An Epochal Bifurcation: The International Criminal Court, the African Court and the Struggle against Gross Human Rights Abuses

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Abstract

Focus on whether a criminal chamber in a reformed African Court represents progress or retrogression relative to advances made in the Rome Statute shifts attention from the similar foundation of the two courts on an epochal bifurcation between the worst human rights abuses and quotidian wrongs. This bifurcation compromises our understanding of how abuses are related, what we should do about them and how we should go about studying them. It is at the core of aspects of the International Criminal Court (ICC) that have come under severe criticism. It also imperils the criminal chamber of the nascent African Court.

Keywords: ICC, African Court, gross human rights abuses, transitional justice, human rights.

1 Introduction

After a century of agitation for a permanent international criminal tribunal, the world was on the verge of getting two in quick succession in June 2014 with the creation of the International Criminal Court (ICC) in 2002 and adoption of the African Union (AU) Protocol on the African Court in 2014. But instead of being an occasion for celebration by many human rights activists and legal internationalists, the period between the birth of the ICC and passage of the AU Protocol has been marked by much acrimony with the adoption of the AU Protocol, which did not even mention the ICC, seen by many as an effort to break the back of the ICC. Suspicion that the African court represents a retrograde step in a world in which the creation of the ICC marked significant progress is pervasive even as criticism of the ICC remains widespread and vociferous.

Baulking the trend that emphasizes differences between the two courts, this article argues that what is most striking about the two courts is not how different they are from each other but how similar they are to each other. In doing this, it explores a similarity that is of significant import for the two institutions – their grounding in an epochal bifurcation that separates the most serious abuses from more quotidian ones. The focus on this similarity is important because it offers a

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theoretical framework that allows us to make sense of some of the more significant criticisms of the ICC. It also sheds light on the extent to which the African Court is likely to suffer from the same deficiencies highlighted in criticisms of the ICC.

I argue that the two counts are similarly grounded in a problematic bifurcation that distinguishes between quotidian abuses and what are considered as the "worst crimes." This distinction has ontological form in our understanding of the nature of the two sets of abuses as well as the relationships between them. It also has important ethical implications in terms of the prescriptions that it gives for how to address these abuses. Finally, its epistemological significance lies in shaping how we go about studying abuses and the ways in which they are addressed.

The grounding of these two institutions in this bifurcation creates debilitations that are already apparent in the ICC and that are bound to appear in the African Court once/if actualized. Criticism concerning the incapacity of the ICC, the seeming selectivity and bias in its approach, comments about its dehistoricization of situations of abuse and complaints over the limits of privileging a retributive justice approach all point at problems that are rooted in the grounding of the ICC in this bifurcation. In choosing to ground the criminal chamber of the African court in this same bifurcation, the framers of the African Court have set that institution down this same flawed path.

The rest of this article is divided into five sections. The first section after this introduction briefly details the path to the planned African Court with a criminal chamber. It is followed by a second section, which reflects on the celebration of difference between the two courts that united both the supporters and critics of the creation of an African Court with criminal jurisdiction. The third section highlights a critical point of convergence between the two courts – their foundation on an ethical bifurcation between two types of human rights abuses. The ethical facet of this epochal bifurcation is developed in the fourth section. The fifth section reflects on the problematic nature of this bifurcation before the conclusion, which begins to suggest ways of escaping the problems engendered by this bifurcation.

2 The Road to a Criminal Chamber at the African Court

In June 2014, African Heads of States adopted a protocol creating a criminal chamber in the African Court of Justice and Human Rights ("African Court" for short) to deal with a special set of crimes including those covered by the ICC. This move seemed to mark the culmination of disputes and disagreements between the AU and the ICC whose creation had been greatly aided by the signature and ratification of the Rome Statute by a large number of African countries.[1] The adoption of the Rome Statute in 1998 was greeted warmly on the continent and

1 M. du Plessis, 'Implications of the AU Decision to Give the African Court Jurisdiction Over International Crimes,' *ISS Paper*, No. 235, 2012, p. 3.

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abroad by many who reveled in what was supposed to curb impunity, prevent abuses and contribute to peace.[2]

The warm relations between the AU and the ICC were fleeting.[3] In an environment in which what Hudson in 1938 had called "the spell which the idea of an international criminal court exercised on the minds of many"[4] was to very quickly wane, the AU become one of the fiercest opponents of the ICC even as some continued to back the ICC.[5] Complaints voiced by the AU, some of its members and other critics against the ICC center on a few issues. One of these is related to the sequencing of justice and peace and reconciliation efforts. Critics often charge that ICC insistence on indictments and prosecutions have sometimes badly undercut long-term peace and reconciliation processes with processes in the conflicts in Darfur, Sudan and Northern Uganda as examples.[6] The AU has suggested temporal sequencing with the goal of deferring criminal prosecutions to opportune moments when they are least disruptive of peace and reconciliation processes.[7] It is a view shared by many and elegantly enunciated by Mamdani when he notes that "it is sometimes preferable to suspend the question of criminal responsibility until the political problem that frames it has been addressed."[8]

The AU has also repeatedly bashed what seems to be the pursuit of a retributive justice approach to the exclusion of other forms of justice in the face of what are often protracted conflicts that result in divided societies. They point out that lines between victims and perpetrators are often unclear in these situations and that mending relations between communities through means that focus on reconciliation instead of punishment represents a better approach.[9]

2 C.C. Jalloh, 'Regionalizing International Criminal Law', *Legal Studies Research Paper Series Working Paper*, Vol. 9, No. 20, 2009, p. 446.

3 T. Murithi, 'Ensuring Peace and Reconciliation While Holding Leaders Accountable: The Politics of ICC Cases in Kenya and Sudan', *Africa Development*, Vol. 40, No. 2, 2015, pp. 74-75; S. Dersso, 'Unplanned Obsolescence: The ICC and the African Union', *Aljazeera*, 29 September 2015, available at <http://www.aljazeera.com/indepth/opinion/2013/10/unplanned-obsolescence-icc-african-union-201310913292871722.html> (accessed 15 September, 2016.

4 M. Hudson, 'The Proposed International Criminal Court', *The American Journal of International Law*, Vol. 32, No. 3, 1938, p. 551.

5 Jalloh, 2009, pp. 462-465; M. Faul, 'African Leaders Decide New War Crimes Court Can't Prosecute African Leaders', *The Associated Press*, 1 July 2014.

6 T. Mbeki & M. Mamdani, 'Courts Can't End Civil Wars', *New York Times*, 5 February 2014; C. Welch & A. Watkins, 'Extending Enforcement: The Coalition for the International Criminal Court', *Human Rights Quarterly*, Vol. 33, No. 4, 2011, p. 1010; D. Rothe & V. Collins, 'The International Criminal Court: A Pipe Dream to End Impunity', *International Criminal Law Review*, Vol. 13, No. 1, 2013, pp. 201-203; Jalloh, 2009, pp. 464-465.

7 Jalloh, 2009, pp. 464-465; C. Odinkalu, 'International Criminal Justice, Peace and Reconciliation in Africa: Imagining an Agenda Beyond the ICC', *Africa Development*, Vol. 40, No. 2, 2015, pp. 276-277.

8 M. Mamdani, 'The Logic of Nuremberg', *London Review of Books*, Vol. 35, No. 21, 2013, p. 33. *Also see* Jalloh, 2009, p. 476. One counter argument is that made by L. Beny, 'Think Courts Aren't Relevant? Ask the Victims', *Endgenocide.org*, 25 February 2014.

9 Jalloh, 2009, p. 489; M. Mamdani, 'Darfur, ICC and the New Humanitarian Order: How the ICC's "Responsibility to Protect" Is Being Turned in an Assertion of Neocolonial Domination', *Pambazuka*, No. 396, 2008; Mamdani, 2013, p. 34.

These two arguments have been accompanied by widespread dissatisfaction with what many at the AU see as the exclusive focus on Africa by the ICC despite the occurrence of grave abuses in many other areas of the world.[10] Appeals by ICC supporters to the perceived lack of willingness or capacity of many African states to deal with these abuses have not prevented talk about another racist scheme by the West to civilize Africans and target African leaders. It may well have been the refusals of the Office of the Prosecutor and the UN Security Council to use powers under Articles 53 and 16, respectively, of the Rome Statute to delay the pursuit of cases against sitting African leaders that represent the final straw that broke the proverbial camel's back in the gallop towards an African Court with criminal jurisdiction.[11]

3 The Birth of the African Court and the Dance of Alterity

The African Court of Justice and Human Rights (ACJHPR) to which a criminal chamber was to be added through the June 2014 protocol had been created through a 2008 Protocol on the Statute of the African Court of Justice and Human Rights. That document sought to unite two AU courts – the African Court of Justice and the African Court of Human and Peoples' Rights. The second of these courts had been created through a 1998 OAU Protocol on the African Court of Human and Peoples' Rights and had broad competence over human rights issues, with the goal of bolstering the protective function of the African Commission of Human and Peoples' Rights.[12] Neither of these courts had criminal competence, and the African Court, which was to result from their merger, also lacked criminal competence.[13] The adoption of the Protocol in Malabo, thus, represented a significant development in the life of the African Court. The Malabo Protocol is supposed to come into effect after 15 ratifications. Incidentally, the earlier protocol creating a unified African Court, which the Malabo Protocol seeks to amend, had only been ratified by five countries by June 2014, short of the 15 ratifications needed to bring it into effect.

The adoption of the protocol unleashed a discourse of alterity that united supporters and opponents of an African Court with criminal jurisdiction as specified by the Protocol. Supporters were quick to point to the ways in which the African Court represented an improvement on the ICC while opponents pointed to how the Court marked retrogression from gains made with the ICC. Opposing parties sometimes focused on different aspects of these courts and at other times dwelt on the same aspects through different interpretative lenses.

Supporters of the move have focused on issues that include the competence of the court, the nature of its institutional anchors and the balance it strikes between the powers of the prosecution and right of defendants. The expanded list

10 M. du Plessis & A. Louw, 'Justice and the Libyan Crisis: The ICC's Role Under Security Council Resolution 1970', *ISS Briefing Paper*, No. 4, 2011; Welch & Watkins, 2011, p. 1019.
11 Jalloh, 2009, pp. 464-465.
12 du Plessis, 2012, pp. 2-3.
13 *Id*., p. 3.

of crimes within the competence of the African Court is said to mark it from and represent an improvement on the ICC. This is partly because it is seen as a more exhaustive list of gross abuses.[14] In addition to the four crimes listed in the Rome Statute of the ICC – genocide, war crimes, crimes against humanity and aggression – the African court is empowered under Article 28A to deal with the unconstitutional change of government, piracy, terrorism, mercenarism, corruption, money laundering, trafficking in persons, trafficking in drugs, trafficking in hazardous waste and the illicit exploitation of natural resources.

Progress is said to also be evident also in the targeting of offences that pose particular problems to African societies.[15] Further, it targets crimes that are unlikely to be inserted in the areas of competence of other international criminal tribunals on account of the peculiar interest that powerful global powers may have in them.[16] Heated debates over and rejection of suggestions to include some of these offences in the Rome Statute[17] seem to bear this out.

The competence of the African Court is said to represent an improvement on the ICC in another critical way. Unlike the ICC, which is only empowered to try individuals under Article 25 of the Rome Statute, the African Court is also mandated to try corporations under Article 46C in addition to its ability to try individuals under Article 46B.[18] This makes sense given its coverage of offences like the illicit exploitation of natural resources. Again, the likelihood that foreign corporate giants are likely to be pursued for such crimes makes it unlikely that powerful countries from which they originate will allow similar provisions in a document like the Rome Statute.

A second point of difference from and improvement on the ICC and the Rome Statute is said to take the form of the institutional anchors of the Court. First, the African Court makes explicit reference to an ensemble of mechanisms and instruments for dealing with the question of human rights and gross abuses that the court is supposed to complement. Mention is made of the Constitutive Act of the AU, the African Commission on Human and Peoples' Rights, the AU commitment to intervene in countries to prevent gross abuses, and the like. Second, it is anchored in a more inclusive institutional basis. Article 29 paragraph 1b of the Protocol grants the Peace and Security Council of the AU the power to refer cases to the court just as Article 13b of the Rome Statute does for the ICC. But the Peace and Security Council of the AU is a far more inclusive body than the UNSC. It is a 15-member elected body with no permanent members and no veto wielders. This is unlike the UNSC with its five permanent members who wield vetoes. The fact that the Protocol does not give the PSC the power to suspend proceedings of the court or investigations of the prosecutor unlike Article 16 of the Rome

14 C. Jalloh, 'International Justice, Reconciliation and Peace in Africa', *CODESRIA Policy Brief Series*, No. 1, 2015, p. 5.
15 Jalloh, 2015, p. 5.
16 N. Boister, 'Treaty Crimes: International Criminal Court?', *New Criminal Law Review*, Vol. 12, No. 3, 2009, p. 352.
17 Boister, 2009, pp. 345-358.
18 Jalloh, 2015, p. 5.

Statute is also a difference that can represent an advance in the autonomy of judicial processes.

The provision of an Office of the Defense under Article 22C also represents a difference from the Rome Statute that could be said to represent an advance in providing more robust provisions for the protection of the rights of suspects.[19]

Critics have overwhelmingly focused on Article 46A bis of the Protocol as a point of difference and retrogression. Focusing on immunities, the article states that "No charges shall be commenced or continued before the Court against any serving AU 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." This article came to confirm all the suspicions of critics that the creation of the court was primarily a move by AU leaders to shield themselves and their own from prosecution. It was cast as an *impunity* provision that would thwart advances made in the Rome Statute, which makes the official position of an individual irrelevant to the ability of the Court to hold him or her accountable for his or her actions (Article 27).[20] In doing this, the Rome Statute had followed the provisions of Article IV of the Genocide Convention, which provides punishment for offenders "whether they are constitutionally responsible rulers, public officials or private individuals."

Critics point out that this ability of the ICC to pursue sitting leaders represents one of its biggest advances since the unwillingness and/or incapacity of many national courts to pursue sitting leaders means that they can only be pursued by international tribunals. Curbing the ability of such tribunals to try leaders effectively means what many see as the sort of impunity for abusive leaders that the Rome Statute was meant to deal with in the first place.[21] For many of these critics the fact that leaders could still be open to prosecution upon stepping down has been of little consolation. Instead, some have pointed out that it might only encourage leaders to cling on to power, threatening gains in democratic transition and consolidation in some politically sensitive countries.[22]

The expansive competence of the African Court compared with that of the ICC has also not escaped the attention of critics. Critics have raised concerns over the funding implications for the Court given the aid dependence of many African states and institutions.[23] Beyond funding concerns, the African Court can be said to have fallen into traps that the ICC was deliberately engineered to avoid through a restricted jurisdiction. A more expanded jurisdiction is said to create greater possibility of friction with national jurisdictions,[24] trivialize the magni-

19 Odinkalu, 2015, p. 278.

20 Faul, 2014.

21 Human Rights Watch, 'Statement Regarding Immunity for Sitting Officials Before The Expanded African Court of Justice and Human Rights,' 13 November 2014, available at <https://www.hrw.org/news/2014/11/13/statement-regarding-immunity-sitting-officials-expanded-african-court-justice-and> (accessed 15 September, 2016).

22 Jalloh, 2015, p. 6.

23 du Plessis, 2012, pp. 7-8; Jalloh, 2015, p. 6.

24 V. Nanda, 'The Establishment of a Permanent International Criminal Court: Challenges Ahead', *Human Rights Quarterly*, Vol. 20, No. 2, 1998, p. 417.

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tude and seriousness of the court and the international crimes it seeks to deal with[25] and make it more unlikely for it to be effective.[26]

While debates between those critical of the move to create the court and those more tolerant of the idea have been heated, the disagreeing parties are rooted on a common foundation. This is the view that the African Court and the ICC are different in fundamental ways.

4 Points of Convergence: The Epochal Bifurcation

This focus on the differences between the two courts masks the fundamental ways in which the African Court and the ICC resemble each other. These similarities are many and of great import. They include the centrality of complementarity and cooperation with the texts of the two documents being the same in many areas. But one of the most fundamental and consequential of these similarities is the foundation of the two courts on an epochal bifurcation that creates a dichotomy between human rights abuses that are seen as special and those that are regarded as quotidian. The rest of this essay focuses predominantly on laying out this bifurcation and exploring its debilitating implications for the two courts.

Human rights as a general quotidian subject have been the subject of much work and debate dating centuries, with discussions about their definition, nature, sources, means of protection, and so forth. The promulgation of the Universal Declaration of Human Rights in 1948 and the twin covenants on civil and political rights and that on economic, social and cultural rights represent giant steps in "global" acknowledgement and codification of a body of rights. Other instruments focus on racial discrimination, the rights of persons with disabilities, the rights of children, discrimination against women, and so forth. Many of these instruments counsel and invoke various levels of obligation for the respect of these rights and condemn their abuse. But they fall short of criminalizing and prescribing punishment for their abuse.

Predating many of these instruments and going back to the period after World War I (WW I), one can find the threads of discourses that sought to designate, codify and prescribe punishment for a special body of human rights abuses that were identified as particularly heinous and so deserving of extraordinary measures of punishment and prevention.[27] Identifying this set of exceptional abuses also by implication involved the delimitation of the boundaries of a set of quotidian abuses that while qualifying as contraventions of human rights were of less gravity and less importance, posed less danger to international peace and security and required less investment in their prevention and punishment. It is the act of imagining, creating and nourishing this dichotomy over decades that I call the epochal bifurcation. Terming this bifurcation epochal is motivated by its

25 Boister, 2009, pp. 352-53.

26 du Plessis, 2012, pp. 8-9.

27 Boister, 2009, p. 346; E. Neumayer, 'A New Moral Hazard? Military Intervention, Peacekeeping and Ratification of the International Criminal Court,' *Journal of Peace Research*, Vol. 46, No. 5, 2009, p. 660.

age in historical time as well as its very important consequences for human rights, gross abuses and international criminal justice.

The Genocide Convention of 1948 represents an early effort at crystallizing this bifurcation by invoking a particularly heinous offence, whose hideousness and danger far surpasses many other human rights abuses.[28] The Geneva Conventions of 1949 undertook the same exercise in focusing on war crimes and crimes against humanity. The Rome Statute of the International Criminal Court of 1998 represents the maturation of this effort at giving institutional form to this epochal bifurcation. In Article 5, it lists four very specific abuses that can be the concerns of the ICC – genocide, war crimes, crimes against humanity and the crime of aggression.

It is important to note, though, that this menu of "the most serious crimes of concern to the international community" is a historical one. It is a menu that is specific to a particular space and time. What have been considered as the "most serious crimes of concern to the international community," to use the language of Article 5 of the Rome Statue, has seen a clear evolution over time. In 1928, concerns for a proposed international criminal tribunal included "false charges and misrepresentations against any nation," "libelous statements against other nations which have led to very serious and critical situations" and the controversy over the issuance of Hungarian banknotes.[29] In the 1930s, terrorism and "terroristic acts" and political assassinations also featured on the list of the particularly abhorrent abuses deserving of attention from an international criminal court.[30] The assassination of Archduke Franz Ferdinand of Austria that sparked the outbreak of WW I might have had something to do with this. War crimes or crimes involving the unrestrained use of violence during war had since the end of WW I commanded significant attention as important violations of rights even if efforts to prosecute and punish perpetrators after the end of the war in 1919 mostly came to naught.[31] "The orgy of inhuman brutalities on a scale unprecedented in previous wars"[32] during WW II firmly placed genocide, war crimes, crimes against humanity and aggression on the menu of the special offences worthy of particular attention.

Discussions and changes of what constitute the special set of abuses of international concern continue. For example, Article 28A of the AU's 2014 *Draft Protocol on the Amendments to the Protocol on the Statute of the African Court of Justice and Human Rights* added many crimes not found in the Rome Statute. Preoccupation with transnational organized crime in this document may have influenced

28 C. Cakmak, 'The International Criminal Court in World Politics', *International Journal on World Peace*, Vol. 23, No. 1, 2006, p. 7.

29 *See* M.A. Caloyanni, 'An International Criminal Court', *Transactions of the Grotius Society*, Vol. 14, 1928, pp. 80-81.

30 V.V. Pella, 'Towards an International Criminal Court', *The American Journal of International Law*, Vol. 44, No. 1, 1950, pp. 38-39; Hudson, 1938, pp. 551-552.

31 G. Finch, 'Retribution for War Crimes', *The American Journal of International Law*, Vol. 37, No. 1, 1943, p. 82; J. Garner, 'Punishment of Offenders Against the Laws and Customs of War', *The American Journal of International Law*, Vol. 14, No. 1/2, 1920, pp. 71-93.

32 Finch, 1943, p. 81.

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the constitution of that list. The additions include some crimes like drug trafficking and terrorism that were considered for inclusion in the Rome Statute but eventually dropped.[33] Debates over what abuses should be included in these lists have been characterized, like most cases of definition, categorization and delimitation in international affairs by contestation between conflicting interests and normative schemas.

If there is debate over the specific abuses on the list of special set of offences, one thing on which there seems to be unanimity is the monstrosity and gravity of this set of offences.[34] There is no shortage of superlatives in their description. Hugo Grotius claimed that the gravity of these abuses was "such as even barbarous races should be ashamed of" them.[35] President Theodore Roosevelt portrayed incidences of such abuses during WW II as "violat[ing] every tenet of the Christian faith."[36] Finch speaks of abuses during WW II as "primitive and barbarous acts of inhumanity which shock the conscience of all civilized peoples and are forbidden by divine as well as human command."[37] Pella spoke of abuses committed during WW II as "criminality offending the sentiments of the entire world," and "crimes of an enormity unprecedented by reason of the vast numbers of victims and the capacity for evil of the actors."[38] In its preamble, the Rome Statute speaks of "unimaginable atrocities that deeply shock the conscience of humanity" and of "the most serious crimes of concern to the international community." Before it, the Genocide Convention of 1948 characterized genocide as an "odious scourge." If we look beyond the chauvinism reflected in references to certain faiths, "civilized people" and "barbarous tribes," these quotations present a good picture of the special status granted to these offences in much of the literature.

Against this special set of offences one can juxtapose the long list of other rights elaborated in the three most widely accepted instruments of human rights – the Universal Declaration of Human rights, the Covenant on Civil and Political Rights and the Covenant on Economic, Social and Cultural Rights. These range from prohibitions against curbs on speech and association to calls for securing of rights to employment, health care and education. Third-generation rights referring to communal rights and the rights to development, which have raised much controversy, can be added here. Even excluding third-generation rights as well as the second-generation rights pertaining to economic, social and cultural rights that have been contested by some, a minimalist approach focusing on civil and political rights still leaves us with a significant body of rights that we can class as quotidian or not being part of "the worst abuses."

The bifurcation between quotidian abuses and grave abuses exist first at an *ontological* level. The gravest offences are seen as being different in nature from

33 Nanda, 1998, p. 419; Welch & Watkins, 2011, p. 954; J. Dugard, 'Obstacles in the Way of an International Criminal Court', *The Cambridge Law Journal*, Vol. 56, No. 2, 1997, pp. 334-335.
34 Boister, 2009, p. 346.
35 Cited in Finch, 1943, p. 81.
36 Finch, 1943, p. 81.
37 G. Finch, 'The Nuremberg Trial and International Law', *The American Journal of International Law*, Vol. 41, No. 1, 1947, p. 22
38 Pella, 1950, pp. 40-41.

quotidian abuses. This difference in nature is often portrayed as a veritable hodgepodge of qualitative and quantitative characteristics. Reliance on a qualitative distinguishing characteristic is seen in the view of "the most serious crimes" as being particularly abhorrent and having the gravest consequences on international society relative to other offences.[39] Here, extermination attempts, enslavement, sexual slavery and sexual abuse, and recruitment of child soldiers, for example, can be juxtaposed to denials of freedom of speech and the right to vote and access to decent health care and education.

But this reference to the quality of acts is often combined with allusion to the extent/scale (quantity) of the offence relative to quotidian abuses.[40] The worst abuses are portrayed as taking place on a grander scale and include attempts to wipe out whole groups in Rwanda and during WW II, the massive and systematic use of sexual violence in the Balkan conflicts, systematic destruction and burning of settlements and other civilian installations in the Mano River Basin wars in the 1990s and the like. In many ways, it is the marriage between acts that are seen as particularly offensive and their systematic and widespread practice that makes these offences shocking and diabolic. This marriage is most clearly seen in the definition of crimes against humanity in the Rome Statute and the AU Protocol. Article 7 in the Rome Statute and Article 28C in the AU Protocol marry certain acts – "murder, extermination, enslavement" and so forth – with their "widespread or systematic" practice.

The question of whether the offences that are classed in the group of "the most serious abuses," indeed, are the most damaging and horrendous and the question of how terms such as "serious" and "worst" that are used to describe these crimes are defined are unsettled issues. It is clear from the literature that material interests and normative beliefs, which vary across time and space, both influence the ways in which actors regard various types of abuses. The dispute over the importance of economic and social as opposed to political and civil rights between the Eastern and Western blocs during the Cold War is the subject of a significant body of work.[41] Differences between the crimes covered by the ICC and the African court are further evidence of such disagreements.

At the level of specific acts, the epochal bifurcation has unleashed vitriolic politics of naming with significant wrangling over whether such and such happening qualifies as this or that type of abuse. Specific abuses in history such as the German colonial attacks on the Namaqua and Herero, the mass killings of Armenians in 1915, the massive killings in Rwanda in 1994, the violence in eastern DRC in the late 1990s are all issues of extensive and enduring contention, with

39 ICC-OTP, 'Policy paper on the interests of justice,' September 2007, p. 5, available at <https://www.icc-cpi.int/NR/rdonlyres/772C95C9-F54D-4321-BF09-73422BB23528/143640/ICCOTPInterestsOfJustice.pdf> (accessed 15 September, 2016); M. du Plessis & S. Pete, *Who Guards the Guards: The International Criminal Court and Serious Crimes Committed by Peacekeepers in Africa*, Institute for Security Studies, Pretoria, 2006, p. 121

40 ICC-OTP, 2007, p. 5.

41 M. Haas, *International Human Rights: A Comprehensive Introduction*, Routledge, New York, 2008, p. 115.

people naming them according to their specific material interests, normative outlooks and scholarly lenses.[42]

The distinction between the "most serious crimes" and quotidian abuses of human rights also operates at an *ethical level*. What should we do about human rights abuses? One can garner two diverging responses in the literature as well as statecraft on the issue of human rights. There has for long been an advocacy of zero tolerance with regards to "the most serious crimes." This approach is seen in its most extreme form in the refrain "Never again," when it comes to genocide. Article 1 of the Genocide Convention regards genocide as a "crime under international law" that contracting parties under the convention pledge to punish and Article 50 of the First Geneva Convention requires parties to the convention to "enact any legislation necessary to provide effective penal sanctions" against those committing offences proscribed by the conventions. Seen as a "blemish" on the conscience of human kind, there has for long been advocacy for the criminalization of the worst abuses and the prosecution of individuals responsible for their commission.[43] Raging debates over decades on whether permanent or ad hoc courts were the most optimal for handling such prosecutions resulted in the creation of the ICC in 2002 and the proposed African Court in 2014.

Beyond the determination to punish these offences, there is also greater commitment to their prevention.[44] Article 1 of the Genocide Convention created a duty on the part of contracting parties to prevent the occurrence of genocide. This duty was crystalized at a more general level in the idea of the Responsibility to Protect (R2P). Formalized in a 2000 report of the International Commission on Intervention and State Sovereignty, it requires that in the case where a state is either unwilling or unable to prevent or stop the commission of grave human rights abuses in its territory, the international community can militarily intervene in such countries to prevent, stop and help states recover from these abuses. Article 4(h) of The African Union Constitute Act instituted R2P as a principle of the Union, making the AU the first regional organization to formally institutionalize R2P.[45]

As a collection, the abuses covered by these instruments stand in contrast to quotidian abuses. There are declarations, covenants and "architectures" covering a host of these quotidian abuses. The Universal Declaration and the two accompanying covenants cover many of these abuses. Other instruments including those covering discrimination against women, indigenous groups and other minorities,

42 G. Steinmetz, 'The First Genocide of the 20th Century and Its Postcolonial Afterlives: Germany and the Namibian Ovaherero', *Journal of the International Institute*, Vol. 12, No. 2, 2005; A. Bright, 'Was There an Armenian Genocide? It Depends on Turkish "Intent"', *Christian Science Monitor*, 23 September 2015 (12:37 AM) <www.csmonitor.com/World/Europe/2015/0424/Was-there-an-Armenian-genocide-It-depends-on-Turkish-intent.-video>; 'Genocide: The Uses and Abuses of the G-word', *The Economist*, 23 September 2015 (12:51 AM) <www.economist.com/node/18772664>.

43 Welch & Watkins, 2011, pp. 932-945.

44 du Plessis & Pete, 2006, p. 14.

45 G.K. Kieh, Jr., 'The African Union, the Responsibility to Protect and Conflict in Sudan's Darfur Region', *Michigan State International Law Review*, Vol. 21, No. 1, 2013, p. 47; Odinkalu, 2015, pp. 273-274.

and the like are all examples of such instruments. The AU's African Governance Architecture and Africa Peace and Security Architecture are all supposed to help deal with and prevent such abuses. But the rhetorical commitment to their absolute intolerance seen in the refrain "Never again" does not exist. These abuses are not codified as prosecutable crimes. There are no special provisions for the prosecution of their perpetrators and no special courts for the trials of those who cause them. Importantly, there is also no absolute and explicit responsibility of the international community to protect people from such abuses akin to what one finds in the Genocide Convention, for example. Both R2P and the AU's commitment to intervene in states that are unwilling and unable to deal with abuses are geared specifically at "grave" abuses.

The third level at which the bifurcation plays out is that of *epistemology*. The consecration of sacrosanct texts and spaces for the prosecution and punishment of these abuses have created epistemological Meccas for the study of the most serious abuses. The production of knowledge about these abuses is seen as a process that necessarily goes through these Meccas. Today the Rome Statute has to be read and thoroughly digested and one has to make the obligatory trip to The Hague, the seat of the ICC, to claim to be a respected scholar on efforts at dealing with the worst abuses. The AU Protocol seeks to produce an African Mecca – Arusha, Tanzania – with all of these characteristics.

There are no such Meccas for the study of quotidian abuses. Understanding the struggle against these abuses is not thought of as requiring a focus on any privileged sites. Instead, focus on multiple and sometimes disparate texts and spaces is a normal approach.

5 A Zone of Zero Tolerance: An Anti-Septic Space

Central to this argument about the debilitating similarity between the ICC and the African Court is the ethical facet of the epochal bifurcation on which they are both grounded. At the heart of the ethical facet is the idea that the "worst abuses" should not just be the subject of condemnation, activism and noncriminal judicial remedies, but were to be instituted as international crimes for which individuals will be prosecuted and punished.

The structure for such prosecutions has for decades been the subject of significant thought and scholarship, and what comes through the literature is the quest to create a highly potent anti-septic judicial system. The unpolluted space was imagined in three important dimensions as one that was apolitical, as one that was impartial and objective and as one that was particularly effective.[46] Welch and Ashley speak of the Coalition for the ICC agreement around the principle of fighting for the creation of "an entity that would be fair, effective, and independent."[47] The idea of an apolitical space comes from a juxtaposition of the judicial realm and the political one as two very different and incompatible spheres.

46 Welch & Watkins, 2011, pp. 973, 974 & 987.
47 *Id.*, p. 987.

The goal of politics understood as the accumulation and protection of power were seen as incompatible and even inimical to the course of justice. On one hand, the political sphere is portrayed as one whose principled nature is questionable, that is characterized by the constant negotiability of all issues and that is marked by continuous processes of give and take. On the other hand, the sphere for dealing with gross human rights abuses has been characterized as a purely judicial one par excellence in its adherence to strict and non-negotiable judicial principles. Being free from the "dirty" and "polluted" world of politics also involved the independence of the court from political authorities of all sorts.[48]

The judicial system for dealing with the worst abuses was also imagined as one that is inherently free from partiality and partisanship.[49] Sewall and Kaysen speak of it as "a free standing, independent court" that applies international law "equally without political favoritism."[50] A key preoccupation in this area concerned the issue of victor's justice. The trial of defeated leaders of the German and Japanese war efforts by the allies in Nuremburg and in Tokyo, while applauded by many defenders of human rights, also raised a lot of questions about the issue of impartiality.[51] What would ensure that the defeated in a conflict get a fair trial at the hands of their defeaters? Would perceptions of partiality ever be absent in the minds of some no matter how impartially the proceedings of such trials were conducted? Related to this has been an equally significant challenge. In the event where the culprit in such abuses happens to be the winner or the most powerful actor in a country, how would a national jurisdiction try and punish such a person? Would this not transform justice into one that is only meted out against losers and the less powerful?

The special judicial arrangement for the trial of the worst abuses was imagined as a thoroughly impartial space.[52] As an international court not tied to any state, it was seen as a forum that would escape the pitfalls of victor's justice that national jurisdictions and courts set up by allies to try their former adversaries face.[53] As an international institution autonomous from national leaders, it was imagined as one that would be free of the manipulative influences of national leaders, creating an equal opportunity for the trial of abusers regardless of their political influence or position.[54]

The third distinguishing characteristic of the special court for these worst abuses focuses on the issue of capacity. It was imagined as a particularly potent and effective weapon for trying the perpetrators of these abuses.[55] One way of seeing this issue is related to the ability of such a court to act beyond the con-

48 *Id*., pp. 988-989.
49 Welch & Watkins, 2011, p. 987; Jalloh, 2009, p. 468.
50 S. Sewall & C. Kaysen, 'The United States and the International Criminal Court: The Choices Ahead', available at <https://www.amacad.org/content/publications/publication.aspx?d=361> (accessed on 25 February 2016).
51 Mamdani, 2013, p. 33.
52 Pella, 1950, pp. 46 and 53
53 *Id*., pp. 45-46.
54 Boister, 2009, p. 355.
55 Pella, 1950, p. 45; Odinkalu, 2015, pp. 280-281.

straints of political authority. Three years after the creation of the ICC, the then British MP Robin Cook very boldly proclaimed, "The International Criminal Court ends the impunity of dictators who could kill thousands but not be held to account because they controlled their domestic courts."[56]

The preamble of the Rome Statute invests the ICC with these aspirations that had been expressed by legal internationalists over decades.[57] It was portrayed as an apolitical instrument governed purely by judicial principles and as an impartial and effective actor. "The aim of the ICC is to put an end to impunity for perpetrators of the most serious crimes of concern to the international community, and to contribute to the prevention of such crimes" is how Gegout puts it.[58] Mangu speaks of the ICC as geared towards moving the world to "a new era of respect for human rights, peace, justice and reconciliation."[59] The Protocol creating the criminal chamber in the African Court closely follows in these footsteps, portraying a court governed by strict judicial principles and separated from the political sphere that will tackle a long list of some of the most pressing challenges facing African countries and communities in this second decade of the 21st century.

6 A Problematic Bifurcation

The epochal bifurcation on which both the ICC and the African Court are built is a very problematic one that ensures that these courts are unlikely to come close to achieving any of the lofty goals that legal internationalists have invested them with. There is an abundance of literature that points to the difficulties the ICC is facing in delivering on the mighty promise it was thought to hold.[60] I argue here that its founding on this epochal bifurcation is largely responsible for this and that the African court will march down the same path because it is built on the same problematic superstructure.

The problematic nature of this bifurcation is first apparent at an ontological level. It posits a dichotomy between special abuses – the worst abuses – and quotidian wrongs in a situation where the field of human rights may best be viewed as a continuum with fuzzy boundaries given the intimate links between various types and incidences of abuses. It represents a better characterization of the ways in which abuses start, how they evolve over time, and the complex links that bind them together. An approach to human rights as one field with continuums has the significant advantage of better reflecting the intimate causal links between abuses. "Quotidian abuses" of civil and political rights and the marginalization of groups often contribute to outbreaks of what are seen as the worst abuses. In

56 R. Cook, 'US Hostility to the International Criminal Court Knows No Bounds', *Review of African Political Economy*, Vol. 32, No. 104/105, 2005, p. 465.
57 Rothe & Collins, 2013, pp. 194-197; Caloyanni, 1928, p. 641; Jalloh, 2009, p. 468.
58 C. Gegout, 'The International Criminal Court: Limits, Potential and Conditions for the Promotion of Justice and Peace', *Third World Quarterly*, Vol. 34, No. 5, 2013, p. 800.
59 A.M. Mangu, 'The International Criminal Court, Peace Justice and the Fight Against Impunity in Africa: An Overview', *Africa Development*, Vol. 40, No. 2, 2015, p. 9.
60 Rothe & Collins, 2013, pp. 197-208; Gegout, 2013, p. 809.

turn, these worst abuses and responses to them often later condition negatively or positively the occurrence of quotidian abuses. Alternatively, we can think of these two categories of abuses often sharing causes, which Mbeki and Mamdani have referred to as the "issues that drive continuous cycles of conflict from which communities need to emerge."[61] It is these interconnections that Banerjee invokes in highlighting the links between gross human rights violations and "the covert source[s] that ma[k]e such violations possible."[62]

The balkanization of the realm of human rights through the isolation of gross abuses from quotidian ones informs the frequent criticism that the ICC dehistoricizes abuses. This in turn is said to have important implications for its ability to give justice to those wronged in societies, to contribute to preventing the re-occurrence of these abuses and to aid reconciliation and peace processes in these societies.[63] This dehistoricization of abuses involves the truncation of long and complexly interwoven histories of abuses and rights violations through the bifurcating move that isolates "the worst abuses" from all other instances of abuses and treats them as stand-alone phenomena that can be understood, dealt with and prevented on their own. Protestations against the dehistoricization of situations of abuse by the ICC, then, can be understood as arguments against the wisdom of conceiving of gross abuses as stand-alone phenomena. The African Court is built on the same principles, and it is difficult to see how it will escape such abuses in its operations.

The bifurcation on which the two courts are similarly built is also problematic at an ethical level. The zone of exclusion for the "most serious crimes" characterized by zero tolerance (never again!), governed by anti-septic judicial processes and cleansed of the polluting effects of politics is a fantasy. All we can have are polluted disparate fields of practices where various agents interact with institutions and with each other in ways that either undermine and/or strengthen respect for human rights, including rights to safety from "the most serious crimes." In the end, the multiple elements of activism, negotiation, concession, and the like concerning rights issues in disparate spatial and temporal locations that characterize the struggle over quotidian human rights abuses are the best we can have.

Olympia and Cryer's excellent reflection on the central issue of cooperation in the Rome Statute exhibit the ways in which on this central plank of the ICC, the Court cannot but become involved in the sort of strategic negotiations, concessions and stratagems that are the hallmarks of what are often denounced as "politics."[64] Peskin goes to great length to show "the political dimensions of the ICC

61 Mbeki & Mamdani, 2014. *Also see* Mamdani, 2013, p. 34. *Also see* Odinkalu, 2015, pp. 263.

62 S. Banerjee, 'Reconciliation Without Justice?', *Economic and Political Weekly*, Vol. 38, No. 2, 2003, p. 1936.

63 Mbeki & Mamdani, 2014.

64 O. Bekou & R. Cryer, 'The International Criminal Court and Universal Jurisdiction: A Close Encounter?', *The International and Comparative Law Quarterly*, Vol. 56, No. 1, 2007, pp. 63-65. *Also see* Jalloh, 2009, p. 478. Insights can be drawn from a reflection on the politics of access to evidence by the ICTY in J. Cogan, 'The Problem of Obtaining Evidence for International Criminal Courts', *Human Rights Quarterly*, Vol. 22, No. 2, 2000, pp. 412-413 and 425.

and how its chief prosecutor engages in politics to further his (this was during the reign of Moreno Ocampo) bid for cooperation."[65] He points to what many may consider as the quintessentially political strategies of flattery, shaming, conciliation, negotiation, the making of concessions, confrontation and the issuance of inconsistent statements on key issues over time in the prosecutor's dealings with leaders. This includes leaders, some of whom were suspected of crimes under the Rome Statute and were later to be indicted for them by the ICC.[66] In this dance, state leaders have also not held back in instrumentalizing the court for individual and national political ends.[67]

The politicized nature of the election of judges is something that Welch and Ashley touch on.[68] The absence of "significant corruption and professional ineptitude" in these courts is also not a foregone conclusion.[69] Many authors reflect on the power play involved in the initiation and investigation of cases by the Court.[70] "Actions by a major power, even if they clearly violate the Rome Statutes, will realistically not come before the Court …."[71] Jalloh' s comment about the "blurring of the crucial distinction between international law and international politics"[72] is one that can be completed by Odinkalu' s comment about the ICC "becom[ing] a … partisan factor in determining the outcomes of elections."[73] Beyond all of this, Article 16, which empowers the UN Security Council to suspend ICC proceedings, can be seen as the testament to the importance of political considerations in the life and work of the ICC.[74]

It is important to note that the conception of an international criminal court as an apolitical space is not the preserve of supporters of the court. Interestingly, even some of its ardent critics occasionally fall into the same trap. Mamdani repeatedly juxtaposes judicial solutions with political processes implying that the ICC is beyond these political processes. Rieff's brief criticism of the limited promise of the law saving us from political failures suffers from the same problem.[75]

The dream of anti-septic judicial grandeur that have characterized the decades-long craving for a permanent tribunal to deal with the "most serious abuses" is a red herring that is rooted in a poor understanding of institutions and their interactions with agency. The institutional determinism that informs this view

65 V. Peskin, 'Caution and Confrontation in the International Criminal Court's Pursuit of Accountability in Uganda and Sudan', *Human Rights Quarterly*, Vol. 31, No. 3, 2009, p. 31.
66 *Id*., pp. 659-689.
67 Murithi, 2015, pp. 92-92; H. Mensa-Bonsu, 'The ICC, International Criminal Justice and International Politics', *Africa Development*, Vol. 40, No. 2, 2015, p. 38; Gegout, 2013, pp. 804-807.
68 Welch & Watkins, 2011, p. 996.
69 *Id*., p. 1015.
70 Mamdani, 2008; Welch & Watkins, 2011, p. 1006.
71 Welch & Watkins, 2011, p. 1006
72 Jalloh, 2009, p. 492.
73 Odinkalu, 2015, p. 280. On this point *also see* Murithi, 2015, p. 77.
74 D. Akande, M. du Plessis & C.C. Jalloh, 'An African Expert Study on the African Union Concerns About Article 16 of the Rome Statute of the ICC', *ISS Position Paper*, 5, 26 October 2010.
75 Mbeki & Mamdani, 2014; D. Rieff, 'Court of Dreams', *The New Republic*, 7 September 1998, p. 17. *Also see* Murithi, 2015, p. 89; R. Tucker, 'The International Criminal Court Controversy', *World Policy Journal*, Vol. 18, No. 2, 2001, p. 80.

sees institutions on their own as having determinate impacts on social realities. These impacts are then conceived of as harmonious sets with each institution producing effects that constitute a coherent set on social realities that constitute a coherent set. Insights from historical institutionalism that emphasize institutional ambiguity and incompleteness and their ingenious exploitation by agents challenge this institutional determinism in convincing fashion.[76] First, in emphasizing the ingenious role of agency, they undermine the idea that any institution can on its own determine social realities. The ICC and the African Court can only impact social realities in combination with a series of other institutions and agents. Provisions for cooperation in Parts 9 and 10 of the Rome Statute and Articles 46J-46L of the AU Protocol make this obvious. But this is a broader question about the sort of pro-rights conspiracies and activism that one needs in disparate locations to achieve the lofty goals of ensuring respect for rights, punishing abusers and preventing further abuse.

Seen in this light, widespread complaints about the weak capacity of the ICC to bring those most responsible for gross abuses to book that one hears from long-time opponents of the court, disenchanted activists, victims and representatives of victims groups sound both true and unsurprising. The lofty goals set for the ICC are in fact goals that the ICC, the African Court or any international criminal tribunal cannot achieve on its own. This is not because of any peculiar weakness of the ICC or the African Court as they are designed. Instead, it is core to institutions as incomplete and ambiguous structures requiring implementation by agents that can innovatively exploit possibilities presented by these "loopholes."[77] The inability of the ICC to deliver justice for victims, end impunity and aid peace and security in Africa is unsurprising and rather banal. It never was going to do any of those things on its own and it, the African Court or any other permanent international criminal tribunal never will be able to do them.

The problem, then, is not so much that the ICC has failed but that people with flawed understanding of institutions and how they function invested the ICC with powers it never could have, ensuring that "failure," was the only result possible. The African Court in following the path of the ICC in being rooted in this bifurcation and its resultant assumptions about judicial grandeur is bound to result in the same disenchantment.

Second, historical institutionalist insights into the contradictory potential of institutions[78] raise questions about the necessarily positive potential, which the

76 J. Mahoney & K. Thelen, 'A Theory of Gradual Institutional Change', *in* J. Mahoney & K. Thelen (Eds.), *Explaining Institutional Change: Ambiguity, Agency and Power*, New York, Cambridge University Press, 2010, pp. 4-31. The questions of ambiguity and interpretation are also raised in by S. Grovogui, 'Intricate Entanglement: The ICC and the Pursuit of Peace Reconciliation and Justice in Libya, Guinea and Mali', *Africa Development*, Vol. 40, No. 2, 2015, pp. 102-103.

77 A.K. Onoma, 'Animating Institutional Skeletons: The Contributions of Subaltern Resistance to the Reinforcement of Land Boards in Botswana', *in* G. Berk, D. Galvan & V. Hattam, *Political Creativity: Reconfiguring Institutional Order and Change*, University of Pennsylvania Press, Philadelphia, 2013, pp. 127-130.

78 A. Onoma, *The Politics of Property Rights Institutions in Africa*, Cambridge University Press, 2009, pp. 51-57.

ethical facet of the epochal bifurcation load the ICC and the African Court with. The idea that each of these courts will necessarily produce impacts that are positive and coherent is problematic because the agents and institutions that they interact with to impact social realities approach them with wildly diverse interests and norms. This understanding of how agents interact with institutions is also interesting in going beyond the question of whether or not implementation happens to *how* implementation and interactions understood broadly are approached and pursued by a wide range of actors with varying interests and norms. Some may harbor interests that are at direct variance with the goals stated in the texts of these two institutions. Because these institutions will be pulled in different directions across space and over time, there are no guarantees that they – the ICC and the African Court – will necessarily and always produce the effects that many campaigners and activists aspire for.

These insights place in perspective accusations about partisanship, selectivity and politicization that plague the ICC. These same accusations are already being levelled against the African Court in the form of the focus on its immunities clause and how it selectively gives a rather ambiguous set of "senior state officials" immunity while they are in office. There is a wide set of actors employing these courts to pursue varied and sometimes incoherent sets of goals. State officials on whom cooperation depends and who are often involved in the referral of cases and civil society organizations involved in multiple ways in the life of the ICC have been the focus of much attention.[79] But this set of actors also has to include the framers of these institutions as well as court officials, including prosecutors, judges and registry personnel.

Complaints about selectivity, bias and partisanship in the workings of the ICC that seem to go against the lofty principles and goals stated in the preamble of the Rome Statute are the result of flawed understanding of institutions inherent in the epochal bifurcation instead of any flaws of these institutions. The surprising fact is not that the ICC and African Court display bias and partisanship. Instead, what is surprising and problematic is the expectation that a permanent international criminal tribunal could be created to deal with the worst abuses that would not display bias, partisanship and selectivity.

These considerations of the ethical implications of the epochal bifurcation have epistemological implications. From the argument that judicial zones can play only a limited role in the punishment of gross abuses and their prevention one can draw certain epistemological conclusions. The location of the instruments for preventing, punishing and repairing gross abuses in the Rome Statute and The Hague have undercut the importance of other texts and geographical spaces as locales for knowing and producing knowledge on gross human rights abuses and the struggle against them. But the textual and spatial Meccas constructed as the privileged sites for understanding issues related to how gross human rights abuses are dealt with hold little promise. Instead, resort has to be made to the dispersed processes through which some folks are held accountable for their actions and others escape such accountability. For example, understand-

79 Jalloh, 2009; Welch & Watkins, 2011.

ing Ivorian history and politics through the exploration of sites and texts that often are far removed spatially and temporally from the era of the ICC in The Hague is fundamental to deciphering why certain people suspected of rights abuses have been sent to the ICC for trial while others accused of similar abuses occupy positions of power in that country. Similarly we have to go well beyond the confines of these Meccas to understand why efforts at holding certain people accountable for gross human rights are more successful than efforts targeting other actors. Frequent reference to the micro politics of evidence gathering, witness recruitment and witness tampering in the ICC Kenyan cases[80] point to the importance of processes, both high and low, far away from The Hague for the outcome of cases and investigations involving gross human rights abuses.

Many an analyst has been wont to complain about how supporters of the Rome Statute and the ICC shrink the policy space for dealing with abuses and the epistemological space for understanding these processes.[81] Some urge a look beyond the retributive justice model to other ways of seeking justice, including through reparations.[82] Others urge a look beyond the judicial to "political processes."[83] What all of these have in common is the understanding that to deal with gross human rights abuses in ways that ensure justice, curb impunity and contribute to peace and security, we have to resort to measures beyond the ICC, retributive justice systems or the political realm. Further, we need to similarly look beyond these realms understood as geographical and temporal locations and textual references to understand how these processes work out.

7 Conclusion

While moves by the AU to explore options that correct some of the flaws in the Rome Statute regime are laudable, a truly alternative approach requires fundamental moves that break in significant ways from the existing framework on which the ICC and the African Court are both built. This has to start with jettisoning the epochal bifurcation that has informed scholarship and practice for almost a century. The field of human rights has to be acknowledged and approached as one broad arena crisscrossed by boundaries that are fuzzy, non-permanent and weak. Approaching human rights beyond this bifurcation should have important implications for how we seek to deal with abuses.

Above all understanding human rights as a unified field would suggest a unified approach to the question of abuses. This approach has to center on political practice understood broadly as the exploitation of multiple strategies, methods and instruments to realize certain goals. Reinforcing traditional mechanisms that

80 C. Stewart, 'ICC on Trial Along With Kenya's Elite Amid Claims of Bribery and Intimidation', *Theguardian.com*, 1 October 2013.

81 O. Okafor & U. Ngwaba, 'Between Tunnel Vision and a Sliding Scale: Power, Normativity and Justice in The Praxis Of the International Criminal Court', *Africa Development*, Vol. 40, No. 2, 2015, p. 59.

82 Mbeki & Mamdani, 2014; Mamdani, 2013, p. 33.

83 Mbeki & Mamdani, 2014.

are already common in struggles against what would normally count as quotidian abuses in the existing schema is critical. Activism, the imposition of sanctions, military interventions, education campaigns, policy and implementation reforms aimed at empowering people to demand, take and protect their rights should be central planks of this system. Efforts should also be made to explore the ways in which these traditional methods can be reinforced by new forms of associational life, mobilization and communication to prevent, stop and punish abuses.

In this system, international criminal justice can play a role that is at once both less important and more expansive. The position it plays in this field of practice will be informed the recognition of justice as an inherently political exercise subject to many of the limitations and abuses that the other forms of political practice highlighted above are subject to. Justice, understood in this sense, should play a less important role in ceasing to be the center of efforts at dealing with gross human rights abuses. It will become only one of many instruments deployed to deal with abuses, with a full understanding of the peculiar advantages and costs it brings as well as the ways in which it can augment and take away from the impact of other strategies and tools. At the same time attempts should be made to explore ways in which international criminal justice could play the more expansive role of shoring up the struggle against abuses across the unified field of human rights, thus ensuring that it ceases to be a preserve of a special zone of abuses demarcated as the most threatening to the international community.

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