

## Short Report on Wilton Park Conference

### “JUSTICE IN AFRICA” (WP643)

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1. There is an almost universal agreement among Africans that the international system has been and still is detrimental to African interests. The legacies of colonialism and slavery and the continuing impact of the state systems and boundaries bequeathed to Africa are still felt. The era of independence has obviously not led to an end of the problems for African countries nor provided their economies with a “fair chance” in the world economic system. African economies are negatively impacted by the international debt crisis and the catastrophic collapse of real commodity prices. As well as the historical and external factors, corrupt and dictatorial political and economic elites have had a severely detrimental effect on the well-being of the people and economic development in many countries.

2. The multiple crises still facing Africa have led to a new mood of determination on the continent. Since the late 1980s, many long-term rulers have been swept away in a new mood of democratization. However, new armed conflicts erupted or old wounds were re-opened. Most notably, the international community failed to respond to the clear warning signs of the genocide planned and executed in Rwanda. Partly as a result of determination to address their own issues in their own way and partly as a result of the failure of the international community to provide viable solutions, Africans have engaged in a variety of responses to situations of national and international injustice. These include the military action against the *genocidaires* in Rwanda, movements to democratic rule in many countries, and a renewal of civil society (often working in difficult circumstances).

3. In 1990, only five of Africa's 54 countries could lay claim to being pluralist regimes – the rest were either civilian or military dictatorships, or non-pluralist governments. No African leader had been voted out of office: only three African heads of state had left power voluntarily, Senghor of Senegal, Ahidjo of Cameroon and Nyerere of Tanzania. Ahidjo had subsequently failed to fight his way back to power. Within ten years, the vast majority of African countries had

introduced political reform and were somewhere along the road of democratic transition.

4. Certain generalizations can be made about these transition processes: in many cases massive protest led very quickly to the accession to office of new elected governments; in most cases, the previous authoritarian government lost legitimacy as a result of economic and political crisis, which led to mass protest; the protests often began in the urban areas among students, the urban working class and the increasingly pauperized middle class; and the protest coalitions became surprisingly broad – embracing new and old social movements, such as trade unions, professional associations (eg teachers and lawyers), women's groups, community organizations and nongovernmental organizations (NGOs), religious leaders and human rights activists.

5. Three broad paths can be identified: the legalisation of opposition parties and institution of multiparty elections; national conferences establishing a new political and constitutional order; attempts at managed transition by military oligarchies. Clearly, there are many factors which need to be assessed for a comprehensive evaluation of these transitions. One factor to be stressed is the difficulty of consolidating the gains of democratisation in the adverse and often appalling economic conditions of much of Africa. The liberal theory of the state defines one of the roles of the state as rational allocation of resources; it is clear that many African states have very little room for manoeuvre when confronted by the expectations of populations who think that the removal of the old regime should lead to significant and quick improvements to their personal security and well-being. Collapsing commodity prices, excessive debt burden, the "rolling back" of state services such as education and health under pressure from the World Bank and IMF, the depletion of state resources through kleptocratic leaders<sup>[1]</sup>, the inadequate tax base for financing state services, capital flight, as well as the additional factors of drought, famine and HIV/Aids all mean that many African state have precious few resources to allocate rationally or in any other way. Constitutionalism, the rule of law, the multiparty system, a fair and transparent legal process all cost money, which many states have to make available (if they do) against competing demands. At one level, the argument can be made that it costs nothing to stop the torture, killing or unjust imprisonment of opponents. In practice, there are costs attached to the retraining of police and military personnel and the inculcation of a culture of human rights observance. Reform of the security sector and the judiciary, restoration of public confidence in the accessibility and fairness of the instruments of justice are major tasks in many countries.

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6. The experience of the 1990s provides some basis for optimism. A number of the new constitutions in Africa can be designated as “international human rights law friendly”. The intellectual discourse on human rights has moved beyond the polarization of advocates of civil and political rights against proponents of economic, social and cultural rights. There are still lessons to be learned from analytical studies from other world regions. The work of Amartya Sen has established that no major famine has occurred in an independent, democratic country with a relatively free press. That there is a symbiotic and irreducible relationship between individual and communal/social rights is suggested by the difficulty in preserving individual rights in situations of extreme poverty. Detailed consideration of African experience in the 1990s should remove any assumptions that the growth of human freedom in many African countries was an “imitation-effect” triggered by the fall of the Berlin Wall.

7. The struggle in each country had its deep and its immediate causes, its history of resistance and its form of social organization. The codification of the gains of these struggles is seen not only in national constitutions, but also in the work within the Organization of African Unity on charters and conventions (often still works in progress) on refugee issues, children, cultural issues, women’s rights, corruption, extradition and mutual legal assistance. The deeper context of African human rights work in the struggle against colonialism is indicated by the naming and content of the African Charter on Human and Peoples’ Rights. The inclusion of “peoples’ rights” is to be understood against background of the struggle of African nations against colonialism and external domination. Within the universal commitment to human rights, Africa has made and is making its traditions and perceptions felt. The communal aspect of justice can be seen in African proverbs which allude to the inseparability of individual and communal understandings of full humanity and well-being.

8. The Charter combines the civil and political rights, with economic, social and cultural rights, as well as adding the dimension of “peoples’ rights”. National governments should, by virtue of Article 1 of the Charter, make their domestic legislation compatible with the provisions of the Charter. In contrast with the rapid progress towards the African Union, only four countries have ratified the protocol for the Establishment of a Court of Human Rights for Africa. Until the institutional provisions are complete, the Charter will be limited in effectiveness. More states have been submitting reports on human rights in their countries than hitherto, but so far, 24 countries have never submitted a single report. The effectiveness of the African Commission on Peoples and Human Rights could be enhanced by: ensuring that changes in domestic law required by the Commission (to achieve

consistency with the Charter to which the African states are signatories) have, in fact, been carried through; strengthening the human and resource base of the Secretariat; and fuller cooperation with the Commission by African states. There is a recognition that formal instruments at continental level are only one element of the work for human rights on the continent. The main human rights complaint of African people is not that the African Commission does not hear them, it is that justice cannot be achieved locally, that justice is denied at local level, that the police and judiciary are deaf to their pleas, that their voice does not even carry to the regional centre or the capital city. The Commission – particularly if a functional and effective court is added - remains, however, an essential dimension of human rights standard setting and institution-building. That an individual or organization would still have redress against their government when domestic remedies have been exhausted would be a significant step forward.

9. The interplay between international standards and the internal, national practice of human rights is mirrored institutionally. At continental and international levels, there are bodies mandated to track the human rights situation in all countries, with special vigilance devoted to those meriting particular concern. There are international and national NGOs which have developed extensive networks of information often under circumstances of great difficulty and, for local workers, considerable personal danger. Capacity-building and international solidarity with local human rights activists are important roles for external human rights organisations. Human life is particularly endangered in situations of dictatorship and internal conflict. Protection of human rights became a particularly acute problem in African countries which have suffered war in the last decade. These include: Angola, Burundi, Democratic Republic of Congo (DRC), Eritrea, Ethiopia, Guinea, Liberia, Rwanda, Sierra Leone and Uganda. Much of the documentation of the worst human violations is pieced together outside, using information provided from within: eg Rwanda (during the genocide), Sierra Leone, the DRC and Cote d'Ivoire. The struggle for human rights requires organizations to change their emphases, expand their mandates and fields of activity. Many have taken up new areas of advocacy. Thus in recent years, Human Rights Watch has taken up involvement by multinationals in human rights violations, the trade in small arms, abuses by non-state actors, and the situation of internally displaced persons as well as more classic human rights concerns. The organization has also been in the forefront of campaigning for the establishment of, and effective working conditions for, the International Criminal Court, which needs 60 ratifications by national governments in order to commence effective operation.

10. In 1989, there was only one state-sponsored human rights commission in Africa. By 2000, there were two dozen operational or in process of formation. The

standard was set for the organization of such commissions by the adoption, in 1993, by the UN General Assembly of the "Paris Principles". *Protectors or Pretenders?* (a major study by Human Rights Watch) which singles out the commissions in Ghana, South Africa and Rwanda for particular commendation; noting that those in Mali and Senegal show promise and that the commission in Togo had a catalytic effect for the democracy movement there.

11. Since 1994, a continuum of approaches has opened up in the wake of the South African Truth and Reconciliation Commission and the creation of the International Criminal Tribunal for Rwanda. Which approach is most applicable in any particular context depends on the history of the conflict, the relative strength of the various conflicting parties and the inclinations of the groups affected once the conflict is over. Timing is also a key issue.

12. The South African Truth and Reconciliation Commission (TRC) emerged from a particular struggle and cannot be transferred to other contexts. It does, however, have relevance to other situations. Following the first democratic elections in 1994, the African National Congress took over government. The Truth and Reconciliation Commission was chaired by Nobel Peace Laureate, Archbishop Desmond Tutu. Its mandate was to assess major human rights violations committed from political motivation between 1 March 1960 and 10 May 1994. Work was conducted in three committees on Human Rights Violations, Amnesty and Reparations and Rehabilitation. The full report was produced in 1998 in five extensive volumes.<sup>2[2]</sup> Weaknesses of the Commission included its inability to get former *apartheid* state president P.W. Botha or former homeland leader and head of the Inkatha Freedom Party Chief Buthelezi to testify. Recent research conducted for the Institute for Justice and Reconciliation, which is carrying on the work of the TRC, provides interesting comparative material on the differential responses by racial group. 76% of black South Africans approved of the work of the Commission compared with only 37% of whites. The overall tenor of the findings was positive about the future of South Africa. Satisfactory settlement of the issue of reparations is an outstanding task.

13. The background to the profound dilemmas faced by the Rwandan government was the systematically planned and executed genocide of 1994, which left over one million of the population (almost 15%) dead in the course of three months. Following the failure of the international community to stop the genocide, the Rwandan Patriotic Front, from exile mainly in Uganda, took the

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country by force, stopped the genocide and took over government. The current security issue for the government is to ensure that no recurrence is possible, given that many of those responsible for the genocide fled the country – particularly into DRC.

14. The International Criminal Tribunal for Rwanda was established in analogy to the International Criminal Tribunal for the former Yugoslavia. Faced with atrocities of such magnitude, it would have been a blatant case of double standards to do any less.<sup>3[3]</sup> The tribunals are examples of transitional justice: most informed observers agree that *ad hoc* tribunals are only a temporary response until the International Criminal Court is operational.

15. The new government in Rwanda took over a country in which the justice system had, to a considerable extent, been deliberately destroyed. The government is committed to trying those responsible for the genocide. The situation of one million killed in the genocide and the huge number of perpetrators (estimates up to 300,000 who actually murdered) meant that the classical justice system was simply overwhelmed, not least because those among the intelligentsia and in responsible positions in the legal system had been deliberately killed. In 1996 legislation was passed specifically to address the genocide. The result is the *gacaca* process. The point of this process is to seek to ensure that justice is done and substantially to clear the prisons. Those who have committed lesser offences will be re-integrated into the community with punishment often being given in the form of community service.

16. Those involved in the genocide are being categorized into four groups; (1) the planners or architects of the genocide, who are to be tried by the ICTR in Arusha; (2) the executioners who killed or intended to kill, who will be tried at district level with the possibility of appeal to provincial level; (3) those who committed crimes of violence but without intent to kill, who will be dealt with at sector level with an appeal to the district level and (4) those who destroyed property, looted or stole, most of whom will be dealt with at cell level, with reparations as the punishment. In terms of sentencing, the Rwandan government considers the death penalty or 25 years to life as the appropriate sentence for the planners or architects. In category 2, a differential sentencing strategy is envisaged, with sentences of 7-12 years for those who confess before the trial, 12-15 for confessions during the trial and up to 25 years or life for those who are found guilty but have refused to confess. Half of the sentence would be served in prison, with parole provision. In

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category 3, a similar sentencing tariff is planned (1-3 years for confession before trial; 3-5 during the trial and 5-7 for no confession). The last category will be dealt with primarily through reparations and community service.

17. The category of the most serious criminals (the planners or architects of genocide) has been a source of contention between Rwanda and the international community. The Rwandan government was initially unhappy with the way in which the ICTR in Arusha was developed. In addition, the government felt that it was appropriate to try those responsible inside the country, whether under national or international jurisdiction. Rwanda has kept the death penalty, whereas the ICTR will not pass death sentences on behalf of the international community. The discrepancy between the high costs (and better conditions for prisoners) in the ICTR, compared with the resources provided to Rwanda for its own legal reform and reconstruction has also been a source of frustration for the Rwandan government.

18. Achieving justice within the Democratic Republic of Congo depends on whether peace can be brought to the country – or indeed whether it will ever again be one country. Since 1998, the country has been involved in a devastating war. First the government of President Mobutu, the long-term dictator of the country, was overthrown by the forces of Laurent Kabila. In a war which has been likened to an African “first world war”, because of the way in which neighbouring countries have been drawn into it, Zimbabwe, Angola and Namibia have supported the new government of Joseph Kabila (whose father was killed in early 2001). The Congolese Rally for Democracy (RCD) has military assistance from Rwanda, Uganda and Burundi. Uganda has also supported the Movement for the Liberation of Congo (MLC). Rwanda and Uganda have invoked security concerns as their reason for military involvement in the DRC. By mid-2000, according to Human Rights Watch, 1.3 million people had been displaced. More recent estimates from aid agencies speak of 2 million displaced, 18.5 million who have no access to access to formal healthcare and 16 million with a critical need for food.

19. One of the key dilemmas for decision-makers in Sierra Leone is whether it is possible or advisable to move forward on creating any kind of truth commission until the security situation is stable. The 1999 Lome Peace Accord between the government and the Revolutionary United Front (RUF) was a failure and was not respected by the RUF. Plans for a Special Court with both national and international participation have been accepted by the UN Security Council.

20. In Mozambique, in the immediate aftermath of the war of independence, the FRELIMO <sup>4[4]</sup> government held mass rallies and meetings at which those who were compromised by their relationship with the Portuguese colonial power were humiliated and pressed to confess. Those who refused to do so were sent to harsh and remote re-education centres. Many supporters of the new government considered these measures harsh, but necessary. Others, even those with serious grievances against the former colonial regime, came to feel that the approach did not contribute to national unity or social stability. Those who admitted their guilt were told that FRELIMO had forgiven them; there was, however, no compensation or restitution for those who had been wronged. The FRELIMO government was successful in the early days in mobilizing people for the reconstruction and development of Mozambique.

21. By the 1980s, however, the country was being destabilized by the RENAMO movement, supported by the white minority regimes of South Africa and Rhodesia. The destabilization and civil war directly affected 4.5 million people and lasted for 15 years. As well as the death and injury which was caused, massive damage and dislocation was caused to people's livelihoods and infrastructure (roads, schools, clinics, railways) was deliberately targeted. In 1994, following the Rome Peace Agreement, the first general election was held. At local level, many communities achieved the reintegration of those who had conducted this war through local purification ceremonies. The justice system which was developed was built up from local level from community courts. This approach, which covered many different models in local settings, had real advantages and some shortcomings. The system of justice developing in Mozambique is neither exclusively modern nor solely traditional- or community-based. The criteria for assessing the success of the system include: bringing justice closer to the citizens; making the judiciary credible; increasing its efficiency; and getting it to correspond to the social reality of Mozambique, which cannot afford the formal training of every member of the judicial system.

22. In many parts of Africa, internal conflicts have created conditions of great insecurity. In many countries, the ordinary people are highly vulnerable, caught between ill-disciplined government forces and rebel groups. Even when it has been agreed that demobilization should occur, those who have previously lived by fighting are ill-prepared for return to civilian life. For many young, uneducated people, having a gun gives power which they have not experienced before. Particularly in an unsafe situation with uncertain prospects for the future, they are

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reluctant to hand over their weapons and face a situation where they have no obvious means of earning a living and few skills to enable them to do so.

23. In both Nigeria and Ghana, the democratically-elected governments have taken steps to address the legacy of unconstitutional government and military rule. In Nigeria, a human rights panel has been established by President Olusegun Obasanjo, headed by former supreme court judge, Chukwudifu Oputa. Thus far about 11,000 depositions have been made. Even the military generals who ran the country are not exempt under the terms of reference, but so far they have not agreed to testify. In Ghana, President Kufour has decided to institute a National Reconciliation Commission with the aim of breaking the cycle of vengeance and vendettas, and removing the legacy of unconstitutional government. Without engaging in a witch hunt, the intention is to ensure that there is no impunity even for senior ministers. This approach is to be supported by a much needed reform of the legal system.

24. Given the very varied historical legacies of African countries, local traditions, the inheritance of colonial legal models in much of the continent, and the different routes to independence and self-rule, there is a wide range of legal practice in the countries of the continent. The key issue is how justice is done and is seen to be done. In functional terms, most systems recognize the need for a separate judicial tier or separate courts for appeals. While most constitutions present the separation of powers and the independence of the judiciary in impressive language, reality is often different. Criteria for assessing the genuine independence of the judiciary include: the manner of appointment, security of tenure, conditions of service, and resource allocation.

25. Accountability of leaders and constitutionalism are widely seen as prerequisites for the strengthening of democracy and justice in Africa. While formal democracy has made considerable advances, the democratic culture is under-developed in many places, because of (among other factors) poverty, a weak civil society, the difficulty of developing and maintaining a free press. Factors which make the development of an effective culture of accountability problematic include: military intervention or the threat of the return of military rule; ethnic divisions and politics organized along ethnic lines; the centralization of power in some of the federal states; the lack of readiness of leaders to leave power and their fear of "what happens after State House" for them and those who have benefited from their rule. It is difficult to see short term solutions. Cultivation of respect for human rights and the rule of law, popular participation in government at every level, a culture of tolerance and respect, mass education

and capacity building for local leaders (eg in civil society), and support for democratic institutions, the media, labour organizations and NGOs can all play a role.

26. Increasingly, Africans are trying to recreate the vision of the first generation of post-colonial leaders, of Africa as a political and economic entity and of a continent seeking its own solutions to its own problems. The first generation of nationalist leaders led their countries to self-rule, whether through peaceful change or an armed struggle for liberation. National self-determination, including the difficult task of achieving effective control over the national economy, is still a core aspiration of African leaders.

27. The approach will require outside assistance, but those who wish to help need to be aware of the mood of African leaders and peoples. They should not seek to impose externally-generated “solutions” upon them. The core elements of the Millennium Action Plan elaborated by African governments are: establishing peace and more democratic government; respecting human rights; investing in people by providing them with better health and education; diversifying economies and in encouraging trade within Africa and between Africa and other parts of the world; combating disease and boosting new technologies.

28. This comprehensive plan requires considerable progress to be made towards justice in Africa. For development to be achieved in many African countries, armed conflict must first cease. Conflict prevention should assume greater importance. Most ordinary people continue to have little confidence in the judicial system – they are sceptical of its independence and of its efficacy as far as they are concerned. In many contexts, politicians, police, judges and the courts are widely seen as corrupt. This has to change.

29. Progress towards the African Union is a significant new step in the maturity of African institutions. The African Commission on Human Rights should be funded from African sources to guarantee its independence. It should continue to focus on human and people’s rights. The OAU has now made it clear that it will not recognize regimes which come to power through *coups d’etats*. There is increasing recognition that there is a duty to intervene in other African countries if crimes against humanity and war crimes are being committed.

30. There is no easy or obvious rule regarding the applicability of Tribunals or Truth and Reconciliation Commissions to a given situation. Each conflict has its own history and context. Each has its own antagonistic groups and interests. It is not possible to export or transplant a model from one context to another. Whatever model is chosen has to have widespread acceptance from the main parties to the conflict. It must mark a line drawn under the conflict and include an element of “purification” in accordance with local customs and traditions to enable the communities to move beyond resentment. It will fail if it only suppresses conflict.

31. It is increasingly felt by Africans that the solution to issues of justice in Africa must be found by Africans and for Africans. This requires the continued development: of a culture of human rights, strong advocacy by civil society, professional organisations and the media. At national and governmental level, judicial and security sector reform is needed to foster the confidence of ordinary people. African countries must also develop their internal and continent-wide institutions, rather than hoping that the international community will solve problems for Africa. Finally, at international level African governments and experts must contribute to continued codification and, above all, implementation.