



# **International Criminal Justice, Peace and Reconciliation in Africa: Re-imagining an Agenda Beyond the ICC**

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## **Abstract**

The system established by the statute of the International Criminal Court (ICC) is founded on the principle of complementarity, i.e. that the ICC complements national legal systems. As such, conceptually, the Court is a support system and system of last resort for when domestic systems are 'unwilling or unable' to undertake accountability. This develops the argument that progress in addressing mass atrocities in Africa should be seen in increments not in quantum leaps. As such, this article seeks to reconstruct a regional trajectory of accountability for mass atrocities in Africa with evidence grounded in both state practice and the histories of African countries. It argues that such historically grounded narrative is essential if the mission of international justice in Africa is not to be misplaced. Contrary to popular narrative which tends to suggest that Africa's institutions have tolerated these atrocities, this paper marshals considerable historical evidence to suggest that African institutions have, over time, made considerable progress in discouraging them through different forms of accountability. It explores different ways in which these regional efforts can be supported by looking beyond the ICC and re-imagining international justice.

## **Résumé**

Le système mis en place par les statuts de la Cour pénal international (CPI) est basé sur le principe de la complémentarité, c'est-à-dire que la CPI complète les systèmes juridiques nationaux. En tant que tel, conceptuellement, la Cour est un système d'appui et un système de dernier recours lorsque les systèmes locaux sont « non-désireuses ou incapables » de mettre en œuvre la responsabilité. Cela développe l'argumentation que les avancées pour faire face aux atrocités de masse en Afrique devraient être perçues sauts par paliers, non en sauts quantiques. De ce fait, cet article cherche à reconstruire une trajectoire régionale de la responsabilité pour les atrocités de masse en Afrique avec des preuves ancrées

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à la fois dans les pratiques d'Etat et les histoires des pays africains. Il soutient qu'un tel récit historiquement ancré est essentiel si la mission de la justice internationale en Afrique n'est pas mal placée. Contrairement au récit populaire qui tend à suggérer que les institutions africaines ont toléré ces atrocités, cet article rassemble de considérables preuves historiques pour suggérer que les institutions africaines ont, au fil du temps, fait des avancées considérables pour les décourager, à travers différentes formes de responsabilités. Il explore différentes manières dont ces efforts régionaux peuvent être appuyés en regardant au-delà de la CPI et en ré-imaginant la justice internationale.

## Introduction

This article addresses the intersectionality between regional stability and accountability for mass atrocities in Africa. The remit of the article covers “the interaction of geopolitics and international justice, which speaks to issues of history...”<sup>1</sup> It seeks, among other things, to reconstruct a narrative on accountability for mass atrocities with evidence grounded in both state practice and the histories of African countries and argues that such historically grounded narrative is essential if the mission of international justice in Africa is not to be misplaced. The ICC Statute itself provides the rationale for this study in its explicit acknowledgement and emphasis that the “Court established under this Statute shall be complementary to national criminal jurisdictions.”<sup>2</sup> Such complementarity, it will be argued, would be facilitated by a better understanding of the histories and context of the relevant national legal systems. As with all historically grounded narratives, such accounts are unlikely to be as unilinear as international justice advocates would sometimes wish.

In the decade and more since the International Criminal Court (ICC) came into existence, the epistemic enterprise of addressing accountability for mass atrocities especially in Africa has somewhat erroneously been conflated with the institutional life of the Court. With this conflation, conversations concerning international justice in Africa have degenerated into shouting matches in which epithets and denunciations are freely traded. Discussions on this subject are not always models of clarity, contemplation or mutual respect among participants in it. In this respect, this writer had complained five years ago about a “*misbegotten duel between supposed imperialists and alleged impunity apologists.*”<sup>3</sup> Looking beyond the ICC easily gets denounced as advocacy to impunity. Any form of support for the court or its difficult work is liable to be dismissed as support for imperialism.<sup>4</sup>

These disagreements, it seems, hue closely to narratives located in the spectrum between Afro-pessimism and Afro-optimism or “Africa rising” in

popular and area studies literatures, a narrative of hyper-optimism founded largely on somewhat untheorised economic growth statistics.<sup>5</sup> Dispassionate discussion of political economy, crime, punishment and mass atrocities in Africa has suffered as a result, and the capacity to diagnose Africa's pathologies or to reimagine pathways beyond immediate fantasies or frustrations has suffered. Reality remains that Africa continues to be the site of all on going eight situations before the ICC, in addition to being the site of several other recent cases of un-extinguished mass atrocities. The coincidence of these narratives of hyper-optimism on the one hand with evidence of mass atrocities on the other suggests a more complex or nuanced situation than traditional legal or advocacy literature is often ready to countenance. Addressing this reality adequately must begin with eschewing doctrine, intellectual coercion or zealotry and allowing for cross disciplinary inquiries in which context, sub-text, history and experience are all relevant.

In seeking to undertake such an inquiry, it is essential to recognize that Africa is simultaneously an idea, a geography and, for most people, a pigment. The African Union and the International Criminal Court (ICC) are both institutions. Peace, justice, and reconciliation are epistemic ideas over which no one person, institution, region or pigment holds proprietary rights. This paper therefore aims to suggest tentative pathways for re-imagining accountability for mass atrocities in Africa as an inclusive, cross-disciplinary and multi-stakeholder enterprise for Africans everywhere. The narrative that follows is developed with the help of sources in history, area studies, politics and international relations, international institutional law and international criminal laws.

## **Multiple Conversations**

International (criminal) justice, peace and reconciliation implicate multiple disciplines. Each of these can be conceptually elusive. These concepts include justice, peace, and reconciliation. In the context of administering international justice to an exclusive collection of Africa situations, the deployment of these concepts telegraphs assumptions about conflict, dysfunction and the capacity (or lack of it) of national institutions. Together, these present infinite challenges of meaning, application, and practice. Pinning down a meaning for any of these concepts could easily be beyond the brief of any paper. It is, nevertheless, important to identify some of these concepts and attempt to infuse them with some limited meaning.

While the meanings may be elusive, the existence of a relationship between them seems well established. In authorizing the establishment of the Special Court for Sierra Leone, for instance, the United Nations Security Council

explicitly suggested an organic link between justice, peace and reconciliation following mass atrocity, saying that “a credible system of justice and accountability for the very serious crimes committed...would end impunity and would contribute to the process of national reconciliation and to the restoration and maintenance of peace.”<sup>6</sup> Eight years later, the African Union High Level Panel on Darfur (AUPD) in its 2009 report argued that “[t]he objectives of peace, justice and reconciliation in Darfur are interconnected, mutually interdependent and equally desirable. None of the three goals can, or should, be pursued in isolation or at the expense of the other objectives.”<sup>7</sup>

These related concepts of justice, peace, and reconciliation recur in narratives of accountability for mass atrocities. It is essential to recognize that any examination of these concepts simultaneously involves conversations over space, time, and subject matter. In terms of space, for example, there is a conversation between people most affected by or who live with the atrocities and those for whom such atrocities are ethical, diplomatic, academic, research experiences. Among Africa’s populations, there is also a conversation between the Diaspora and those in Africa. In terms of time, there is a concurrent conversation between the past and the present. Past atrocities and how they were responded to deeply shape communities’ views of present mass crimes and appropriate responses to them. On subject matter, there is another conversation between the normative focus of lawyers and the more empirical, experiential and narrative-based formats of other social sciences. In addition, there is also a conversation between philosophy, epistemology and institutions.

These conversations can be asymmetrical and noisy to begin with. Agreement on concepts does not necessarily translate into mutual intelligibility or, indeed any form of consensus on institutional design, architecture, or process for their realisation. Finding a common language can also be frustrating. *Non-sequiturs* and other illogics are not unusual and distinct ideas can easily be mistaken for one another. Despite obvious frustrations, this multi-dimensional dialogue is a necessary enterprise.

Persevering in this dialogue, however, requires us to synthesise directions out of the various strands of conversations. It also bears recalling that dominated though it is by cases concerning African countries, international criminal justice is not usually discussed in Africa. Most of the people that claim or are thought to have expertise in it are based outside Africa. The vehicles they use to express their views are media outlets and scholarly journals located outside Africa. Africa is thus increasingly *objectified* in an enterprise in which it ought to have significant agency. This state of affairs implicates political leadership and statehood in Africa. It is thus essential to begin with a brief examination of the political economy of statehood in Africa.

## International Justice, African Statehood and the Imperative of Political Reform

The primary obligation of the state is to guarantee the safety and security of all who live in it.<sup>8</sup> This obligation is heavily implicated in the foundations of international criminal law and accountability and forms the base for the principle of complementarity. The existence of state capability to provide safety and security, however, is not to be taken for granted nor asserted glibly. Whether this capability exists, therefore, is a matter for empirical inquiry and evidence.

Most African states continue to struggle with fulfilling this role of providing effective protection to those who live within their borders. State formation in Africa is an ongoing project. Cycles of violence that have afflicted a majority of states on the continent since the end of colonialism reflect this reality. It is quite clear to any interested and objective observer that “governance deficits and pervasive insecurity.... are inter-linked and mutually reinforcing.”<sup>9</sup> Steven Pinker has marshalled compelling evidence to show that the course of human progress is defined by a progressive diminution of violence through legal regulation of its deployment and accountability for its unlawful use.<sup>10</sup> “Declines in violence”, he argues, “are a product of social, cultural, and material conditions.”<sup>11</sup>

Around our continent, these conditions have steadily deteriorated since Independence. For many people around the Africa, the directed and controlled violence of the colonial enterprise has been succeeded by an increasingly deregulated and democratized violence of the postcolonial era. The postcolonial African State appears to have lost its claim to any monopoly of violence and the realization of its responsibility to ensure legal consequences for unlawful violence faces daunting challenges. In their compelling examination of the *Challenges of Security Sector Governance in West Africa*, Alan Bryden, Boubacar Ndiaye and Funmi Olonisakin point out that “in many African contexts, Max Weber’s vision of the state holding the monopoly on the legitimacy of coercive violence has never existed and states have historically been unable or unwilling to provide security to their citizens.”<sup>12</sup>

The ultimate measure of the effectiveness of any legal system or political economy, therefore, is its ability to protect those that live within its territory. Thus Aryeh Neier explains that “the Weimar government perished in the same way that it began its life: unable to act against political violence...”<sup>13</sup> and adds:

the lesson of Germany in the 1920s is that a free society cannot be established or maintained if it will not act vigorously and forcefully to punish political

violence....Prosecutions of those who commit political violence are an essential part of the duty government owes its citizens to protect their freedom....<sup>14</sup>

Turning to contemporary Africa and international justice, the functional relationship of peace, justice and reconciliation can be traced to the evolution of statehood, governance and citizenship in Africa. In the case of Sudan, for instance, the AUPD report on the situation in Darfur, Western Sudan in 2009 reminds us that:

It is also equally self-evident that the most urgent priority facing the people of Darfur is the achievement of peace, and taking concerted action to deliver justice and reconciliation would itself strengthen progress towards the realisation and consolidation of peace. The three pillars, separately or jointly, are meaningful only within an overall framework of ownership by the people of Sudan, in the context of a system of democratic governance. In that regard, there is a crucially important fourth component to the Panel's vision, which is the integration of Darfur into Sudan in such a way that Darfurians can play their rightful role as citizens of Sudan.

Mahmood Mamdani's history of the continent as a comparative timeline of the preclusion of citizenship is compelling.<sup>15</sup> Citizenship in this context is constitutive of statehood and it is arguable that a state that fully owes its legitimacy to its citizens will not idly sit by while those citizens are killed in mass atrocities. Mamdani's history tale of the evolution of citizenship in Africa could equally be read as a timeline of the destruction of the infrastructure for accountable government. By accountability here is meant mean both political accountability enabling citizens to change their governments through the electoral process; as well as legal or judicial accountability delivered through the institutions of the judicial process. These capabilities are located in the normative and institutional foundations of the State and guaranteed by the independence and skills of the judiciary, civil service, and bureaucracies of government to police the rules without which government becomes whimsical, arbitrary, and personalised.

For the most part, Africa's post-independence regimes precluded any form of political competition for power through the creation of nation-building projects in which power was monopolised by single parties and often single persons. Pluralism or advocacy for it was criminalised. The institutions of state became personalised, corrupted, and instrumentalised to the end of keeping the single person or family in power. This destroyed government as a system of norms, rule constraints and institutional processes established for and by equal citizens. In the words of the ICC Statute, many African countries have suffered "a total or substantial collapse or unavailability of [their] national judicial system."<sup>16</sup> In its place, discrimination was institutionalised and

categories of citizenship created based on status or mass denial of precisely those public goods that the State supposedly exists to guarantee. The result was that by the middle of the 1980s, in most countries and most of our continent, those who controlled government enabled themselves to deliberately conflate the essential distinction between the public and personal, get away with this, and preclude the possibility of ever being held accountable whether through the legal process of investigations and prosecutions, or through the political process of competitive elections.

It is no accident that mass violence has become a shared experience bordering on fate for many peoples around the continent irrespective of borders. To take voting as the political counterpart to judicial accountability, elections in much of the continent were essentially become reduced to three things – administrative processes of manufacturing figures unrelated to ballots (Nigeria);<sup>17</sup> an expensive race to finagle three or four judicial votes from panels of five or seven judges depending on the country or office in dispute (Nigeria; Uganda; Ghana; Kenya);<sup>18</sup> or a diplomatic debacle in which disputants for office are persuaded to split their differences at the risk of mass slaughter (Kenya, Sudan, Zimbabwe).<sup>19</sup> Whichever option it is, they have become tools for affording a veneer of public legitimacy to fundamental illegalities or what Cheeseman has called “democratic breakdowns”.<sup>20</sup> At the end of 2009, the African Governance Report concluded with rather remarkable understatement that “elections have yet to be free and fair in most African countries.”<sup>21</sup>

Mamdani is on strong grounds, therefore, in asserting that “[i]f we are interested in bringing the violence to a stop, we should be interested not just in crime and punishment but, more so, in political reform.”<sup>22</sup> Political reform in this sense is a struggle against power and entrenched interests. Political reform in this sense must be seen as part of a programme of accountability not an alternative to it. Establishing mechanisms of political accountability within a capable state is thus an essential element of an effective accountability regime in Africa. The elements of reform required for sustainable response to atrocity violence require attention. To appreciate that, one other issue is important: memory.

## **Memory and Forgetting**

Memories of suffering are short in much of Africa. African citizens are descendants of several generations of victims of mass atrocities for which there has hardly ever been acknowledgement, not to speak of accountability. It is possible to suggest that the absence of memories of accountability sustains a tradition of impunity for atrocity. Records of impunity for mass atrocity against Africans have some antiquity and very much pre-date the postcolonial State.

The slave trade commodified Africans, treating them as no worse than chattels of very cheap value. Concentration camps were invented in Africa during the Boer war at the end of the 19th Century before it travelled through the operations of the US in the Philippines back down to Nazi Germany. Contemporaneously, Belgium's King Leopold II converted the Congo into one massive plantation killing field. One witness described atrocities in Leopold's Congo Free State as "positively indescribable. . . estimates of the death toll range from 5 million to 15 million and historians have compared the atrocities to actual genocide."<sup>23</sup> In 1904, the British Consul, "Roger Casement, delivered a long and detailed eye-witness account",<sup>24</sup> confirming horrific details of the life in Leopold's Congo. In 1908, the year before Leopold's death, the Belgian Parliament, finally driven by European outrage, voted to expropriate Congo from King Leopold, transferring ownership instead to the country. This did little to end the colonial atrocities in The Congo. Contemporaneously, following the rebellion of the Herero against German rule in 1904, Germany embarked on a campaign of extermination in which "Herero were massacred with machine guns, their wells poisoned and then driven into the desert to die" in what has become recognised as the first genocide of the 20th century.<sup>25</sup> In 1935, Benito Mussolini invaded Abyssinia (Ethiopia). In a brief and brutal campaign for territory, troops under his command attacked Ethiopians with chemical weapons gassing and killing an estimated 300,000-600,000 persons. Haile Selassie described what happened in his 1936 "Appeal to the League of Nations" as follows:

Towards the end of 1935, Italian aircraft hurled upon my armies bombs of tear-gas. Their effects were but slight. The soldiers learned to scatter, waiting until the wind had rapidly dispersed the poisonous gases. The Italian aircraft then resorted to mustard gas. Barrels of liquid were hurled upon armed groups. But this means also was not effective; the liquid affected only a few soldiers, and barrels upon the ground were themselves a warning to troops and to the population of the danger. It was at the time when the operations for the encircling of Makalle were taking place that the Italian command, fearing a rout, followed the procedure which it is now my duty to denounce to the world. Special sprayers were installed on board aircraft so that they could vaporize, over vast areas of territory, a fine, death-dealing rain. Groups of nine, fifteen, eighteen aircraft followed one another so that the fog issuing from them formed a continuous sheet. It was thus that, as from the end of January, 1936, soldiers, women, children, cattle, rivers, lakes and pastures were drenched continually with this deadly rain. In order to kill off systematically all living creatures, in order to more surely poison waters and pastures, the Italian command made its aircraft pass over and over again. That was its chief method of warfare.<sup>26</sup>

This happened notwithstanding that the 1925 Geneva Protocol to the Hague Conventions of 1907 contained an international “prohibition of the use in war of asphyxiating, poisonous or other gases, and of bacteriological methods of warfare.” Elsewhere in Africa, from Kenya to Namibia, the colonial era reveled in egregious atrocities against “natives”. In her study of colonial Kenya, Caroline Elkins concludes that “an integrated reading of all the sources – written, oral and visual – yields an astonishing portrait of destruction... I now believe that there was in late colonial Kenya a murderous campaign to eliminate Kikuyu people, a campaign that left tens of thousands, perhaps hundreds of thousands, dead.”<sup>27</sup>

This pattern of slaughter was facilitated by a bureaucratic and institutional system that was comfortable with and facilitated the idea that the African was expendable. The postcolonial system was established on this foundation and did nothing to reform it. It bears acknowledging that the history of Africa’s regional human rights system lies in a history of permissive attitude towards mass atrocities to which the postcolonial state succeeded. Viljoen reflects that the most significant impetus for the adoption of the Charter was “a long list of human rights abusers who were at best ignored and at worst embraced by the OAU, including Idi Amin in Uganda, Emperor Bokassa in the Central African Republic, and Macias Nguema in Equatorial Guinea.”<sup>28</sup> By the time the postcolonial state was established, ironically, there was already a very well established tradition of treating the African as a non-person or an object. This was to be the basis for the early indifference of postcolonial African governments to gross violations of human rights.

When between 1978 to 1979 this indifference led to the overthrow of the governments of Idi Amin Dada in Uganda, Macias Nguema in Equatorial Guinea, and Jean-Bedel Bokassa in Central African Republic, it became evident that this attitude had passed its sell-by date.

Arguments over the relative merits and demerits of the ICC seem to have displaced any commitment to or respect for the lesson of memory. At the beginning of his *Book of Laughter and Forgetting*, Milan Kundera reminds us that “[t]he struggle of man against power is the struggle of memory against forgetting.”<sup>29</sup> There is a corollary to this in law: there is no time bar to or prescription for crimes of atrocity. Those who work for accountability for atrocity crimes in Africa must, thus, take a long view. As a long term policy issue, history needs to be resuscitated as a subject of study in schools. In the short term, one idea that could usefully be explored is an Africa Atrocity Archive.

## **Regional System for Protecting Human Rights: Origins of African State Practice and Institutions on Accountability**

The obligations subscribed to or recognized by African countries in the field of accountability for mass atrocities have evolved since the emergence of the postcolonial African State, the formation of the African Union (AU) and its predecessor, the Organization of African Unity (OAU). This evolution is tied closely with shifts that have occurred in the practice of African States with respect to the doctrines of sovereignty, domestic jurisdiction and non-interference in the affairs of African States. It is not proposed here to undertake a full mapping of the contours of this evolution. But some landmarks are noteworthy.

The African Charter on Human and Peoples' Rights acknowledges its peculiar origins in a history of mass atrocities in three ways. First, Article 23(1) of the Charter uniquely guarantees a right to "national and international peace and security." Second, Article 26 of the Charter obliges African States to "guarantee the independence of the Courts and shall allow the establishment and improvement of appropriate national institutions entrusted with the promotion and protection of the rights and freedoms guaranteed by the present Charter." Third, Article 58 provides for special procedures for dealing with situations of "serious and massive violations" of human rights, or what would in effect be atrocity situations. In reality, these essential provisions for precluding atrocity crimes in Africa have for the most part not worked as envisaged.

At the national level, self-serving leaders have subverted effective institutions triggering conflicts with atrocity consequences. At the continental level, Nigeria's former Foreign Minister, Bolaji Akinyemi, suggested that the early practice of the OAU indicated that, in relation to civil wars and mass atrocity situations, the OAU mostly undertook discussions, resolutions and committee work within the constraints of its self-defeating doctrine on non-intervention.<sup>30</sup> The International Panel of Eminent Persons (IPEP) constituted by the OAU to investigate the Rwanda Genocide complained in its report that "the OAU Charter is categorical about the sovereignty of member states and about non-interference in their internal affairs",<sup>31</sup> noting with resignation that efforts to confront conflicts, violations or atrocities were "complicated by the need to work within these strict guidelines."<sup>32</sup>

Historically, the practice of African States has, however, been mixed and does not lend itself to any single interpretation or to any generalisations. In the Nigerian Civil War, Tanzania, Cote d'Ivoire and Gabon, among others, recognized Biafra as part of a response to what they considered atrocities in those countries – at a time when more established democracies were unwilling

to do so. Tanzania's Julius Nyerere declined recognition to the notorious government of Idi Amin in Uganda, acting unilaterally first to bring down the East African Community in 1977 and later to overthrow Amin's government in 1978.<sup>33</sup>

In the wake of mass atrocities in the Central African Republic, Equatorial Guinea and Uganda, leading to unilateral intervention by different actors to overthrow the governments of all three countries between 1978-1979, a significant shift in the OAU's doctrinal position with respect to gross violations of human rights took place. In 1979, the OAU authorised a mission of investigation to Bangui, capital of the Central African Republic, to investigate alleged massacres of children on the orders of Emperor Bokassa.<sup>34</sup> The mission's report was later tabled by Senegal at the OAU summit in Monrovia, Liberia in the same year. Despite some opposition, a coalition of states led by Senegal's Leopold Senghor and Uganda's Godfrey Binaisa (who had just been installed as Uganda's President at the end of another period of mass atrocities) prevailed in ensuring that the report was considered by the Summit.<sup>35</sup>

At the same Summit in 1979 also, the Assembly of Heads of State and Government of the OAU for the first time clearly drew a link between human rights and economic development in Africa when it acknowledged for the first time in 1979 that a political regime that protects fundamental human rights was indispensable for Africa's development.<sup>36</sup> At the suggestion of Senegal's President Leopold Senghor,<sup>37</sup> the Assembly adopted by consensus a resolution reaffirming "the need for better international cooperation, respect for fundamental human and peoples' rights and, in particular, the right to development,"<sup>38</sup> and requesting the Secretary-General of the OAU to "organise as soon as possible, in an African capital, a restricted meeting of highly qualified experts to prepare a preliminary draft of an 'African Charter on Human and Peoples' Rights', providing, *inter alia*, for the establishment of bodies to promote and protect human and peoples' rights."<sup>39</sup>

These normative developments were reinforced by developments in the field of regional peace and security. Also in 1979, under the Lagos Accord negotiated at Nigeria's instance between eleven warring factions in the Chadian conflict, Nigeria unilaterally deployed a peace keeping operation in the country, later to be succeeded by an OAU force under Nigerian command.<sup>40</sup> Between 1978 and 1981, sixteen West African States, under the auspices of ECOWAS, concluded two Protocols respectively on Non-Aggression and Mutual Defence, enabling the deployment of regional enforcement action by the Community.<sup>41</sup>

Addressing the Ministerial conference on the negotiation of the African Charter on Human and Peoples' Rights in Banjul, Gambia, in 1980, Gambian

President, Dauda Jawara, acknowledged the dawn of a new era in the OAU's disposition as follows:

It is unfortunate that we in Africa have tended, for too long, to overstate the principle of non-interference in the affairs of other African States in relation to violations of human rights, when it is obvious that the question of human rights should be of universal concern and not only of that State within whose borders the gross violations are allegedly occurring. In this context, it will be recalled that at the Monrovia Session, the Heads of State and Government, without dissent, specifically requested the group of legal experts to provide for the establishment of bodies to promote and protect human and peoples' rights. We believe that implicit in that request is the desire to make gross violations of human and peoples' rights in any African State a matter of concern for all Africans.<sup>42</sup>

The OAU adopted the Charter in June 1981 and it entered into force five years later in October 1986.<sup>43</sup> The adoption of the African Charter on Human and Peoples' Rights in June 1981 crystallised this shift but failed to create any effective mechanisms behind it. Following the entry into force of the Charter in 1986, the establishment of the African Commission in 1987, and the collapse of the Berlin Wall in 1989, the OAU in 1990 adopted the Cairo Declaration on the Political and Socio-economic Situation in Africa and the Fundamental Changes Taking Place in the World in which member States, among other things, committed themselves respectively, as a political objective, to establish "a political environment which guarantees human rights and the observance of the rule of law",<sup>44</sup> and declared themselves "equally determined to make renewed efforts to eradicate the root causes of the refugee problem."<sup>45</sup> Today, as when this Declaration was adopted, conflicts and mass atrocities remain the major cause of the refugee problem in Africa. To bolster the commitments embodied in the Declaration, the OAU established a Conflict Resolution Mechanism in 1993.<sup>46</sup> The implications of these commitments for the elimination of mass atrocities in Africa were to be put to test in the Rwanda Genocide and the Liberian Conflict.

### ***Rwanda***

The OAU began its involvement in the Rwanda crisis in 1990, three years before the establishment of any formal mechanism within the organization for managing such situations and nearly four years before the onset of the Rwanda genocide. In this, it deployed the full array of its "methods common to such interventions ... a ceasefire agreement, followed by observation, consultation, mediation, and conciliation at the level of regional Heads of State."<sup>47</sup> As described by the IPEP Report:

The priority of the mediators was to stop the civil war and forge agreements that would bring key players together. That way, they reasonably assumed, the uncivil war against the Tutsi would end. As a result, no direct action was taken against those conducting the anti-Tutsi pogroms with the support of the inner circle around President Habyarimana. Perhaps, no action was in fact possible. But the result was an excellent agreement that had little chance of being implemented.<sup>48</sup>

The major reason for this failure, in the analysis of the IPEP was the failure of moral leadership among African leaders to call the extermination of the Rwandese Tutsi by its proper name. Again in the words of the IPEP:

Throughout April, May, June, and July, the OAU, like the UN, failed to call genocide by its rightful name and refused to take sides between the genocidaires (a name it would not use) and the RPF or to accuse on side of being genocidaires. ... Under the circumstances of the time, this Panel finds that the silence of the OAU and a large majority of African Heads of State constituted a shocking moral failure. The moral position of African leaders in the councils of the world would have been strengthened had they unanimously and unequivocally labeled the war against the Tutsi a genocide and called on the world to treat the crisis accordingly.<sup>49</sup>

In effect, the IPEP called on the OAU to jettison its pre-existing doctrine and practice, especially in the face of mass atrocities. The views of the IPEP appear to have had an influence on the later conduct of the OAU and its member States generally and, in particular, in relation to the situation in Liberia.

### *Liberia*

Regional response to the onset in 1989 of the Liberian conflict began in 1990 through the Economic Community of West African States (ECOWAS), under the leadership of Nigeria. Invoking the ECOWAS Mutual Defence Protocol, member States of the Community inserted a regional peace enforcement deployment – the ECOWAS Monitoring Group (ECOMOG) – into Liberia in October 1990. ECOMOG stabilized the major fronts in the conflict but, without progress in any direction, the warring factions began splintering, leading to a break down in command and control structures and an escalation in atrocities against non-combatants. Serial ceasefires and peace agreements broke down, forcing ECOWAS to seek the political support of the OAU member States. At the instance of the OAU member States at the Yaoundé Summit of the OAU in July 1996, the OAU adopted a decision warning the:

Liberian warring faction leaders that should the ECOWAS assessment of the Liberian peace process during its next Summit meeting turn out to be negative,

the OAU will help sponsor a draft resolution in the UN Security Council for the imposition of severe sanctions on them, *including the possibility of the setting up of a war crime tribunal to try the leadership of the Liberian warring factions on the gross violations of human rights of Liberians.*<sup>50</sup>

In a follow up to this decision, the ECOWAS Council of Ministers<sup>51</sup> and later the Summit of Heads of State and Government,<sup>52</sup> citing the “requisite goodwill” among the warring factions in Liberia, resolved in August 1996 to “invoke the OAU 1996 Resolution which calls for the establishment of a war crimes tribunal to try all human rights offences against Liberians.” In their decision, the ECOWAS Heads of State specifically “condemned the crimes, atrocities and other acts by the Liberian fighters which violate the rules of armed warfare” and issued “a fresh warning to the factions to desist from such acts which are offensive to the international community”, calling also on the “faction leaders to guarantee the safety of relief personnel in Liberia.”<sup>53</sup> The ECOWAS Heads of State and Government subsequently transformed this into a summit level decision on “relating to Sanctions against persons who violate the ECOWAS Peace Plan for Liberia”, embodying the Code of Conduct for the Members of the Council of State of Liberia.<sup>54</sup>

Liberia’s Council of State was the ruling Council for Liberia under the Abuja Peace Agreement and its Chairperson, Ruth Sando Perry, was the Head of State. Under the Code of Conduct instituted by the ECOWAS Heads, “where a member or members of the Council are adjudged to be in breach of the provisions of the code of Conduct for members of the Liberian National Transitional Government (LNTG), and in particular, any act which impedes the implementation of the Abuja Agreement, appropriate steps shall be taken by the Chairman of ECOWAS”, including the “establishment of a war crimes tribunal to try human rights offences against Liberians.”<sup>55</sup> Implicitly, this decision committed Heads of State of ECOWAS potentially to the support of a possible trial of one of their peers. This was a quite significant development in inter-State relations in Africa. It is somewhat surprising that contemporary debates about accountability for mass atrocities in Africa are conducted without any memory of these developments or of the role that African institutions played in them.

The significance of these decisions was two-fold. First, the threat to invoke war crimes prosecution was directed by African Heads of State and Government at a class that included a sitting Head of State. Secondly, it marked the first time the OAU or any group of African leaders would use such a threat in support of peace negotiations or settlement. In effect, the OAU and ECOWAS in tandem used the threat of war crimes prosecution to force a peace settlement and transition from conflict and mass atrocities.

## **Normative Developments: The AU Peace and Security Council (PSC) Protocol**

Article 58 of the African Charter contained the following dispositions:

1. When it appears after deliberations of the Commission that one or more communications apparently relate to special cases which reveal the existence of a series of serious or massive violations of human and peoples' rights, the Commission shall draw the attention of the Assembly of Heads of State and Government to these special cases.
2. The Assembly of Heads of State and Government may then request the Commission to undertake an in-depth study of these cases and make a factual report, accompanied by its findings and recommendations.
3. A case of emergency duly noticed by the Commission shall be submitted by the latter to the Chairman of the Assembly of Heads of State and Government who may request an in-depth study.

Until the establishment of the African Union, mechanisms for dealing with mass atrocities in Africa under the OAU Charter were mostly ad-hoc, ponderous and ineffectual in preventing these atrocities or mobilizing the kinds of committed responses needed to ensure they did not recur.<sup>56</sup> It has thus been said that:

While the [African] Commission's mandate has always extended to responding to mass atrocities or serious and massive violations in Africa, it has not always received habitual cooperation from states parties or regional institutions in doing so. Under the OAU Charter, the only organ that the Commission could liaise with in relation to such situations was the Assembly of Heads of State and Government. Ironically, this is also the organ whose members were most likely to be self-interested or deeply implicated in mass atrocities. Unsurprisingly, the African Charter's mechanism of response to such situations proved to be largely ineffectual.<sup>57</sup>

There were several reasons for this. Serving Heads of State, even as the "Chairman" of the Assembly of Heads of State and Government, were – not unnaturally – reluctant to request the Commission to investigate their peers. The Commission was unable to undertake effective investigations in territories affected by serious human rights and humanitarian emergencies as, in most cases, the safety of its personnel and assets could not be guaranteed by home governments.<sup>58</sup> In some of these situations, such as Malawi under Banda, the host countries refused to guarantee the safety of Commissioners. In some others, such as Chad, Rwanda, and the Democratic Republic of the Congo, developments proved to be too rapid for the Commission to respond adequately. Following Chad and Rwanda, the Commission established

its Special Rapporteur procedures. The first two to be deployed were on Summary, Arbitrary and Extra-judicial Executions and on Prisons and Places of Detention in Africa.

However, it is also the case that where the Commission undertook an investigation, such as in the situations in Zimbabwe and in Darfur, Sudan, the AU appeared to have failed to act swiftly enough on its reports.<sup>59</sup> Against this background, the AU in 2002 created a Peace and Security Council as “a collective security and early-warning arrangement to facilitate timely and efficient response to conflict and crisis situations in Africa.”<sup>60</sup> Article 19 of the PSC Protocol provides:

The Peace and Security Council shall seek close cooperation with the African Commission on Human and Peoples’ Rights in all matters relevant to its objectives and mandate. The Commission on Human and Peoples’ Rights shall bring to the attention of the Peace and Security Council any information relevant to the objectives and mandate of the Peace and Security Council.

In effect, the mechanisms available to the Commission in response to situations of mass atrocities in the continent or of serious and massive violations are no longer restricted to Article 58 of the Charter. It has, therefore, been said that “the Protocol Relating to the Establishment of the Peace and Security Council of the African Union formalizes the responses of the continental institution to the crises of mass atrocities and serious and massive violations of human rights and the attendant instability in Africa.”<sup>61</sup> They are now designed to address mass atrocities in the context of peace and security challenges in Africa. A former Chair of the African Commission on Human and Peoples’ Rights, Emmanuel Dankwa, recalls his experience with this provision as follows:

In 2004 PSC requested the Commission to “carry out an investigation into human rights violations’ in Cote d’Ivoire” while it endorsed the UN Commission on Human Rights decision “to set up a Commission to investigate the human rights violations” that had been committed since the beginning of the crisis. The African Commission is damned for waiting “to be prodded into action on a matter of grave concern to the continent, while a UN body had already initiated action”. The present writer testifies that long before that date, at the prompting of the Secretary of the Commission of an impending mission by the OAU, at the highest level, he wrote to the Secretary-General of the OAU about the Commission’s eagerness to be part of the mission. And long before the UN Commission on Human Rights dreamt of its lauded decision, the Commission, with the intention of dousing the flame of conflict and violation of human rights in Cote d’Ivoire sent a mission to that country with the present writer as leader of the mission. Towards the realization of its objective, the Commission sent another mission to la Cote d’Ivoire.<sup>62</sup>

## **Complementarity: Regional and National**

The preamble to the ICC Statute asserts that the Court “shall be complementary to national criminal jurisdictions.” The essential foundation of international criminal justice in the Rome Statute of the ICC is complementarity. The Court can only admit a case if the state from which it originates is “unwilling or unable genuinely to carry out the investigation or prosecution.”<sup>63</sup>

While the complementarity envisaged is with the states parties to the Statute, the architecture of the Rome Statute does not preclude complementarity between the ICC and regional mechanisms. Article 52(1) of the United Nations Charter expressly allows for “the existence of regional arrangements or agencies for dealing with such matters relating to the maintenance of international peace and security as are appropriate for regional action provided that such arrangements or agencies and their activities are consistent with the Purposes and Principles of the United Nations.” The only substantive limitation on regional treaty making in international law is in Article 103 of the UN Charter which provides that “in the event of a conflict between the obligations of the Members of the United Nations under the present Charter and their obligations under any other international agreement, their obligations under the present Charter shall prevail.”

These developments crystallized a substantial departure from the previous indifference of African countries to mass atrocities. By the turn of the century, the position of the OAU had evolved in all but name from non-interference through a condemnation of mass atrocities to a recognition that in some cases criminal prosecutions for mass atrocities could be warranted or justified in support of a strategic goal. In the course of these developments, it had established by decisions and resolutions several organs that breached its non-interference principle, including Mechanism for Conflict Prevention, Management and Resolution in 1993, with some role in dealing with gross human rights violations,<sup>64</sup> and a standing Conference on Security, Stability, Development and Cooperation in Africa (CSSDCA), which meets at the highest levels every two years and amongst whose goals are promotion of rule of law, human, citizenship and participation rights, the elimination of war crimes, crimes against humanity and genocide, and the promotion of ratification of both the African Court Protocol and the Statute of the International Criminal Court.<sup>65</sup>

It was, therefore, easy for the Constitutive Act of the African Union adopted in 2000 to embody new commitments mandating intervention where its predecessor, the OAU Charter established a rule of strict non-interference. Thus the Constitutive Act embodies new common political values, including

a sanction-backed prohibition against a right of the Union to intervene in “grave circumstances”, such as war crimes, crimes against humanity and genocide.<sup>66</sup> In constituting a committee of eminent African jurists on the case of former Chadian President, Hissène Habré, in 2006, the AU Heads of State and Government clearly articulated a stand in favour of “total rejection of impunity”,<sup>67</sup> and has repeatedly reaffirmed this commitment since then.<sup>68</sup> Concerning the scope of this commitment, the Committee in its report argued that “Hissène Habré cannot shield behind the immunity of a former Head of State to defeat the principle of total rejection of impunity that was adopted by the Assembly.”<sup>69</sup>

This position is supported by the normative commitments of most African states. In particular, the Protocol for the Prevention and the Punishment of the Crime of Genocide, War Crimes and Crimes against Humanity and All Forms of Discrimination<sup>70</sup> to the Pact on Security, Stability and Development in the Great Lakes Region,<sup>71</sup> the provisions of the chapter on genocide, war crimes and crimes against humanity apply irrespective of the official status of the suspect.<sup>72</sup> However, the AU has also expressed “strong conviction that the search for justice should be pursued in a way that does not impede or jeopardize efforts aimed at promoting lasting peace”,<sup>73</sup> and urged strongly for complementarity between national, regional and international mechanisms of accountability for mass atrocity.<sup>74</sup> In its report, the CEJA had presaged this position by recommending the extension of the jurisdiction of the (then) proposed merged African Court of Justice and Human Rights to include criminal matters. In justifying this recommendation, it argued:

The Committee discussed the prospects for the creation of the African Court of Justice and Human Rights based on the project to merge the African Court of human and People’s Rights and The African Court of Justice. The Committee proposes that this new body be granted jurisdiction to undertake criminal trials for crimes against humanity, war crimes and violations of Convention against Torture....The African Court should be granted jurisdiction to try criminal cases. The Committee therefore recommends that the ongoing process that should lead to the establishment of a single court at the African Union level should confer criminal jurisdiction on that court.<sup>75</sup>

## **The Controversy over Immunities**

Between 2004 and 2005, three African situations were referred to the ICC: Uganda and DRC were self-referrals while the Security Council referred the situation in Darfur. The referral of the Darfur situation was ultimately based on the report of an international investigation commission headed by Professor Antonio Cassese.<sup>76</sup> The role of African institutions in bringing this

about is not always investigated or acknowledged. The dominant narrative of a continent invested in granting impunity to its rulers is not born out by the evidence or records.

Let's illustrate with the situation in Darfur. It is often forgotten that at its 35th Ordinary Session in May 2004, the African Commission decided to "send a fact finding mission to Darfur to investigate reports on human rights violations in Darfur and to report back to it."<sup>77</sup> Led by the Chairperson of the Commission, the five-person mission deployed 8 – 18 July. In its report, it recommended, among other things that:

- the Government should accept the setting up of an International Commission of Enquiry, which would include international experts from the United Nations, African Union, Arab States, international humanitarian and human rights organisations with the following terms of reference:
- to investigate the role and involvement of the military, the police, and other security forces in the Darfur conflict, and to establish those responsible for committing war crimes and crimes against humanity, violation of human rights and international humanitarian law and ensure that they are brought to justice;
- to investigate the role of rebel movements, all armed militias, in particular the Janjawids, the Pashtun, the Pashmerga, and the Torabora, and to establish those responsible for war crimes, crimes against humanity and massive violation of human rights and international humanitarian law and ensure that they are brought to justice; and
- to rehabilitate the destroyed physical security infrastructure, and to suspend any police or security agents who are alleged to have been involved in the violation of human rights, pending the finalisation of investigations.

The Government should allow the International Commission of Inquiry unhindered access to the Darfur region to enable it to thoroughly investigate alleged human rights violations with a view of further investigating as to whether or not genocide has occurred.<sup>78</sup>

Indeed, in April 2005, the Commission adopted a resolution on the situation in Darfur which, among other things called "on the Government of The Sudan to cooperate fully with the Prosecutor of the International Criminal Court (ICC) in his investigation under the terms of the United Nations Security Council referral of the Darfur situation to the ICC, in order to investigate and bring to justice all persons suspected of perpetrating crimes of concern to the international community."<sup>79</sup> The resolution also appealed

to the UNSC to “continue monitoring the implementation of its resolutions on the Darfur, in particular the cooperation by the Government of The Sudan with the Prosecutor of the ICC.”

Another issue that is worth addressing is the impression that African Heads of State always receive a free pass for mass atrocities. Among advocates for accountability, however, memories remain short. In Equatorial Guinea, Colonel Nguema Mbasogo put his uncle and former president, Macias Nguema, on trial in 1979. Following his conviction, President Nguema was put to death. Central African Republic sentenced Emperor Bokassa to death on 12 June 1987. This was subsequently commuted to life and then to 20 years in prison. He died in 1996, three years after being paroled in 1993.<sup>80</sup> In 1989, when he sought to return to Uganda, President Museveni forced Idi Amin to return to Saudi Arabia after he got as far as neighbouring Zaire (as DRC was then known). In response to the request by one of Amin’s wives in July 2003 for President Museveni to accede to the return to Uganda of Amin, “the reply from the President was that if he returned, he would have to answer for his sins and face a trial for war crimes.”<sup>81</sup> These positive developments made Africa one of the strongest supporters of the ICC supplying an early rush of ratifications for the court. In 2004, Uganda became the first country to refer a case to the Court. In 2006, however, a court in France indicted Rose Kabuye, a former Colonel in the Rwandese Army and Chief of Protocol to the President of Rwanda, in connection with the 1994 genocide in Rwanda. In response, Rwanda sponsored a debate at the AU on the “Abuse of Universal Jurisdiction”.

The year 2008 would prove to be a watershed year of rupture between Africa institutions of international criminal accountability. In Sharm-El-Sheikh in June 2008, the AU adopted a decision in which it deplored the “abuse of the Principle of Universal Jurisdiction” as “a development that could endanger International law, order and security.”<sup>82</sup> The decision further complained that the “abuse and misuse of indictments against African leaders have a destabilizing effect that will negatively impact on the political, social and economic development of States and their ability to conduct international relations” and requested for a meeting with the European Union to address this issue. Five months later, in November 2008, while this request was pending, Germany, acting on the French indictment, arrested Colonel Kabuye in in November 2008 in Frankfurt, where she had gone to prepare for a state visit by President Kagame to Germany. Earlier in May the same year, Jean-Pierre Bemba, a Congolese Senator and contestant in the Presidential elections in the DRC had been arrested in Belgium on an arrest warrant issued by the ICC. In the same year, the ICC opened an investigation into President Omar

Al-Bashir of Sudan, leading to his indictment in March 2009 for war crimes and crimes against humanity.

In response, on 1 July 2009, the Assembly of Heads of State and Government of the AU at the conclusion of its Summit in Sirte, Libya, decided that “AU Member States shall not cooperate ... in the arrest and surrender of President Omar al-Bashir of The Sudan.” In a press release issued two weeks later, on July 14 2009, the Organisation explained that this decision “bears testimony to the glaring reality that the situation in Darfur is too serious and complex an issue to be resolved without recourse to an harmonised approach to justice and peace, neither of which should be pursued at the expense of the other”.

At the AU Summit in Malabo, Equatorial Guinea, of June 2014, the AU adopted a Protocol on Amendments to the Protocol on the Statute of the African Court of Justice and Human Rights, Article 46Abis which provides that: “No charges shall be commenced or continued before the Court against any serving African Union Head of State or Government, or anybody acting or entitled to act in such capacity, or other senior state officials based on their functions, during their tenure of office.”

On immunities, international law does not speak with one voice and all formulations must grapple with the profound doctrinal and political difficulties. For the moment, three points may be underscored. First, with regard to the doctrinal issues, there is no immunity from jurisdiction, responsibility or prosecution for anyone under international law for crimes of atrocity. This is also why there is no prescription or limitation for prosecution of crimes of atrocity. However, customary international law clearly recognizes a rule of functional immunity for sovereigns and the provisions on immunities in the ICC Statute are mutually contradictory. Article 27(1) of the ICC Statute itself is very carefully worded. It reads:

This Statute shall apply equally to all persons without any distinction based on official capacity. In particular, official capacity as a Head of State or Government, a member of a Government or parliament, an elected representative or a government official shall in no case exempt a person from criminal responsibility under this Statute, nor shall it, in and of itself, constitute a ground for reduction of sentence

A little-noticed provision in Article 89(1) of the ICC Statute reads: “States Parties shall, in accordance with the provisions of this Part and *the procedure under their national law*, comply with requests for arrest and surrender.”<sup>83</sup> What does a domestic court do where it is faced with a surrender or transfer request for a Head of State who, under its domestic law, enjoys immunity? Article 98(1) further provides:

The Court may not proceed with a request for surrender or assistance which would require the requested State to act inconsistently with its obligations under international law with respect to the State or diplomatic immunity of a person or property of a third State, unless the Court can first obtain the cooperation of that third State for the waiver of the immunity.

Dapo Akande has suggested that there is a “tension between Art. 27 and Art. 98 of the Rome Statute on the question of immunity. I have argued elsewhere that the only way to give meaningful effect to both provisions is to interpret Art. 98 as requiring the ICC and national authorities to respect immunities accruing to non-parties. On the other hand, Art. 27 is to be taken as removing immunities accruing to ICC parties.”<sup>84</sup>

Second, however, the scope of this most recent Protocol, however, potentially goes beyond Heads of State to cover “other senior state officials based on their functions.” This is new and rightly objectionable. In explaining this decision, the report of the Specialised Technical Committee that finalized the Protocol said:

delegations raised concerns regarding extension of immunities to senior state officials and its conformity with international law, domestic laws of Member States and jurisprudence, underlining the challenges inherent in widening immunities, and especially considering the lack of a precise definition of “*senior state official*”, as well as the difficulty in providing an exhaustive list of persons who should be included in the category of senior state officials. After exhaustive deliberations, taking into consideration the relevant Decisions of the Assembly of the Union, and appreciating that senior state officials are entitled to functional immunities by virtue of their functions, the meeting resolved that Article 46*Abis* should include the provision “senior state officials based on their functions.” The meeting further resolved that interpretation of “senior state official” would be determined by the Court, on a case-by-case basis taking their functions into account in accordance with international law.<sup>85</sup>

The ensuing controversy over this provision in the new Protocol has overshadowed the many significant developments introduced by the Protocol. For instance, it makes Africa the first regional system to establish a criminal competence for atrocity crimes; the Defence Office in this system is a distinct organ of the Court; and it recognizes and punishes corporate responsibility for atrocity crimes. Like all institutions, however, this experiment is imperfect and will need time both to prove itself and to be improved.

Thirdly, there remain practical political constraints on the rendering of a sitting Head of State who remains in effective control of power and enjoys electoral legitimacy. In their comprehensive study on *Prosecuting Heads of State*, Ellen Lutz and Caitlin Reiger rightly point out that “the waxing and waning of political fortunes still dominates the extent to which former leaders are held judicially accountable for their crimes at all.”<sup>86</sup>

## **Avoiding the Regime Change Narrative: Understanding Africa's Rupture with the ICC**

It remains important to understand the reasons for the rupture between Africa and the ICC. It has been suggested that this was mainly a response by African Heads of State to the Bashir indictment and that Africa's political leaders are mainly concerned with "protecting themselves from prosecution."<sup>87</sup> Such a position grossly underestimates the extent of the ICC's crisis of credibility in Africa. The extent of the shift in attitudes towards the ICC is evident in the fact that many of the candidates for the Presidency of the Assembly of States Parties in 2014 ran an ICC-sceptic campaign. This would have been unthinkable 10 years ago. What has happened?

To begin with, in terms of factual sequence, the first community of people to fall out of affection with the ICC in Africa were not Presidents or Prime Ministers but victims. In 2009, this writer had warned that:

Victims now seem to be the people paying the highest cost for international justice. They suffer threats of death, exile, and other forms of persecution for their commitment to justice with little protection, assistance or acknowledgement from governments or international institutions. I have heard claims that those who express uncertainties about the work of the ICC in Africa may have been purchased by powerful enemies of justice. This makes victims seem expendable and discredits their well-founded fears as dubious. They are neither. Most victims need reassurance that when the neighbourhood mass murderer arrives their only defence is not the promise of a warrant from a distant tribunal on thin resources. They are right in asking that the promise of justice should be accompanied by credible protection from reprisals.<sup>88</sup>

Second, beginning with the execution of the Bemba arrest warrant, the ICC had become a factor in African contests for power. As such, it became fair game in political contests. In a continent in which contests for power mobilize ethnic and other narrow identities, the ICC easily became an instrument to be mobilized or denounced along these narrow terms. In Cote d'Ivoire, DRC, Kenya, Sudan and arguably Central African Republic, the ICC became a dispositive and partisan factor in determining the outcome of elections.

With respect to the Bashir indictment, thirdly, the major issue for most African States was not the fate of President Bashir but the consequence for regional peace and security. The reasoning, as I explain elsewhere, was as follows:

The execution of the warrant without an adequately managed transition could create a power vacuum in Khartoum, unleashing destabilising tremors beyond Sudan's borders. Consequently, all nine countries that share a border with

Sudan are on a war footing. Without a government for two decades, nearby Somalia is already a major destabilising factor in the region. Uganda's murderous Lord's Resistance Army, long supported by Khartoum and whose leaders are also wanted by the ICC, is re-grouping in vast ungoverned border territory between Sudan, Uganda and DRC. The 2005 'comprehensive' peace agreement (CPA) that ended Sudan's half century-long north-south war risks breakdown, while the Darfur crisis in western Sudan remains active. These uncertainties drive an undisguised arms race in the region. If the CPA collapses, many fear a transnational atrocity site like none this region has known.<sup>89</sup>

Fourth, the capabilities of the ICC has been somewhat overstated arguably to mask the fact that its sovereign enthusiasts have are unwilling to give it the means to match realize its true potentials. The States have been unwilling to give it the means to match the reach of footprint of the Court, while simultaneously saddling it with a crippling burden of expectations and dockets. For many States, the ICC represents cheap diplomacy without costs. Civil society support for the court in its most formative years was uncritical and slavish, creating the impression among the leading personnel of the Court that it could do no wrong. This probably led them to underestimate the extent of the challenges confronted and encouraged mistakes that would prove toxic to the perceptions and reputation of the institution.

Fifth, the Court has been short of the kind of support in strategic diplomatic and other assets that it needs. This kind of hypocrisy has a long history in international relations. In this respect, it is worth recalling Emperor Haile Selassie's lamentation in his Appeal to the League of Nations in 1936:

What have become of the promises made to me as long ago as October, 1935? I noted with grief, but without surprise that three Powers considered their undertakings under the Covenant as absolutely of no value. Their connections with Italy impelled them to refuse to take any measures whatsoever in order to stop Italian aggression. On the contrary, it was a profound disappointment to me to learn the attitude of a certain Government which, whilst ever protesting its scrupulous attachment to the Covenant, has tirelessly used all its efforts to prevent its observance. As soon as any measure which was likely to be rapidly effective was proposed, various pretexts were devised in order to postpone even consideration of the measure.

Sixth, living out these enthusiasms, CSOs and academic advocates for accountability created a narrative of international justice in the Rome Statute that easily got international justice entrapped into being a tool for regime change by other means. The undue focus on Heads of State and immunities appeared to contradict the strident argument that the ICC was a non-political institution. The challenge was always how to make the case for removing a President who proves himself able to win elections. In heated domestic political

situations, therefore, it was easy to cast the ICC as a project of re-litigating losses in domestic political arenas before a foreign-controlled court. The effort to render the ICC as antiseptic has been patronizing, self-contradictory and not totally honest. Unsurprisingly, it has backfired.

Above all, quite clearly, the ICC was oversold. Promises by the pioneer Prosecutor to make accountability for atrocity crimes “sexy” were misplaced and ill-judged.<sup>90</sup> With an annual budget that has never much been over \$160million and optimal staff strength of about 700, the ICC was always a court of very limited means. The burden of expectation on the court was far in excess of what this very limited institution could take. In this connection, it bears recalling that the *Mbeki Report* had argued quite strongly that the ICC’s “prosecutorial policy leaves the overwhelming majority of individuals outside of the ICC system and still needing to answer for crimes they might have committed. Justice from the ICC exclusively would therefore leave impunity for the vast majority of offenders in Darfur”.<sup>91</sup> It seems clear, therefore, that for the sake of the ICC and its credibility, it is necessary to look beyond the ICC in order to sustain the promise and project of accountability for atrocity crimes in Africa. To use a well-worn metaphor, the demand for accountability is well beyond the supply capabilities of the ICC.

### **Beyond the ICC: Evolving a Programme and an Agenda**

The institutionalization of international justice is a project in progress. As with all such projects, it may experience reversals along the path of increments. That is not unusual. Africa’s track-record on international justice is not susceptible to hasty generalization. The origins of Africa’s challenges with grave crimes of mass atrocity are traceable to outrages committed by European countries on the continent for which there has been no acknowledgement or accountability and for which memories have been deliberately obliterated in historical record. These fed a narrative of African personhood as expendable. Bureaucratic and institutional mechanisms of colonial and postcolonial governments reinforced this. On the whole, however, despite early challenges, a close review of postcolonial state practice and institutional developments from the continent suggests that there has been considerable progress in establishing norms and practice against impunity for mass atrocities, which predate the establishment of the ICC. All sides would benefit from promoting adequate mechanisms of complementarity between the regional institutions in Africa, African States and the ICC.

This said, it should be acknowledged that the history and footprint of mass atrocities in Africa compels that the continent must look beyond the ICC but it cannot repudiate the Court. As an enterprise, international justice is much

bigger than the ICC. We must begin from first premises: the responsibility for protecting persons living in Africa and affording them justice and fairness lies primarily with African States. This is where we must begin the search for an agenda beyond the ICC. Suggesting that there has to be an agenda beyond the ICC does not, however, imply nor does it mean that the ICC should be irrelevant. Rather it means that there should be explicit recognition of burden sharing between Africa and the ICC as one institution that contributes to a more accountable world. Mindsets need to be adjusted: there are fallacies, illogics and unsustainable expectations inherent in treating the ICC as if it were a proxy for international justice. It isn't.

The burden of expectation on the ICC in fact encourages more irresponsible and unaccountable governments in Africa. A strategy for a more effective ICC must preserve it as a credible threat and an option of exceptional with a limited docket of demonstration cases on which it can concentrate limited resources for effective results. In a world of shrinking budgets, we must accept that there is a relationship of inverse proportionality between the size of the docket of the ICC and its effectiveness as a threat to impunity anywhere.

There is, however, no choice between national or regional mechanisms and the ICC. They're all part of a menu. Therefore, we need an agenda that works for Africa in order for the ICC to be relevant. That agenda, it is submitted, must begin with political and institutional reform in African countries. A lot has been said about reforming elections to make them more credible and reforming courts. African scholars and theorists also have to give more attention to reform of public administration. Just as importantly, we need to make national institutions for the protection of human rights work. One possible agenda that could emerge from here is how to make National Human Rights Institutions (NHRIs) relevant to the agenda of preventing mass atrocities in Africa.

Second, we must address the proclivity for short memories and the need for sustained memory on mass atrocities in Africa. It is worthwhile to consider here the idea of an Africa Atrocities Archive. Alex de Wall recalls a relevant story here to buttress this suggestion:

When the Organisation of African Unity (OAU) was created in 1963, the Emperor Haile Selassie granted it land near Addis Ababa University. But the Africa's leaders were in a rush and didn't want to wait to construct their headquarters from scratch so they asked for the OAU secretariat to move into a ready-made set of buildings. They were given the police training college, and have been there ever since. Right next door to the college was located the city's central prison. Built by the Italians during their brief colonial occupation (1936-41), it was colloquially known as Alem Bekagn – "farewell to the world."

During the Italian period, many Ethiopians who passed through its squat, square portal never saw the outside world again. When exercising in the small octagonal courtyard, surrounded by two tiers of cells, all they could see of the rest of the world was the sky. Hundreds of Ethiopia's educated and social elite were killed there in what was called the "Graziani massacre" after the Italian military governor of the day. In Haile Selassie's time – before and after the creation of the OAU – Alem Bekagn continued to house political prisoners, the great majority of whom did actually see the world outside after their spells in prison. During the revolutionary period and the rule of the Dergue – the Provisional Military Administrative Committee headed by Mengistu Haile Mariam, from 1974-91 – Alem Bekagn's name became grimly appropriate. In the first days of the revolution, sixty ministers were killed just outside the prison's front gate. In the days of the Red Terror, it was the site of countless extrajudicial executions. Thousands of political prisoners, and people merely suspected of harboring opposition sentiments, were crammed into the old prison and an expanding cluster of jerry-built barns in the compound. Alem Bekagn was the epicenter of Ethiopia's ruthless experiment in totalitarian rule. The building itself – low and ugly – was physically far smaller than its huge imprint on the psyche of a generation of Ethiopians.<sup>92</sup>

In 2004, the government of Ethiopia donated the site to the AU. On the tenth anniversary of the genocide, April 7, 2004, the AU approved a resolution jointly sponsored by Ethiopia and Rwanda, to turn the site into a permanent memorial for mass atrocities in Africa. This was widely welcome. But in 2005, the site was demolished to make way for the new Chinese-donated headquarters conference building of the AU. This history of the site of the AU headquarters makes places an even greater responsibility on the AU to ensure that such an archive is brought into existence. Until it is done, our obligation to memory remains to be fulfilled. In the short term, African intellectuals and researchers can begin mapping the archaeology, geographies and taxonomies of atrocities.

Third, legal research and anthropology is needed. Models of workable accountability are important. To begin with, African institutions could be taken a lot more seriously. It is not enough to simply dismiss them as unworkable or useless. If there is no demand on these institutions, they cannot prove themselves. The jurisprudence of African institutions as well as their practice thus needs better documentation and analysis. To begin this, we may wish to convene a closer examination of the new international crimes protocol to the African Court Protocol. Evidence-based advocacy is required. We also need to cultivate and grow the skills of Africa's legal and intellectual communities. This will require a knowledge creation and transmission agenda which African universities can lead on.

Such evidence-based advocacy will address the need to wean ourselves of some reflexes and habits. One of such reflexes is the idea that the ICC is able and African institutions are incapable. As institutions run by human beings, the first premise must be that all institutions are imperfect and mostly inward looking. Institutional theories and laws are about seeking mechanisms to perfect inherently imperfect institutions. Many institutions are not always created for the right or sustainable reasons. But every institution is an opportunity waiting to be seized. If everyone went along with writing off the African Commission on Human and Peoples' Rights in 1981, we would have no African Court on Human and Peoples' Rights nor indeed the regional courts and tribunals of the sub-regions of Africa.

Above all, we must not forget that mass atrocities are about human victims. As long as we continue to fixate on the politics, we miss what matters. We also miss the fact that victims will seek help from wherever they can get it. Such help is not always to see someone go to jail or hanged. There needs to be an agenda for how to amplify the voices of victims, ensure they have access to assistance and get across the message that it is not agreeable for people to suffer at the hands of those who govern them.

All these will not be done by one entity or institution. Nor do they require the same concentration or pool of skills. They do require, however, that we sustain conversations beyond a single forum and we find ways to seek mutual understanding and pathways beyond and complementary to the ICC. Zealotry of any hue diminishes this enterprise. Certainty about where it could lead to does not exist. We do need genuine partnerships though – between various disciplines, hemispheres, and points of view: partnerships built on mutual respect among a community of actors that can agree on ends but not always as to means.

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## Notes

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24. *Ibid.*, p. 117
25. BBC, "Germany Admits Namibia Genocide" available at <http://news.bbc.co.uk/1/hi/world/africa/3565938.stm> See generally, David Olusoga & Casper Erichsen, *The Kaiser's Holocaust: Germany's Forgotten Holocaust and the Colonial Roots of Nazism*, (2010)
26. Haile Selassie, Appeal to the League of Nations, June 1936, available at <https://www.mtholyoke.edu/acad/intrel/selassie.htm>
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28. Frans Viljoen, "Introduction to the African Commission on Human and People's Rights" in, *Human Rights Law in Africa*, Vol. 1, at 385, 389 (Christof Heyns ed., 2004).
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30. Bolaji A. Akinyemi, "The Organisation of African Unity and the Concept of Non-Interference in Internal Affairs of Member States" XLVI, *Brit. Yrbk of Int'l Law*, 393 at 397
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32. *Ibid.*
33. Tulya-Muhika S., ed., *Lessons From the Rise and Fall of the East African Community: A Summary*, 35 (1995)
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35. *Ibid.*

36. Monrovia Declaration of Commitment on the Guidelines and Measures for National Collective Self-Reliance in Economic and Social Development for the Establishment of a New International Economic Order”, AHG/ST3 (XVI), July 1979, Preamble, para. 6
37. President Leopold Senghor had requested the drafters of the African Charter to “keep constantly in mind our values of civilisation and the real needs of Africa.” “Address by President Leopold Senghor to the Dakar Meeting of Experts Preparing the Draft African Charter on Human and Peoples’ Rights, OAU Doc. CAB/LEG/67/X, reprinted in Kunig P., Benedek W. & Mahalu C.R., eds., *Regional Protection of Human Rights by International Law: The Emerging African System*, 121 (1985).
38. Decision on Human and Peoples’ Rights in Africa, AHG/Dec. 115(XVI), Rev. 1, 1979, para 1.
39. *Ibid.*, para 2(b).
40. OAU, *Resolving Conflicts in Africa: Implementation Options*, paras 107-124
41. Under cover of these instruments, ECOWAS States deployed a regional monitoring group in the Liberian civil war in 1991, later backed by the UN Security Council. See, Weller M., *Regional Peace-keeping and International Enforcement: The Liberia Crisis*, (1994); Fatsah Ouguergouz , “Liberia”, 2 *AYIL* 208 (1994)
42. Speech by His Excellency, The President of the Republic of The Gambia, at the OAU Ministerial Conference on Human and Peoples’ Rights, Banjul 9-11 June, 1980, CAB/LEG/67/8, 7.
43. The Charter contains 68 articles organised in four chapters. Its normative guarantees are enunciated in articles 1-29; articles 30-62 contain institutional provisions, while the remainder contain general provisions relating to its adoption, ratification, entry into force, and amendment. For an account of the negotiating history of the Charter, see, Mbaye K., *supra*,, 147-160. Ouguergouz, *The African Charter, supra*,, 20-48; Ramcharan B., “*The Travaux Préparatoires* of the African Commission on Human and Peoples’ Rights”, (1992) 13 HRLJ. 307; Kannyo E., “The Banjul Charter on Human and Peoples’ Rights: Genesis and Political Background”, in Welch C.& Meltzer R., eds, *Human Rights and Development in Africa*, 128 (1984)
44. Cairo Declaration on the Political and Socio-Economic Situation in Africa and the Fundamental Changes Taking Place in the World, AHG/Decl. 1(XXVI), 1990, para. 10.
45. *Ibid.*, para. 11
46. OAU, *Resolving Conflicts in Africa*, (1993)
47. IPEP Report, para. 11.14, p. 71
48. *Ibid.*, para 11.28
49. *Ibid.*, paras 15.86-15.87
50. 64th Ordinary Session of the Council of Ministers of the OAU, 1-5 July, 1996, Resolution on Liberia, CM/Res. 1650 (LXIV), para 12 (italics supplied)
51. 8th Meeting of Ministers of Foreign Affairs of the ECOWAS Committee of Nine on the Liberian Crisis, Abuja 15-17 August, 1996, Final Report, para 32, reprinted in 22 *ECOWAS Official Journal*, 100 at 104.

52. 4th Meeting of the Heads of State and Government of the ECOWAS Committee of Nine on the Liberian Crisis, Abuja, 17 August 1996, Final Communiqué, para 13, reprinted in 22 *ECOWAS Official Journal*, 112 at 114.
53. *Ibid.*, para 28. Also rising from their meeting in Monrovia on 9 November 1996, ECOWAS Foreign Ministers “condemned the abuses, harassment and atrocities inflicted on the civilian population.” See, 9th Meeting of Ministers of Foreign Affairs of the ECOWAS Committee of Nine on the Liberian Crisis, 8-9 November 1996, Final Report, para 67, reprinted in 22 *ECOWAS Official Journal*, 121 at p. 130.
54. See Decision HSGC9-1/8/96, Relating to Sanctions against Persons Who Violate the ECOWAS Peace Plan for Liberia.
55. Code of Conduct for the Members of the Council of State of the Republic of Liberia, reprinted in 22 *ECOWAS Official Journal*, 119 at 121.
56. See Chidi Anselm Odinkalu, “From Architecture to Geometry: The Relationship Between the African Commission on Human and Peoples’ Rights and Organs of the African Union” 35 *Hum. Rts. Q.*, 850 (2013)
57. *Ibid.*, p. 862
58. By August 2012, for instance, the Commission had been unable to deploy a mission of investigation into Libya, for instance, because “the situation on the ground in Libya has continued to be so unstable and fluid, it has not been possible to gather the required evidence.” See Letter, Ref No. ACHPR/AfCHPR/2/799/12 of 28 Aug. 2012 to the African Court on Human and Peoples’ Rights in respect of Application No. 004/2011, *African Commission on Human and Peoples’ Rights v. The Great Socialist Libyan Peoples’ Arab Jamahiriya*.
59. See African Commission on Human and Peoples’ Rights, Zimbabwe: Report of the Fact-Finding Mission, DOC/OS(XXXIV)/346a (June 2002); African Commission on Human and Peoples’ Rights, Report of the African Commission on Human and Peoples’ Rights Fact-Finding Mission to the Republic of Sudan in the Darfur Region, EX.CL/364 (XI)Annex III (July 2004).
60. Protocol Relating to the Establishment of the Peace and Security Council of the African Union, art. 2(1), adopted 9 July 2002, *entered into force* 26 Dec. 2003, available at <http://www.au.int/en/content/protocol-relating-establishment-peace-and-security-council-african-union>, [hereafter PSC Protocol], Article 1.
61. Chidi Anselm Odinkalu, “From Architecture to Geometry”, *supra*, note... p. 863
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73. Communiqué of the 142nd Meeting of the Peace and Security Council, para 3.
74. *Ibid.*, para 11; Decision on the Application by the International Criminal Court (ICC) Prosecutor for the Indictment of the President of the Republic of Sudan, Assembly/AU/Dec.221(XII), para 8.
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82. Assembly/AU/ Dec.199(XI), para 5
83. Italics inserted
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