

The International Criminal Court and the African Union: Is the ICC a bulwark against impunity or an imperial Trojan horse?

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Abstract

There is a diplomatic impasse between the International Criminal Court (ICC) and the African Union (AU) regarding accountability for mass atrocities committed in Africa. The AU accuses the ICC of bias against African rulers, in effect, 'Africans', while the ICC insists that as a permanent legal institution, it affords justice to all victims of egregious crimes such as war crimes, crimes against humanity and genocide. And so Africans, victims of these crimes, deserve justice too. Since the indictment of the Sudanese president, Omar al-Bashir, twice for crimes against humanity and then for genocide, the ICC has elicited antipathy from some African rulers and their supporters who perceive it as an adjunct of imperialism encroaching on Africa's sovereignty. However, sovereignty entails responsibility to protect (R2P). The AU Constitutive Act of 2000 affirms this under the non-indifference principle. It is therefore counter-intuitive to accede to international norms and concurrently invoke 'absolute sovereignty' as

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some African rulers attempt to do. Africa's conflicts are characterised by mass atrocities owing to weak states that are unable and often unwilling to protect citizens and dispense justice. In some cases these states are themselves perpetrators of heinous crimes, which necessitates intervention by the international community. Historically, *realpolitik*, self-preservation and geopolitics have marred international criminal justice, and Africa's relationship with the West is steeped in humiliation making some African rulers suspicious of Western-dominated institutions. The perception that the ICC dispenses lopsided justice stems from this history. This paper argues that the choice between justice and peace is a false one since the two mutually reinforce each other, while impunity, if not checked, portends instability in Africa.

Keywords: Africa, Kenya, African Union, ICC, R2P, ethnicity, international criminal justice

Introduction

The European Holocaust brought into sharp focus the horrendous atrocities that human beings, possessed by visceral hatred and incitement, can afflict on fellow human beings because of racial, political, ethnic, religious or even class difference. It showed how a rogue regime can be a threat to the existence of a people defined as a group. The sheer scale and meticulousness of the European Holocaust was unconscionable. Nazi extremists abused science, a marker of modernity, to kill millions of people in a manner that bordered on the barbarous. The mass killings were unprecedented and unsurpassed in recorded history. Not that there is a hierarchy of atrocities and suffering, but what distinguishes the European Holocaust was the attempt to annihilate entire groups of people – Jews, Gypsies, communists and other groups they defined as sub-human – because of their identity. These horrendous crimes gave rise to the word 'genocide'. It is, however, important to note that the first historically documented genocide in the 20th century was the Herero one (1904–1908). German troops targeted Herero and Nama people in the then German South West Africa, now Namibia, for elimination (Melber 2005).

Genocide is the apex crime in the criminal justice system. It is an attack against our collective sense of humanity and that is why it must concern human beings of ethical and moral standing, regardless of where it occurs and who are the victims. In Article 2 of the United Nations (UN) Convention on Genocide, 'genocide' is defined as any of the following acts committed with intent to destroy, in whole or in part, a national, ethnical, racial or religious group, such as: (a) Killing members of the group; (b) Causing serious mental or bodily harm to members of the group; (c) Deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part; (d) Imposing measures intended to prevent births within the group; (e) Forcibly transferring children of the group to another group (United Nations 1948; Rome Statute of the International Criminal Court (ICC) 2002: Article 6). What is central to the definition of the crime of genocide is not the severity of the atrocities or the number of victims, but the intent. If the killings are deliberate, discriminative and targeted at a particular group, it is regarded as genocide, regardless of whether the deaths are thousands or millions.

In the wake of the atrocities committed by the Nazis, the world vowed that 'never again' would such a horrendous crime be tolerated anywhere in the world. Since the European genocide, however, humanity has been debased throughout the world by further crimes against humanity, war crimes, ethnic cleansing, and genocide. Since the European genocide, gross violations of international humanitarian law have occurred in Latin America, Africa, the Middle East, and Eastern Europe, specifically in the Balkans. At the time of writing, egregious violations of human rights continue unabatedly in Syria, Libya, the Democratic Republic of the Congo (DRC), Myanmar (formerly Burma), Ethiopia, and South Sudan. The world has learnt either little or nothing from the history of atrocities.

Had the ICC been in existence at the time when mass atrocities occurred in Latin America, most of its indictments would most likely have been from this region. When the ICC began functioning (2002), however, it was Africa where there was a legacy of autocratic regimes responsible for mass atrocities, and where, in spite of the shift to multiparty democracy

in the early 1990s, egregious crimes still occurred. The Rwandan genocide in 1994, the genocide in Darfur, Sudan (2003), ethnic massacres in South Sudan, cyclic tribal atrocities in Kenya, Nigeria, Uganda, the DRC and the Central African Republic (CAR) are among prominent cases of wanton destruction of human life under multiparty politics – in an era in which the rule of law and respect for human rights were expected to prevail. Previous atrocities and specifically the Rwandan genocide, atrocities in the Balkans, Liberia, Sierra Leone, among other parts of the world, made a compelling case for a permanent legal infrastructure to address heinous crimes and flagrant disregard of international humanitarian law.

Dictatorial civilian and military regimes under Africa's one-party states committed gross human rights violations. Those of Hissène Habré of Chad, the Dergue of Mengistu Haile Mariam in Ethiopia, Jean Bédel Bokassa of CAR, Idi Amin of Uganda, Sani Abacha of Nigeria, to name but just five, rank among the most brutal of them all. A history of horrific occurrences, and specifically the Rwandan genocide, resulted in Africa's near unanimous initial support for the formation of the ICC, a permanent institution to combat mass atrocities. Thus Africa has the largest regional bloc within the Assembly of States Parties (ASP). South Africa's frontline support and participation in the drafting of the Rome Statute was invoked by the fact that the UN defined the apartheid system as a crime against humanity (United Nations 1973; Rome Statute of the ICC 2002: Article 7(j)). The ICC is central in international criminal justice since it obviates the need to form ad hoc UN criminal tribunals and hybrid courts previously set up on a case-by-case basis. The International Criminal Tribunal for Rwanda (ICTR), the International Criminal Tribunal for Yugoslavia (ICTY), and the Special Court for Sierra Leone are illustrations of institutions previously used to discharge international criminal justice.

The article defines the concept of genocide, analysing it and related crimes to underscore its centrality in the Rome Statute and the Responsibility to Protect (R2P). It also highlights sovereignty as a moral obligation to defend and secure international humanitarian law, but not as a veneer behind which mass atrocities unabatedly take place. The article, further, problematises the question of justice and particularly the false choice between justice

and peace, and the ‘dichotomy’ between retributive and restorative justice. It argues that justice is *sine qua non* to entrenching political stability and in its absence, impunity thrives which, if not checked, can easily dissolve a state into unmitigated lawlessness. A nuanced reading of the clash between jurisprudence and politics in the ICC operations in Africa also features.

Sovereignty as ‘Responsibility to Protect’

The principle of sovereignty is not an absolute. Interference in the internal affairs of states by others has been in existence for centuries. In the nineteenth century, for instance, the international community intervened to bring an end to piracy, slave trade, and violation of the human rights of minority groups (Sarkin and Paterson 2010:347). As such, the character of the principle of sovereignty must reflect a state’s international obligations, treaties, and its participation in international organisations. All these instruments and membership within international bodies limit the sovereignty of a state. Simply put, ‘by virtue of their commitment to human rights and democratic governance, and by virtue of their membership in the global community of nations, all states and their personnel undertake to abide by international norms’ (Mwanasali 2006:90).

According to Deng, the concept of sovereignty rests on three principal sources: the degree of respect merited by an institution, the capacity to rule, and the recognition that this authority acts on behalf of and in the best interest of the people (Deng 2010:360). Sovereignty imposes obligations on a state. A government worth its salt has the responsibility to maintain security, enforce the rule of law and deliver on collective goods and services. In a word, sovereignty entails accountability and responsive leadership. When people are in imminent danger of deprivation, or death, the concerned state has to secure their wellbeing and safety; if not, the international community is morally obliged to intervene to forestall a humanitarian crisis and violation of human rights (Deng 2010:354). Moreover, Deng observes that it would be callous and irresponsible for a caring world not to respond in the face of a humanitarian crisis. He sums up the essence of the idea of ‘sovereignty as responsibility’ thus: ‘The best assurance of maintaining sovereignty is therefore to establish at

least minimum standards of responsibility if need be with international cooperation. Thus, the role of the international community is to render complementarity protection and assistance to those in need and to hold governments accountable in the discharge of their national responsibilities' (Deng 2010:354).

The application of the responsibility to protect (R2P) principle in Africa is controversial because of a history of humiliation. Slavery, colonialism, the Cold War, and Western-dominated institutions, have eroded the sovereignty of virtually all African states. Many African rulers are therefore suspicious of the intentions of Western-led intervention missions in Africa's conflicts for fear of encroachment on their sovereignty, or what remains of it, under the pretext of responsibility to protect (Sarkin and Paterson 2010:344). African governments have acceded to the principle and practice of a multilateral approach to R2P both at the regional and continental levels (Sarkin and Paterson 2010:344). Therefore these governments have to implement these norms by upholding human rights and international humanitarian law.

Prevention: The core of R2P

According to the United Nations Secretary-General's report on 'Implementing Responsibility to Protect', responsibility to protect means a responsibility to prevent a crisis from occurring, a responsibility to react once it occurs, and a responsibility to rebuild in the aftermath of a crisis (United Nations 2009:7). The R2P principle provides for the use of force, but prevention is its centrepiece in the sense that States are encouraged to meet their core protection responsibilities to pre-empt conflicts (United Nations 2009:7). States have the responsibility to protect their citizens from avoidable catastrophes such as mass murders, rape, and starvation, but when they are unwilling or unable to fulfil this responsibility, the international community must step in. When a population is threatened by serious harm due to civil war, insurgency, repression, or state failure, but the affected state is unwilling or unable to bring the challenge under control, 'the principle of non-intervention yields to the international responsibility to protect' (Sarkin and Paterson 2010:344–345).

Deng argues that the concept of sovereignty as responsibility has two complementarity dimensions. Firstly, sovereignty obliges the state to protect its citizens for it to have legitimacy and respectability within the international community. Secondly, 'sovereignty as responsibility' refers to accountability. It means that when a state lacks the political will or capacity to discharge its responsibility to safeguard the welfare of its citizens, the international community is duty-bound to intervene and assist whether the affected state seeks international assistance or not (Deng 2010:354–355). However, the intervention must not be unilateral. The International Commission on Intervention and State Sovereignty (ICISS) outlines six criteria that a military intervention must meet: it must be for a just cause, have the right intentions, be a last resort, be authorised and executed by a legitimate authority, adhere in action to the principle of proportionality, and have a prospect of success (Sarkin and Paterson 2010:347). Owing to the power imbalance in global affairs, however, it is often easy to intervene in small and weak states, but geopolitically strategic states in imminent danger of a humanitarian crisis, or themselves responsible for the violation of their citizens' rights, are usually engaged diplomatically or their actions are deemed consistent with the dictates of sovereignty (Deng 2010:355).

Sovereignty is a tenuous concept in Africa, however. In some African countries such as the DRC, the government is confined to Kinshasa, the capital city, and hardly controls the entire territory because various internal forces challenge its legitimacy. In a word, 'sovereignty is more legal fiction than practical reality' in this context (Sarkin and Paterson 2010:348). African countries have ceded part of their sovereignty through membership in regional bodies and the African Union whose Constitutive Act of 2000 is consistent with R2P principles (Sarkin 2010:348). Sovereignty is no longer sacrosanct when the United Nations (UN) Human Rights Council reviews the human rights of countries that have ratified specific human rights treaties as well as those that have not – a development that has diminished the claim to sovereignty that tends to regard 'domestic affairs' as the exclusive domain of individual states (Sarkin and Paterson 2010:348).

The African Union and R2P

The launch of the AU in July 2002 in Durban, South Africa, was expected to herald transformative and normative politics in Africa. Article 4(h) of the AU Constitutive Act affirms ‘the right of the Union to intervene in a Member State pursuant to a decision of the Assembly in respect of grave circumstances namely: war crimes, genocide, and crimes against humanity’ (AU Constitutive Act 2000). The Organisation of African Unity (OAU) abetted gross human rights violations through the notion of non-interference in internal affairs of member states. Counter-intuitively, the non-interference clause is still codified in the AU Constitutive Act 4(g): ‘non-interference by any Member state in the internal affairs of another’ (AU Constitutive Act 2000). The OAU was exclusively an entity of heads of state and government and played a negligible role in addressing human rights violations because these rulers were at the same time the perpetrators of human rights abuses. As such, humanitarian intervention was often out of the question (Sarkin 2010:372). Not long before its dissolution, however, the OAU made some steps to prevent and resolve some conflicts in countries such as Burundi (Sarkin 2010:372).

Africa’s single party and multiparty autocrats took advantage of the OAU’s self-serving interpretation of sovereignty in order to oppress dissidents and entire communities, and, in some cases, commit human rights violations against them. Illiberal regimes defined sovereignty parochially to mean territorial integrity and the right to abuse legitimate instruments of violence to suppress dissent with impunity. They dismissed those who disagreed with them as a threat to state security. They thus conflated dissent with a treasonable offence that provided a legal imprimatur to target political opponents, stigmatised as enemies of the state and traitors. The AU has seen some shift in thinking regarding its role in addressing human rights violations in Africa. The AU places emphasis on the non-indifference principle in line with the international norm whereby strict and rigid notions of sovereignty are giving way to the ‘responsibility to protect’ (Sarkin 2010:373). But this norm is yet to be consistently and optimally actualised under the rubric of ‘African solutions to African problems’ due to the absence of political will, the lack of resources, and the normative incoherence within the AU.

Non-interference to non-indifference

The AU has not demonstrated aversion to pervasive impunity. Impunity imperils Africa's stability. Some African rulers exploit violence and amend constitutions to cling to power upon removal of term limits. Pierre Nkurunziza of Burundi, Denis Sassou Nguesso of Congo Republic, and Joseph Kabila of the DRC lengthened their stay in power through removal of the third term limit. Dubious elections were thereafter held in Burundi and Congo Republic that the incumbents controversially won. Paul Kagame of Rwanda, in power since 2000 and as de facto president since 1994, extended his stay in power through a dubious referendum in which his campaign for the constitutional amendment received near universal endorsement that could see him stay in power possibly until 2034. In 2016, Nkurunziza and Sassou Nguesso were challenged locally, whereupon they reacted brutally and cracked down on protesters resulting in deaths and injuries. In May 2018, Burundi held a referendum on the removal of the constitutional term limit and extension of the presidential term from five to seven years. A majority, 73.26 percent, voted 'Yes', which allowed Nkurunziza to run for two seven year terms and potentially extend his tenure until 2034 as well. The DRC is in the throes of instability across the country, a situation that could be exacerbated by succession-related violence unless Joseph Kabila paves the way for credible elections to allow the Congolese to exercise their inalienable right to choose his successor. Kabila overshot his legal two terms that expired in December 2016 under the pretext that the country lacked the capacity to hold elections. The AU must treat the contravention of term limits, sham elections that guarantee that the incumbent retains power, and refusal by incumbents to concede defeat during elections as seriously as unconstitutional change of power through coups that are outlawed by the AU Constitutive Act (AU Constitutive Act 2000). Impunity was the defining characteristic of the OAU, cemented by the non-interference in internal affairs of member states clause (OAU 1963: Article III). The OAU interpreted this clause to mean non-intervention even in situations of gross human rights violations. Then, sovereignty was synonymous with non-interference and impunity. Like its precursor, the AU still has to contend with the lack of resources and political will to

implement the non-indifference principle. Most of the rulers under the AU, have credibility and moral issues that deprive them of the moral authority to condemn impunity and call out its perpetrators.

The Politics of International Criminal Justice

International criminal justice is not immune to politics. In any case, masterminds of crimes against humanity, war crimes, and genocide are not ordinary suspects. They are powerful state actors and non-state actors who often deploy violence to compete for power and resources. It is for this reason that geostrategic considerations and politics, but not legal considerations per se, play a role in the operations of the ICC. Who to indict and when, how many people to indict in a given conflict, issues of evidence gathering, and issuance of arrest warrants and how to affect them are as much legal matters as they are political. Despite these realities, a credible judicial process must restrict itself to individual criminal responsibility, and must not only be impartial in the pursuit of justice, but also be seen to be so.

Like its predecessors – International Military Tribunals (IMTs) after World War II, ad hoc UN tribunals, truth commissions, amnesties, and hybrid courts – the ICC has been dogged by politics since its inception and accused of perpetrating victor's justice. It simply means the victor in a conflict subjects the vanquished to the victor's preferred justice since the victor has the power to decide what will happen to the loser (Jalloh and Morgan 2015:199). The irony is that the triumphant parties that come to control the government of a post-conflict nation are likely to have had a role in the conflict (Jalloh and Morgan 2015:199). In Côte d'Ivoire, the ICC is accused of discharging victor's justice by focusing on atrocities by Laurent Gbagbo, the former president, and his supporters while ignoring atrocities by the allies of his successor, Alassane Ouattara (Corey-Boulet 2012). The Nuremberg Trials and the ad hoc UN tribunals were accused of dispensing the victor's justice too. In 1946, the Allies expediently ignored atrocities committed by their associates but chose to prosecute twenty-two

Nazi leaders (Jalloh and Morgan 2015:199). The ICTR was accused of trying only Hutu suspects but not Paul Kagame's Rwandan Patriotic Front (RPF) personnel who committed atrocities as well (Call 2004:104–106). Jalloh and Morgan, however, do argue that 'victor's justice is not only practically inevitable but in some cases it may also be practically desirable' (Jalloh and Morgan 2015:200). Critics fault the ICC for apparently ignoring atrocities in Palestine, Israel, Ukraine, Afghanistan, Chechnya, Iraq, Myanmar, Sri Lanka, and Syria because of the sensitive politics attendant to these conflicts (Murithi 2013:5). It has to be noted, however, that the Court has since opened preliminary examinations in more countries including Palestine, Iraq/UK and Afghanistan. Murithi is not convinced that these preliminary investigations are genuine. He observes that the former Chief Prosecutor, Luis Moreno-Ocampo, ensured that these investigations had an air of interminability in the sense that Moreno-Ocampo invoked technicalities to indefinitely avoid launching prosecutions (Murithi 2014:11; Murithi 2013:5). Iraq is not a State Party to the Rome Statute and neither has the United Nations Security Council (UNSC) referred atrocities in that country to the ICC although investigations concerning possible atrocities by British soldiers in Iraq have been launched (ICC 2006). ICC critics cite the fact that except Georgia, all ten countries with cases under investigation before the ICC are African. The fact that five of these situations are self-referrals has not debunked the narrative that the ICC caseload has an African hue while atrocities elsewhere seem to have been ignored for political and geostrategic reasons. No matter how hard it tries, the ICC cannot claim to be apolitical:

I think the ICC has to recognize, and what Ocampo has to recognize and I don't think he really did it at first, is whether he likes it or not, the ICC is a political institution. I fully believe that there are no institutions, governmental, legal, etc, that are not political institutions. There is a political component to all aspects of the global community and the ICC is not exempt from that (Prof Eric Leonard in Hoile 2014:27).

Furthermore, critics accuse the ICC of ignoring atrocities committed in Libya by the world's powerful nations under the North Atlantic Treaty

Organisation (NATO) aegis, while concentrating entirely on those by the ‘bad guys’ such as the fallen Libyan dictator, Muammar Gaddafi and his allies. What these accusations illustrate is that the relationship between jurisprudence and politics affects not only the ICC but also other international bodies, and that that happens for one principal reason: the law always operates closely with politics. Generally, their relationship is a reciprocal one. In international criminal law, this relationship is permanent – although not always evident – in at least two areas: the establishment of relevant institutions, and the specific operations of those institutions (Musila 2009:11).

The fact that the five veto-wielding permanent members (P5) of the UNSC – the US, Russia, Britain, France and China – refer cases to the ICC is evidence that the ICC is not and cannot be entirely a judicial institution. Among them, the US, Russia and China have not ratified the Rome Statute but often use their privilege to block proceedings against them and their allies as the case in Syria demonstrates. The UNSC cannot refer Bashar al Assad and his forces to the ICC for crimes against humanity because Russia and China, his backers, would veto such a resolution. Neither can the US, Britain and France countenance referral of the Syrian opposition to the ICC for war crimes. Contrary to Moreno-Ocampo’s stance that the ICC remit did not involve politics, the Court is not a purely legal institution and has to navigate international jurisprudence, realpolitik, and cultural nuances. During the trial of Kenyan suspects, the Office of the Prosecutor tried to prove that an organisational policy preceded the post-election violence in 2007–08. Uhuru Kenyatta and William Ruto, the most prominent of the Kenyan suspects, were accused of exploiting their command of tribal militias established by ancient traditions to commit atrocities against enemy tribes after the violently disputed elections in 2007 (ICC 2016; The New York Times 2016b). Moreover, the Assembly of States Parties (ASP) of the ICC, serves as the administrative arm of the Court, and constitutes mostly politicians, civil society, and government functionaries. This further proves that politics is closely linked to the law in the operations of the ICC.

The ICC also relies on the cooperation of member states to effect arrest warrants, and in evidence gathering against the accused – actions which go to the core of politics. The politically charged Kenyan and Sudanese cases and the impasse between the AU and the ICC, and that between South Africa and the Court over its failure to arrest al-Bashir while in attendance during the AU summit in Johannesburg in 2015, highlight the influence of politics in international criminal justice. The ICC intervention in Africa's conflicts is guided by geopolitics and, in some cases, is devoid of impartiality. It is ironic that some of the ardent critics of the Court are also beneficiaries of its perceived bias. The ICC is silent on complicity of Rwandan and Ugandan forces in gross human rights violations in the DRC (Reuters 2012). In Uganda, CAR, and the DRC, the ICC is accused of focusing exclusively on atrocities by rebels but not those by government forces. In the Ugandan context, President Yoweri Museveni was in attendance during a conference at which Luis Moreno-Ocampo, the founding Chief Prosecutor, announced that Uganda had referred five top commanders of Lord's Resistance Army (LRA), a rag tag army led by Joseph Kony that committed mass atrocities in Northern Uganda since 1986, to the Court. This seemingly skewed approach to justice erodes the ICC independence and casts aspersions on its impartiality (Hoile 2014:26–31). In Sudan, however, it indicted government actors as well as Darfuri rebels. Ultimately, 'The ICC must be committed both to the prosecution of crimes – that is, the most serious crimes of concern to the international community as a whole', as defined by Article 5 of the Rome Statute – and to the shifting, often contested terrain within which the Court was forced to operate' (Clarke 2012:311).

The ICC as a bulwark against impunity: Is Justice taken seriously?

Given that the ICC dispenses retributive justice, it was accused of impeding social cohesion and sustainable peace in Sudan and Libya after it indicted Omar al-Bashir and Muammar Gaddafi, respectively, in the midst of conflicts in the two countries. Previously the ICC had issued arrest warrants

against LRA commanders when negotiations for peace were ongoing, and were blamed for scuppering the process and hence to the resumption of hostilities and violence in northern Uganda (Clarke 2012:310–311). The AU asked the UNSC to defer proceedings against al-Bashir in the interest of peace in Sudan but when the UNSC did not act on the request, it asked member states not to cooperate with the ICC or risk being sanctioned. But there is no unanimous position on the ICC impasse even within the AU, let alone Africa, and that is why Botswana, among other states, publicly defied the AU and affirmed their international obligations under the Rome Statute (Werle et al. 2014:247). The UNSC Resolution 1593 that referred the situation in Darfur to the ICC included positive votes by Benin and Tanzania while Algeria abstained. UNSC Resolution 1970 that referred Libya to the Court was unanimous and had positive votes by Gabon, Nigeria and South Africa.

According to Nouwen (2013:172), the ICC-style justice is faulted because it tends to be ‘individual rather than communal, criminal rather than distributive, and punitive rather than restorative’. The ICC critics advocate restorative justice as often happens through African traditional conflict resolution systems. This does not create villains and victims. The *gacaca* courts, formed in the aftermath of the Rwandan genocide, complemented the ICTR and trials in the local judiciary, but they also exposed the inadequacies of traditional forms of conflict resolution because they were bedevilled by challenges such as intimidation and killing of witnesses, incomplete or fake confessions and corruption (Rugege and Karimunda 2014:99–101). The contrarian view is that the ICC, as a ‘court of last resort’, operates under the complementarity principle that compels it to intervene only when local judicial systems fail victims of atrocities. Although the ICC has inherent flaws, it is not compelling to dismiss it wholesale, especially if there is no other recourse to justice for the aggrieved. The failure to afford justice to victims of mass atrocities throughout Africa’s post-colonial period has cemented impunity and the consequent vicious cycle of violence. As Rwanda demonstrated, there is no dichotomy between redistributive justice and restorative justice because the two forms of justice are complementary and neither takes precedence over the other.

Antidotes for impunity and lawlessness are therefore urgently needed, because entrenched impunity ultimately spawns a deleterious cycle of violence (Nouwen 2013:172). Justice and accountability can indeed function as such antidotes, and should be taken as seriously as possible. The dichotomy between justice and peace and/or peace and truth is a false one. Clarke argues that justice and peace are often treated as if they are polar opposites: binaries that must be dealt with by different entities on the assumption that justice deals with the law while peace falls in the realm of politics. This false separation overlooks structural issues at the core of violence in many parts of Africa (Clarke 2012). In fact, it is counter-intuitive to talk about peace while ignoring justice and truth. Justice guarantees sustainable peace through reconciliation and state building. Through justice, a society affords itself an opportunity to affirm the sanctity of human life, and humanise victims of violence. Often Africa's victims of gross human rights violations are reduced to mere statistics, especially in the media. Fundamentally, the judicial process is cathartic, especially for the victims when they recount the horrors they encountered at the hands of callous perpetrators, and when they witness their tormentors atoning for their crimes in a judicial process that seeks to impartially ascertain the truth regarding atrocities committed. Although it may not deter would-be masterminds and perpetrators of egregious crimes in the future, and entrench the rule of law, justice ensures that the suspects of mass atrocities are held accountable and that the sanctity of human life and people's property is not degraded. Murithi is oblivious of this point when he argues that despite the ICC conviction of Thomas Lubanga in 2012, militia still visit atrocities upon Congolese unabatedly, to discredit the Hague-based justice (Murithi 2013:7).

The 'no peace without justice ideology' (Nouwen 2013:187) can serve as the searchlight of an impartial judicial process. An impartial criminal justice system can, however, also accord masterminds and perpetrators of violence a chance to redeem themselves. It does not have to be adversarial. The masterminds and perpetrators have to face their victims in a fair judicial process and could either be acquitted or convicted to atone for their crimes. Retributive justice and peace are not mutually exclusive. In the absence of

justice, impunity holds sway and impedes resolution of conflicts. Impunity renders conflicts intractable and recriminatory because it buttresses the notion that violence for political gain is rewarding. When state actors and non-state actors get away with the violation of international humanitarian law, violence gets embedded in power contestations. Politics imbued with violence easily leads to state collapse because it erodes the capacity of the state institutions, particularly the judiciary, to rein in politicians' caprices and regulate their behaviour. Rogue politicians are a threat to constitutionalism and social cohesion.

South Sudan illustrates the significance of justice in conflict resolution. Since 2013, the country has experienced internecine violence as forces allied to Salva Kiir, the President, and Riek Machar, the former first Vice-President cum rebel leader, fought against each other largely along ethnic lines following a fall-out between the two. Upon formation of a unity government in 2016, the United States (US) and the United Kingdom (UK) recommended the formation of an international tribunal, the Hybrid Court for South Sudan, to try those responsible for atrocities committed since December 2013 until 2016, although egregious human rights violations continued unabatedly beyond 2016. Whereas Kiir seemed to favour reconciliation through truth telling as opposed to 'disciplinary justice', Machar seemed to back the hybrid court approach to bring to justice those responsible for gross violation of international humanitarian law. He disowned an article in *The New York Times* purportedly jointly authored by the two politicians that argued for reconciliation to the exclusion of retributive justice (*The New York Times* 2016a). The Human Rights Watch report on atrocities in Unity State, South Sudan, attributed continued commission of atrocities in that country to decades of impunity, and recommended intervention through an independent hybrid court or the ICC (Human Rights Watch 2015). If individual criminal responsibility falls away under the guise of peace and stability, impunity could be entrenched in the South Sudanese body politic, the newest African state that seceded from the greater Sudan in 2011, and render the country dysfunctional.

The AU and external actors

Despite avowed talk against impunity and even documents that extoll normative politics, the AU has battled to get past statements of intent to implement the ideal of non-indifference. Implementation of the non-indifference norm is hampered by a lack of political will, which can be ascribed to several factors: the age-old propensity by African rulers to stand in solidarity with one another no matter what; the rulers' tendency to outsource responsibility for Africa's problems by wholly attributing them to actors from outside Africa; and suspicion over the intentions of multilateral bodies due to the legacy of colonialism and imperialism. Overdependence on external funding whereby over 70 per cent of the AU's annual budget is underwritten by donors contributes to the inability by the AU to take charge of Africa's security and assert its sovereignty. The AU lacks the capacity – logistically, technically and financially – to deploy peacekeeping missions in conflict situations without external assistance.

The conflict in Sudan's Darfur region was meant to give form to the AU's much vaunted mantra of 'African solutions to African problems'. In 2004, the AU dispatched troops on the ground in Darfur but they were overwhelmed by the scale and complexity of the conflict in a region so expansive. It forced the AU to shed all pride and call for its mission to be upgraded to a United Nations one. The Darfur humanitarian crisis showed how a security situation could go terribly awry when the 'responsibility to protect' does not go beyond rhetoric (Mwanasali 2006:95).

Since 2007, soldiers under the African Union Mission in Somalia (AMISOM) have been fighting against Al Shabaab militants to stabilise Somalia since it descended into anarchy in 1991. The forces depend on the European Union (EU) and the United States (US) for financial, expert, and logistical support. Burundi runs a risk of relapsing into civil war following a crisis triggered by the insistence by Pierre Nkurunziza to run for an unconstitutional third term in 2015. Neither the regional body, the East African Community (EAC), nor the AU could pre-empt the crisis, which casts doubts on the efficacy of early warning systems within the two bodies. Violence broke out,

but the AU and the EAC could not stabilise the country. The AU initially invoked Article 4(h) of its Constitutive Act and resolved to deploy a 5000-strong peacekeeping force to protect civilians from government forces and other violent groups. In reaction, Pierre Nkurunziza stated that he would regard the AU troops as an invading force if they ever set foot on Burundian soil. It compelled the AU to back off and instead send human rights and military monitors (Reuters 2016). One of the AU's glaring inadequacies is that it is not a supranational body with powers to enforce and even impose its resolutions on member states – a failing of non-institutionalisation of the rule of law within individual member states. Errant rulers invariably ignore the AU's resolutions without sanction.

The ICC and African judiciaries

Some African rulers and their supporters accuse the ICC of bias. It is not easy to denounce this accusation because the ICC case-load is largely African and black, and there is asymmetry in global power as reflected in the composition of the United Nations Security Council (UNSC). European funders are perceived to have leverage over the operations of the Court, hence 'cases are not being pursued on the universal demand of justice, but according to the political expediency of pursuing cases that will not cause the Court and its main financial supporters any concerns' (Murithi 2013:3). Worth noting, however, is that the ICC is a 'Court of last resort', whose cardinal pillar is the principle of complementarity, a core principle in the Rome Statute. Put simply, the Court only intervenes in situations in which the local judiciary is either 'unwilling or unable' to prosecute masterminds of gross human rights violations. The responsibility to prosecute suspects for egregious human rights violations lies first with national jurisdiction. According to Article 17 (1) (a), a case is inadmissible before the Court as long as '[t]he case is being investigated or prosecuted by a State which has jurisdiction over it unless the State is unwilling or unable genuinely to carry the investigation or prosecution' (Rome Statute of the ICC 2002).

But Africa is the ICC's 'favourite customer', in Igwe's words (Igwe 2008) because the continent is hamstrung by certain legal and political deficits.

Principally, there is lack of political will and capacity to prosecute masterminds of crimes under the ICC jurisdiction. Furthermore Africa's judicial systems tend to be weak due to executive political interference and corruption. Compounding the situation is that most African legal systems do not anticipate crimes under the Rome Statute and therefore a legal framework for such crimes is absent. In the Kenyan government's admissibility petition before the ICC, it argued that cases against six suspects be referred to the country, and promised to form an international crimes division in the High Court to try them (International Justice Monitor 2014). Moreover, identity politics based on ethnicity, cultural and linguistic differences, religion, clannishness, and regionalism make it hard for state institutions, including the judiciary, to operate above the fray of societal fissures. Thus Africa's judiciaries have no capacity or political will to bring to justice violators of international humanitarian law, who in most cases are exclusively prominent state actors some of whom are heads of state and government or their surrogates in the security forces. Warlords are equally powerful and the fact that they have the capacity to challenge the state through violence means it is not easy to try them locally either. The ICC suspects are therefore usually influential individuals, some with cult-like support that assumes tribal and clan fault lines. Besides, they have massive resources. Cumulatively, these individuals are often too powerful for domestic judiciaries.

Before the Rome Statute came into force on 1 July 2002, African countries did not invoke the principle of universal jurisdiction that permits countries to hold to account suspected masterminds of egregious human rights crimes irrespective of where the crimes were committed. Ousted dictators were accorded sanctuary in exile in other African states, where they lived in luxury. Some still do, such as Mengistu Haile Mariam who fled to Zimbabwe in 1991 and has been living there in exile since – despite requests by Ethiopia that he be sent back home to face trial for crimes under his socialist autocratic regime. Successive Ethiopian regimes have equally been implicated in atrocities and so, in a way, lacked the moral gravitas to try Mengistu had he been extradited. Apart from solidarity

among African rulers, Mugabe offered him sanctuary in reciprocation for Mengistu's support during the liberation struggle against Ian Smith and fellow Rhodesians. Except within South Africa, Ghana, Botswana, Mauritius and a handful of African countries, the doctrine of separation of powers is non-existent in African polities. Weak and dysfunctional judicial systems beholden to the executive are the norm. This combined with deeply divided polities because of identity politics causes Africa to have the highest number of cases before the ICC.

African rulers and self-preservation

Initially the ICC was preoccupied with cases involving warlords specifically in situations in the DRC, Central African Republic (CAR), Darfur, Sudan, and Uganda. There was no backlash from the AU after the indictment of warlords and rebel leaders. In these cases, particularly in the DRC and Uganda, the ICC helped to eliminate from the political matrix elements that incumbents regarded as undesirable and a threat to their hold on power. That is why Uganda's President, Yoweri Museveni, referred Lord's Resistance Army (LRA) commanders to the ICC but later turned into an acerbic opponent of the Court. Self-referral cases are not necessarily proof that the referring states have confidence in the ICC or uphold the rule of law. Some incumbents invoke the ICC to delegitimise the rebels and opposition that pose a threat to their hold on power. One of the ICC's critics, David Hoile, argues that Uganda and the DRC government forces also committed atrocities similar to those that the rebels were accused of before the ICC, but none of their actors was indicted on the basis of command responsibility (Hoile 2014:243, 271). In these countries, local judiciaries could not resolve these disputes owing to lack of resources, capacity, independence, and the fear of polarising further already divided societies and polities – thus leaving the ICC as the only recourse.

Once the ICC issued arrest warrants against Sudan's Omar al-Bashir, first for war crimes and crimes against humanity and then for genocide, in March 2009 and July 2010 respectively, most African rulers were concerned. Through al-Bashir's legal woes, their own sense of vulnerability before the

Court that they had no control over became clear. This unprecedented situation, followed by the indictment of Uhuru Kenyatta of Kenya, elicited a siege mentality and the closing of ranks among African rulers. Kenyatta was indicted in 2010 before he rose to power in 2013, but the AU rallied behind him and launched attacks against the ICC, dismissing the Court as a tool of the West to dominate, harass and even recolonise Africa. Curiously, Kenyatta, Ruto and their allies had rejected attempts to form a local tribunal to try suspected masterminds of Kenya's post-election violence by defeating a motion to that effect (The Standard 2011). Eventually the Kenyan cases collapsed for lack of sufficient evidence, and because of state interference with witnesses. The Kenyan government adopted a non-cooperation policy towards the ICC and refused to avail incriminating evidence against the accused, especially Kenyatta, as requested by the Court. The Office of the Chief Prosecutor (OTP) dropped crimes against humanity charges against Kenyatta, his deputy William Ruto and co-accused. Some witnesses inexplicably recanted their testimonies once Kenyatta and Ruto ascended to power in 2013. Witness tampering was extreme in that some witnesses had died through extrajudicial execution while others disappeared (ICC 2015; Kenya Human Rights Commission 2016). The dropping of crimes against humanity charges against the Kenyan suspects revealed three major weaknesses. Firstly, it exposed shortfalls in the ICC especially in the witness protection and investigative units. Secondly the pressure Kenya and the AU mounted against the ICC that led to some concessions, witnesses disappearance, deaths and recanting of testimonies by others, is proof that not many local judiciaries in Africa can withstand the pressure and interference from high profile suspects – the masterminds of mass crimes. Thirdly, the collapse of the Kenyan cases, in a way, showed that the ICC relies on evidence and not politics to convict and so powerful suspects have no reason to antagonise it unless they have something to hide. Curiously, not as much resources and energy have been expended in the case against the former Ivorian president, Laurent Gbagbo, or his Liberian counterpart, Charles Taylor, although the latter was tried and convicted before the Special Court for Sierra Leone. It implies that incumbency is what makes African rulers to rally behind one of their own in solidarity as

opposed to the mere fact that an ICC suspect was at some point a head of state or government. And so the accusation of bias that some African rulers level against the ICC is self-serving.

‘The African ICC’

A suggestion to expand the mandate of the African Court on Human and People’s Rights, and make it ‘the African Court’ to have jurisdiction over the Rome Statute crimes is laudable. However, it is not clear where the AU will source funding to operationalise it, given that the AU itself relies on donors. The cost of running the ICC is prohibitive and largely rests with the European states. The cost of successfully prosecuting one case can be extremely costly in monetary terms (Hoile 2014:37). However, justice is priceless and so cannot be quantified in cents and dollars. The impartiality of a judicial process but not the number of convictions is the yardstick for its credibility. Having said that, a judicial system in which colossal amounts of money and resources are invested but which has few convictions attracts criticism. The International Criminal Tribunal for Rwanda (ICTR) has been widely criticised for guzzling a lot of money but being short on convictions. Its significance, however, lay elsewhere. Jalloh and Morgan argue that the ICTR was jurisprudentially significant and contributed to international criminal justice that had been in abeyance for 45 years since the Nuremberg trials. It gave effect to the 1948 Convention on Prevention and Punishment of the Crime of Genocide and laid the groundwork for modern genocide law (Jalloh and Morgan 2014:215–217).

In June 2008 the AU Assembly adopted a Protocol on the Statute of the African Court of Justice and Human Rights to merge the African Court on Human and Peoples’ Rights (AfCHPR) in Arusha, Tanzania, and the African Court of Justice in Banjul, the Gambia, to form the African Court of Justice and Human and Peoples’ Rights (ACJHR), as the ‘African ICC’, as it were, to have jurisdiction over the Rome Statute crimes. Although this intention predates the impasse between the AU and the ICC, it is difficult not to see the link between the AU’s attempt to shield errant African rulers from prosecution and the renewed call for the fast tracking of the process

of the creation of the 'African ICC'. During the AU Summit in Equatorial Guinea in 2014, the AU member states voted and passed the Malabo Declaration to grant immunity to sitting heads of state and government and senior government officials before the envisaged court – an aberration from international criminal justice that historically has no immunity for suspects (Van Schaak 2010). If the 'African ICC' would not have jurisdiction over egregious crimes masterminded by senior state actors then it is doubtful whether it would play a role in addressing impunity. Before the Malabo Declaration, the AU had passed a resolution in Addis Ababa in 2013 that purportedly accorded heads of state and government immunity against the ICC. The Malabo Declaration and the Addis Ababa resolution were conspicuous in their failure to mention victims of violence and citizens of the affected countries.

The independence of the would-be African Court is also in doubt. In large measure, Africa's judicial systems are weak, pliable and pander to the whims of the executive, and it is doubtful that this court would be different. The whole is as good as the sum. The plan to form an 'African ICC' is reactive and aimed at duplicating efforts, and at worst is a cynical subterfuge by wily African politicians. Initiatives towards justice for victims of mass atrocities and other forms of injustices in Africa have proven elusive. The Southern African Development Community (SADC) tribunal, for instance, became a victim of its independence when it was defanged and then disbanded in 2012 after it ruled against Zimbabwe's former president, Robert Mugabe, in a series of cases involving land disputes (Zimbabwe Daily 2011).

Conclusion

Genocide and other crimes under the Rome Statute are the most egregious that a human being or group of human beings can ever commit. It behoves the world to ensure that there is no room for commission of these crimes. Africa needs to strengthen its judiciaries to avoid being in the sights of international criminal justice. Through justice, Africa would secure peace and stability. Restorative justice and retributive justice reinforce each other and are not diametrically opposed to each other. Impunity imperils

sustainable peace and stability because it undermines the rule of law and emboldens rogue politicians keen on exploiting violence for political disorganisation to reach self-serving ends.

The ICC is deficient in the sense that its operations are marred by inherent weaknesses as a result of the treacherous thin line between politics and the law in the Rome Statute. The refusal by the US, Russia and China among other nations to ratify and domesticate the Rome Statute and the UNSC politics regarding referral of cases to the Court denies the ICC universal legitimacy and credibility, and reinforces the perception that the Court is meant for weak states, especially in Africa. Such perceptions, however, do not justify denunciation of the institution as an adjunct of ‘imperialists’, formed to harass and gratuitously lock up African rulers. There are hardly any remedial legal mechanisms for victims of mass atrocities in Africa. Given that appropriate justice can hardly be accessed locally, the ICC is obliged to afford these people justice in keeping with the complementary principle. Justice and peace or peace and truth are not mutually exclusive. Such a dichotomy is spurious and therefore a false choice. Without truth, there cannot be justice and without justice, reconciliation, peace and stability cannot be attained. Ultimately, the ‘Never again’ rallying cry in the aftermath of the European Holocaust should not be a hollow slogan as it has been exposed by the Rwandan genocide. The legacy of atrocities on the continent is a living testimony that unless accountability becomes the lodestar of politics, the risk of recurrence of mass atrocities exists.

The ICC is seen as a bulwark against impunity by its apologists who hold the view that, on the whole, Africa’s judiciaries are weak, compromised and beholden to the executive, and thus genuinely unable to hold masterminds of egregious crimes to account. In contrast, some African rulers, their supporters and other critics perceive this institution as specifically set up to harass and keep African rulers in check. Both positions deserve attention. The ICC has to contend with a crisis of legitimacy, yet it requires legitimacy in order to dispense justice even-handedly and avoid the enduring accusation of promoting only victor’s justice. It is time the inherent deficits in the Rome Statute were addressed. The foremost is

the mandate by the UNSC to refer cases to the Court although three of its Permanent Members – the USA, China and Russia – have not ratified the Rome Statute. It effectively means these nations do not recognise the Court. This provision embeds the Court deeply in global geopolitics. The ICC should come to terms with the fact that although it is a permanent legal institution to address the most heinous of crimes, it operates in a political milieu because its suspects are predominantly political actors. The ICC, therefore cannot afford to characterise itself as an apolitical entity.

In as much as African rulers' accusations against the ICC cannot be dismissed out of hand, these individuals have the responsibility to uphold the rule of law within their respective states, protect their citizens' lives and property, and strengthen local judiciaries to combat impunity. It is not tenable for these rulers, under the aegis of the AU, to plead victimhood while at the same time some of them stand accused of perpetrating mass violence against defenceless citizens. The AU must uphold and implement the R2P as encapsulated in its Constitutive Act. Normative politics – hinged on the rule of law, invocation of the complementarity principle, at the core of the Rome Statute, as well as the principle of universal jurisdiction – will obviate the need for the ICC to intervene in African conflicts. Many treaties and international obligations, like the Rome Statute, to which African rulers are signatories, do chip away at sovereignty and render untenable the notion of 'absolute sovereignty'. African rulers, like their counterparts in other parts of the world, are duty-bound to honour such restrictions on their powers. Failure to comply with these treaties must elicit sanction.

The tendency among African rulers to stand in solidarity with their colleagues accused of gross human rights violations diminishes human life and impedes Africa's quest for security, peace and stability. Sovereignty means responsibility to defend and protect lives and property and is tested when citizens are at risk of ethnic cleansing, war crimes, crimes against humanity, and genocide. Given that in some cases high ranking government officials and security personnel are responsible for these apex crimes, the 'responsibility to protect' those at risk falls on regional bodies, the AU, the UN, and influential international actors such as the US.

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