrate traditional leaders and elders into the judicial process to increase awareness of gender violence not only among the leaders themselves, but also among the larger community served by them.

In discussion, one of the questions raised was how to undertake a programme that addresses the causes of and reasons for gender violence. The importance of this question related to the admitted ineffectiveness of donor programming in post-conflict environments that sought to implement an institutional capacity development model. In Sierra Leone and Liberia, for example, the establishment of family support units and women/children centres had achieved little in reducing gender violence.

### **Tanja Chopra**

Consultant

Ms Tanja Chopra observed that over the past few years there had been a notable improvement in the recognition of the role and function of customary law, as well as the appreciation of legal pluralism as the way in which many societies organise their legal systems and jurisprudence. Nevertheless, Chopra argued, there remained a tendency among donors to try and fix the legal systems of developing countries. The legal experts brought in for this task wanted to undertake reform by drafting a unitary legal framework and harmonising the parallel forms of jurisprudence. Not only did this approach result in a one-size-fits-all cookie-cutter methodology, one that might arguably suit a country such as Finland but was woefully misguided in an African context, but in addition it fundamentally ignored history, politics, power relations and cultural values. Even though this initiative claimed to be supportive of women's rights it actually was extremely detrimental to the ability of women to gain access to justice and progress towards gender equality. Once codified, customary law lost its flexibility and solidified the subservient position of women. It also prevented the evolution of common law.

The fundamental issue was not the law per se, but the underlying societal power relationship, she said. In Kenya, for example, while formal law made provision for gender equality, in reality women had no access to justice. When it came to land rights, men used formal and informal methods to restrict ownership by women. Women's groups thus needed help to gain a voice. Enabling women to confront village leaders and elders would assist customary law to develop. There were many ways of supporting this form of RoL development, e.g. via theatre and film, paralegal organisations, and communal dialogue and discussion. It was imperative that men and women were brought together.

In addition, Chopra argued, justice and security development support had to expand beyond criminal justice. In fact, the limitation of donor support to the development of criminal law resulted in donor policy that discriminated against women and did little to further gender equality. The incorporation of family law into donor agency agendas was also of crucial importance, particularly when it came to land rights and tenure, and property ownership. It was important to recognise that the general belief among donors that all offenders should go to court and, if convicted, to prison, had little support in many societies. Moreover, RoL programmes that supported such aims operated without appreciation of the unintended consequences of such policies. The incarceration of men could, for example, result in women losing their household incomes and facing societal prejudice. This was not an argument against punishment for criminal activity, but rather advocacy for greater understanding of the complexities of the environments in which donors conduct their RoL development programmes.

There was an acute need, she continued, for institutions and organisations to partner each other in conducting research and gathering information. While this involved time and money, the cost of uninformed programming was far greater and was in fact immeasurable. Similarly, more credible and reliable research methodologies were required. For example, focus group selection and the conducting of interviews were delicate processes that required careful and thoughtful attention and could not be undertaken hastily and unthinkingly.

In discussion, it was noted that in Somalia, although female police officers have been trained, their culture did not allow them to work at gender assault centres at night. It had been established, however, that if men were hired to escort the officers to the centres, they then could perform their duties. In the same way it had become clear that by working with village and clan leaders and elders, legal centres for international displaced persons (IDPs) and paralegal organisations focusing, at least partially, on women's rights could start making an impact.

### **Professor Max Du Plessis**

Associate Professor, International Criminal Law, University of KwaZulu-Natal

Professor Max du Plessis discussed the bringing of cases by the International Criminal Court (ICC) against former or current leaders and others of African states such as the CAR, the DRC, Uganda, Sudan, Kenya and Libya. With regard to Sudan and Libya, the UN Security Council (UNSC) had referred the cases to the ICC. The



concentration of ICC cases on African leaders in recent years had become problematic, however, since it had created scepticism about the roles of the ICC and the UNSC in Africa. On the other hand, there was little doubt, he observed, that the cases brought had legitimacy and a basis in law, and that opposition to them was of a political nature stemming from the common interest of African leaders to insulate and protect one another against prosecution.

In the instance of the ICC case against President Omar al-Bashir of Sudan for alleged genocide and crimes against humanity, the African Union (AU) quickly mobilised and released a statement urging African states not to cooperate with the court. The issue came to the fore in Kenya where al-Bashir was expected to attend a conference in 2010. Kenya had not only ratified the ICC treaty, but had also adopted appropriate legislation, which obligated the authorities to arrest al-Bashir should he enter Kenya. As a result, Kenyan human rights organisations were able to draft legal documents that would trigger a judicial process against al-Bashir if he were to enter the country. To avoid his arrest, the conference had to be moved to another African country.

In a case involving senior Kenyan officials and politicians, the ICC issued summonses against six persons, including the son of former president Jomo Kenyatta. In response, the Kenyan Parliament threatened to withdraw from the treaty and requested a deferral that could only be granted by the UNSC for reasons of preserving 'international peace and security'. Prof. du Plessis suggested that the request for a deferral was a political manoeuvre that would fail.

In the speaker's view, it was imperative that RoL development on the continent incorporated international treaty provisions in national domestic law so that African human rights organisations were able to act, as was the case in Kenya regarding al-Bashir. He observed that international criminal justice would continue to be difficult to pursue, but that basing the process in national domestic law would be a key first step.

### **Richard Buteera**

Director of Public Prosecutions, Department of Justice and Constitutional Development and Human Rights, Uganda

Echoing Prof. du Plessis, Mr Richard Buteera observed that the international community should not act as a substitute for national domestic law in cases of international criminal justice. Rather, as part of its RoL development strategies, the international community should act a positive force to invigorate the implementation of national domestic institutions. The main thrust should be towards assisting with the integration of international

human rights law into domestic law, as in the case of Kenya, and to bolster the abilities of national institutions to pursue prosecutions.

Using Uganda as an example, Mr Buteera said that while that country had incorporated international criminal justice provisions into its national domestic law, it was still unable to carry out its own prosecutions because of capacity constraints. However, with the help of the ICC institutions in Uganda it had undertaken investigations and the challenge was now how the country could pursue and conduct prosecutions if and when alleged perpetrators were arrested. With international assistance, domestic capacity was being bolstered to complement ongoing truth and reconciliation processes in local communities.

### **Martin Schönteich**

Senior Legal Officer, Open Society Justice Initiative

Reiterating what had been discussed previously, Mr Martin Schönteich noted that the ICC should be the court of last resort rather than the arena to which international criminal justice cases were brought initially. In support of African national prosecutions, donors should help with the development of various tool kits to increase the capacity of national institutions to investigate and prosecute international crimes.

What he found interesting was that donors currently did not possess the requisite expertise to draft such tools, while a coherent and cogent strategy was also not in place. Donor efforts appeared to be made on an ad hoc basis and were somewhat scattershot. His suggestion, therefore, was for more involvement by human rights organisations to stimulate RoL development. It was important for state institutions to protect victims and witnesses so as to ensure their safety and the availability of their testimony.

During discussion of the previous three presentations the lack of trust between Kenyan human rights organisations and state institutions was raised. Kenya's Parliament had done little to dispel concerns in this regard. One of the primary challenges, therefore, was how elite and high-level political opposition to implementing international criminal justice could be overcome. It was maintained that this situation did not arise from a lack of political will, but from implementation being a direct threat to senior African politicians. The answer could be to develop special courts and to encourage the AU to commit itself to establishing a tribunal that would act as a 'surrogate' for the ICC in Africa. However, the intention was not to channel, disseminate and transfer the skills, managerial systems and work cultures from such special courts and tribunals to



national domestic institutions, a process for which there was limited, if any, good practice.

It was also noted that there were instances of domestic abuse of the universal jurisdiction embedded in international criminal justice. South Africa, for example, refused to prosecute alleged perpetrators resident in the country for crimes in other countries, while Denmark refused to extradite a Ugandan who had admitted to committing multiple murders on the principle that Danish law does not permit extradition to a country where the death penalty can be enacted.

### **Monica Moore**

United States Agency for International Development (USAID)

Ms Monica Moore offered a donor's perspective on RoL programming, with emphasis on the organisational dynamics and constraints within which donors operated. Recognising the reality that many donors engaged in development initiatives that reflected their own national interests and priorities, she noted that questions of political will resided on both sides of the recipient-donor relationship. Similarly, donors were often risk averse, which might not only hamper their involvement in RoL programming, but also made it difficult for them to terminate a support initiative even if it appeared to be ineffective. An admitted paradox related to these issues was the need to understand and adapt to local contexts while at the same time acknowledging donor preference for channelling assistance through recipient governments. In addition, conflict often arose between the need to undertake initiatives that involve service delivery and/or problem-solving, and the need to engage in institutional capacity development.

There were occasions, she said, when donors' local offices might be less constrained than their country and/or national head offices. One way to leverage greater

manoeuvrability was to work with national parliaments and congresses. The flipside of this effort to increase flexibility was that elected officials frequently were more interested in outputs than outcomes, and that they were rarely conversant with the political and cultural complexities associated with RoL development.

Ms Moore observed that one of the prominent and successful features of the Thuthuzela Centres, which were supported by USAID, was their adherence to a service delivery and problem-solving model. This approach was crucial for endeavours that concentrated on gender, access to justice for women and the wider field of legal empowerment. She argued that this support model had relevance to the strengthening of court administration and other more traditional forms of RoL assistance.

In the conversation that followed, the role and function of SADC was raised and how linkages could be improved between SADC's tribunal and national domestic judicial structures. The tribunal's inaccessibility to ordinary citizens and the lack of awareness of the tribunal's jurisdiction were also discussed.

During a brief discussion of the UN's role in RoL it was noted that the organisation was currently reviewing its RoL architecture. While the findings of the review were still to be published, it was argued that even though the UN had been undergoing continuous RoL reform for the past 11 years, there had been little evident improvement in performance based on the activities of peace operations in Timor-Leste, Sierra Leone, Liberia and South Sudan. It was suggested that the original intention of the UN's RoL reform process, namely to improve performance, had been submerged under bureaucratic turf wars and an approach dominated by an institutional capacity development model that had proven to be ineffective. It was observed that the ISS might have an opportunity to engage in the UN's review of its RoL architecture and bring an African perspective to the table.



## Appendix A

# List of participants

NO.	TITLE/NAME	ORGANISATION	DESIGNATION
1.	Mr Eric Scheye	Independent Consultant, Security Sector Development and Conflict Management	
2.	Ms Janine Rauch	African Security Sector Network (ASSN)	Senior Consultant
3.	Mr Peter Cross	Rule of Law Programme-Somalia, United Nations Development Programme (UNDP)	Programme Specialist, Rule of Law Programme – Somalia
4.	Mr Martin Schönteich	Open Society Justice Initiative (OSJI)	Senior Legal Officer
5.	Mr Eric Pelser	Consultant	
6.	Mr Sean Tait	African Policing Civilian Oversight Forum (APCOF)	Co-ordinator
7.	Adv Thoko Majokweni	National Prosecuting Authority of South Africa	Special Director: Sexual Offences and Community Affairs
8.	Dr Tanja Chopra	Consultant	
9.	Prof Max du Plessis	University of KwaZulu-Natal	Associate Professor: International Criminal Law
10.	Mr Richard Buteera	Department of Justice and Constitutional Development and Human Rights, Uganda	Director of Public Prosecutions
11.	Ms Monica Moore	United States Agency for International Department, Southern Africa	Democracy and Governance Team Leader
12.	Ms Jessica Coulibaly	United States Agency for International Department, Southern Africa	
13.	Dr Jakkie Cilliers	Institute for Security Studies	Executive Director
14.	Ms Cheryl Frank	Institute for Security Studies	Director, Pretoria Office
15.	Adv Anton du Plessis	Institute for Security Studies	Programme Head, International Crime in Africa Programme
16.	Mr Gareth Newham	Institute for Security Studies	Programme Head, Crime and Justice Programme
17.	Mr Hennie van Vuuren	Institute for Security Studies	Director, Cape Town Office
18.	Ms Erin Torkelson	Institute for Security Studies	Researcher, Organised Crime and Money Laundering Programme
19.	Mr Casper Badenhorst	Institute for Security Studies	Management Support Consultant
20.	Ms Phakamani Lisa	Institute for Security Studies	Intern, African Conflict Prevention Programme-Pretoria Workshop Rapporteur
21.	Dr Paul George	Department of International Affairs and Trade, Canada (DFAIT)	Director - Africa and Middle East - Orient Stabilisation and Reconstruction Programming Division
22.	Mrs Ramata Molo Thioune	International Development Research Centre (IDRC) – Dakar	Director: Social and Economic Policy Programme
23.	Ms Diana English	United States Department of State	Programme Officer, Bureau of International Narcotics and Law Enforcement, Office of Africa and the Middle East
24.	Mr Lars Ljung	Folke Bernadotte Institute	Senior Advisor
25.	Dr Wolf Krug	Hann Seidel Foundation	Resident Representative to South Africa
26.	Mrs Makanatsa Makonese	SADC Lawyers Association	President

