Editorial

Africa has been the site of some of the world's worst atrocities. It is also home to some of the most innovative mechanisms, ranging from truth commissions to national and international criminal trials, to address accountability to the perpetrators of mass violence. Yet, African voices, and those from the Global South more generally, tend to be marginalized in important global conversations about peace, justice and reconciliation.

The new *African Journal of International Criminal Justice* (AJICJ) is a refereed and interdisciplinary scholarly periodical that aims to help bridge at least a small part of that gap. It is intended to serve as a forum for international criminal law and transitional justice issues from the developing world as analysed by authors drawn from throughout the Global South and the world. The AJICJ seeks to carve intellectual space for profound scholarly reflection on the phenomenon of atrocity crimes in Africa and national, regional as well as international efforts to combat such crimes through criminal prosecutions, traditional justice approaches such as *gacaca* or other alternatives such as truth commissions, lustrations and vetting. By providing an outlet for solid scholarship, we especially hope to stimulate an Intra-South as well as South–North dialogue on the complexities facing societies seeking to transit from war and other collective traumas such as pre- and post-election violence to peace, stability and democracy. With these wider goals in mind, the Journal will air diverse perspectives on fundamental, long-term and systemic problems concerning the struggle for justice and peace, as well as emerging issues, and possible solutions to them. We are particularly interested in views from below and new streams of scholarship that engage in critical reflections from law and the social sciences based on empirical observations and experience as well as theoretical and cross-disciplinary methodologies.

In addition to scholarly articles and reports from the field, the AJICJ will contain a section for *book reviews*; shorter case reports on significant *national and international decisions* from African and other *ad hoc* and permanent international courts and tribunals; a *current events* section; a special section on African *state practice* in international criminal justice as well as compilations of hard to obtain documents such as the July 2014 African Union treaty amending the Protocol on the Statute of the African Court of Justice and Human Rights to provide for jurisdiction over general, human rights and criminal matters.

The Journal hopes to recognize as well as to stimulate intellectual creativity by awarding several prizes for the best articles published each year: one to a doctoral student from a developing country university; the second to an author under 40 and another to a scholar, of any age and of any nationality, who has contributed a groundbreaking work on a fundamental question in the literature. Fur-

ther information, including the criteria and selection process for these prizes, will be announced in a future edition of the AJICJ.

To launch this inaugural issue, we could not imagine a more relevant and timely topic, given the goals espoused above, than that of Africa and the International Criminal Court (ICC). The proposal to marry Africa's anti-impunity efforts with the institutional apparatus of the international community seems to have first seriously taken place when the governments in Rwanda and Sierra Leone sought international assistance to establish *ad hoc* courts to prosecute serious atrocities committed within their borders during the decade of the 1990s. African governments drew inspiration from those experiences, especially the horrific 1994 Rwandan Genocide, to participate actively during the May to July 1998 negotiations of the Rome Statute of the ICC. We might call this the engagement period.

The marriage followed, on 1 July 2002, when the Rome Statute entered into force with 60 ratifications, 17 of which were from African States. The symbolism of Africa's centrality to the ICC was underscored by Senegal's status as the first signatory and member to the Rome Statute. Thereafter, the first and all the subsequent self-referrals by States Parties came from, respectively, Uganda, Democratic Republic of Congo, Central Africa Republic and more recently Mali. The fate of the new court seemed symbolically as well as practically hinged on its relationship with the world's second largest continent. This reality was only further enhanced with the Security Council's decisions to refer two non-party countries – Sudan and Libya – to the Court and the Prosecutor's only exercise of *proprio motu* authority in Kenya and Ivory Coast. The ICC has since gone on to issue summonses and indictments from all those situations, making its docket to date an all-African affair.

However, as the four authors of the three articles contained in this inaugural issue show, the honeymoon between African States and the ICC lasted for only about 6 years. It started to end in March 2008 when the ICC Prosecutor announced plans to seek an arrest warrant for Sudanese President Omar Al Bashir for alleged crimes committed in Darfur. African States expressed concerns that the ICC's short-term desire to prosecute could jeopardize or unravel their long-term efforts to secure peace. Since then, political rhetoric seems to have overshadowed or at least clouded legal obligation in light of the lack of clarity as to the scope of cooperation under Articles 27 and 98(1) of the ICC Statute. African States' duty to cooperate with the Court under the Rome Statute has become contested, especially following the much derided July 2009 decision by all African Union (AU) states that they shall not arrest or surrender President Al Bashir, for whom the Pre-Trial Chamber had issued a first arrest warrant containing crimes against humanity and war crimes charges in March 2010 and a second one including genocide in July 2010.

As some might argue with the adoption of the July 2014 African Union treaty to create a criminal chamber, the apparent marriage of convenience between the Court and the African States seems to be headed towards some type of separation. To continue with the couple analogy, robust discussion of problems and counselling did not take place, although that could have helped straighten things

out. Attempts to have a frank debate, in November 2013 at the Assembly of States Parties meeting in The Hague, saw each side dig its heels against the backdrop of the controversial proposals to amend the ICC Statute from Kenya with the support of AU states. On top of that, the United Nations Security Council, whose referral and deferral practice in respect of situations proved highly political and consequently became perceived as problematic, seems to have made matters worse. The official narrative is that the ICC and international criminal law more broadly has become a neocolonial Western project bent on undermining or taking away their countries' hard-won sovereignty. The irony is that the loudest voices are those governments whose leaders ostensibly have some self-interest in the outcome of concrete cases from Sudan and Kenya.

But much of African civil society and academia, as exemplified by the authors featured in this volume, appear to generally be contesting this official assessment. In the first article, Lydia Akpori-Ansah discusses the origins of the AU's misgivings about the ICC indictments to the trials of sitting presidents in Africa. She suggests that the claim by African governments that there has been some selectivity in the application of international justice before The Hague tribunal cannot, or rather should not, be dismissed because it will undermine the Court's work on the continent. She ruefully observes that the trials of leaders entail serious political, legal and social implications for the communities and countries involved. Yet, she maintains, these criticisms, which have been largely ignored in the literature, ought not to be ignored. But Akpori-Ansah goes further and contends that the African government criticisms are partly a result of the ICC's failure to attend to the specificities of the various domestic contexts where it is operating as well as the inherent weaknesses of the narrow role that it can play as a criminal tribunal tasked with addressing questions of individual criminal responsibility. She concludes that deploying the law in an attempt to stop and prevent international crimes in African societies, while laudable, would require a more concerted effort to harmonize the strident demands of justice with the imperatives on the ground.

In the second article, Mia Swart and Karin Krisch also discuss the AU–ICC relationship. They come to the topic from the perspective of the July 2014 Protocol for the African Court of Justice and Human and Peoples' Rights, adopted by the AU Assembly of Heads of States at Malabo, conferring jurisdiction over criminal, general and human rights matters. This jurisdiction includes prosecution of what I have elsewhere characterized as Rome Statute Plus Crimes. Like Akpori-Ansah, and other authors before them, they trace the origins of the tension between the Court and the African States to the Sudan situation and explore the reasons for its deterioration. They then focus on the controversial issue of immunity of sitting heads of state, which has become symptomatic of the tension between the two sides. Although the controversy started with concerns about Al Bashir's immunity, they crystallized with the ICC's efforts to prosecute Kenyan President Uhuru Kenyatta and his deputy William Ruto.

Swart and Krisch then examine the legal position on head-of-state immunity under international law. They take on the live issue of Kenya's November 2013 proposal that the ICC States Parties amend the Rome Statute to provide for tem-

porary reprieve from trial for sitting heads of state. This would essentially qualify Article 27 of the ICC law, which renders official capacity irrelevant and does not admit of any exceptions based on personal or functional immunities. Such a provision as Kenya has proposed would, if adopted, reflect the same idea granting temporary exemption from prosecution for sitting presidents, their deputies and other senior officials now contained in the July 2014 AU instrument. The authors contend that inclusion of this idea in the ICC Statute will constitute a step backward since such an amendment will arguably be contrary to international law and would certainly contradict the AU's anti-impunity stance in its Constitutive Act. In what may well be more of a normative position on how the law of immunity *ought to be* (*lex ferenda*), rather than what *it is* (*lex lata*) at the moment, they controversially claim that whereas customary international law on immunities may protect heads of state and senior state officials in respect of certain acts, it does not protect such officials from prosecution for international crimes.

Last but not least, Nsongurua Udombana claims in his article that the competing visions of international criminal justice between the ICC, on the one hand, and the AU on the other, reached a climax with the recent adoption of the treaty enlarging the mandate of the African Court of Justice and Human and Peoples' Rights to provide for substantive criminal jurisdiction. He, like Swart and Krisch, hones in on the controversial immunity clause provided for state officials in the AU instrument. He asserts that it clearly conflicts with the ICC Statute's normative framework. Udombana predicts that this new clause and instrument will deepen an already frosty relationship between the two sides. He therefore calls for restraint by all stakeholders concerned in order to revive the increasingly criticized effort at advancing international criminal justice in Africa.

Besides the above three articles, in the annexure, we have included the AU's newly adopted instrument: the July 2014 Protocol on Amendments to the Protocol on the Statute of the African Court of Justice and Human Rights. As far as we know, because the AU does not publish its treaties in a hard copy compendium, the AJICJ is the first to make the hard copy of this important treaty available to the public. This instrument, and the three other AU treaties that preceded and contextualize it, will no doubt be of interest to researchers from the continent but also from around the world. One might note that although the controversies surrounding the immunity clause have so far clouded reactions to the idea of a regional African Criminal Court taking up what I have elsewhere described as Rome Statute Plus Crimes, the Protocol will also be of interest to scholars. They will find within it several innovative ideas not seen before in international law, including a progressive definition of acts of sexual violence constituting genocide, corporate criminal liability for international and transnational offences such as mercenarism and the first full defence office organ in a permanent tribunal.

We are excited to share these articles and regional treaty materials with you, our readers, in what we hope will eventually become one of the flagship journals in this issue area. But scholarly debate is a two-way street. The AJICJ is therefore pleased to invite you to send us your reactions to the articles contained here, including on the current law of immunity for sitting heads of state. Relatedly, it is worth noting that we are also exploring the possibility of a blog for the Journal

wherein selected authors' articles can be discussed and debated by a wider community of scholars interested in the issue. We shall keep you posted.

Lastly, to make the Journal a more meaningful and user-friendly resource for scholars, we dearly welcome any comments you might have on possible future topics, ideas for coverage not found elsewhere or any other matter relating to the substance and form of this publication. As an international journal, we also welcome any expressions of interest from persons of any nationality to serve on our editorial and advisory boards as well as for possible inclusion in our database of expert reviewers. Wherever we can improve the quality and value of our new journal, we would be most glad to do so.

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