# Access to international justice in Africa: the conundrum of states' non-compliance with judicial decisions

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***Abstract***
Following the African Court on Human and Peoples' Rights decision in the *Atebong Denis Atemnkeng* case in 2013, critics predictably focused on Article 34(6) of the Protocol Establishing the Court as far as its application is a hindrance to individuals' access to justice on the continent. Forgotten in this discussion were the far-reaching consequences of states' non-compliance with judicial decisions even where individuals have direct access to international judicial organs. This contribution argues that in Africa, greater threats to access to justice are posed by states' conduct post adjudication. Using the experiences of the ECOWAS Court of Justice, the International Criminal Court and the suspended SADC Tribunal as empirical evidence, this article argues that post adjudication, states can seriously reverse the gains made by the international justice agenda. Finally, this article cautions against judicial activism as a means of seeking the extension of *locus standi* to individuals before the African Court on Human and Peoples' Rights and urges contentment with the snail's pace at which the continent's judicial organs are evolving.

## INTRODUCTION

On 1 December 2011, Atabong Denis Atemnkeng, a Cameroonian national and a staff member of the African Union (AU), brought an application against the AU before the African Court on Human and Peoples' Rights (ACtHPR)[1] arguing that Article 34(6) of the Protocol to the African Charter on Human and Peoples' Rights on the Establishment of an African Court on Human and Peoples' Rights[2] is inconsistent with the African Union Constitute Act[3] and the African Charter on Human and People's Rights.[4]

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1 *Atabong Denis Atemnkeng v The African Union, Application 014/2011,* Judgment (2013).

2 Protocol to the African Charter on Human and People's Rights on the Establishment of an African Court on Human and People's Rights <http://www.achpr.org/instruments/court-establishment/> accessed 10 May 2017 [hereinafter the Protocol on the Establishment of the ACtHPR].

3 Constitutive Act of the African Union <http://www.africa-union.org/root/au/AboutAu/Constitutive_Act_en.htm> accessed 10 May 2017 [hereinafter AU Constitutive Act].

4 Adopted in Nairobi on 27 June 1981, entered into force on 21 October 1986.

A little more than fifteen months later, on 15 March 2013, the ACtHPR delivered its judgment. Without considering the merits of the case, six of the court's judges (constituting a majority) dismissed the application, finding that the Court lacked jurisdiction.[5] However, the President of the Court, Judge Akkufo, and Judges Nguepe and Thompson, handed down a persuasive dissenting opinion[6] wherein they argued that the right to access to justice has attained *jus cogens* status and as such states 'have a duty to ensure that the peoples of Africa have access to judicial protection of their rights' and that this judicial protection 'cannot be achieved with the clog of article 34(6)'.[7] Consequently, the three judges found Article 34(6) to be in violation of the AU Constitutive Act.[8]

Following the Court's decision, scholars and critics predictably focused on Article 34(6) in so far as its application precludes individuals from directly accessing the court. Indeed, this attention is warranted. However, because scholarly analyses of the right of access to justice within the African system is often confined to access to judicial institutions as well as procedural aspects of fair and just proceedings, less attention has been directed at the enforcement of judicial decisions as the final leg of access to justice. This article is, therefore, predicated on the gap in literature between access to judicial institutions vis-à-vis what transpires post-adjudication. The value of this inquiry is obvious. An investigation into the post-adjudication conduct of states serves as an important indicator of the scope of access to justice and more importantly answers the question upon which this article is premised, that is: will granting individuals *locus standi* before international judicial bodies in Africa translate to access to effective remedies for victims of human rights abuses? Because of Africa's unenviable reputation as a continent dominated by dictatorships and autocratic regimes with minimal respect for human rights, the article focuses on the individual's right to access to justice for violations of fundamental human rights by state agents or their proxies, a phenomenon other scholars have termed state terrorism.[9] Included in this scope is the existence of an effective international criminal justice system for the prosecution of perpetrators of serious crimes, namely: genocide, war crimes and crimes against humanity.

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5 *Atabong Denis Atemnkeng v The African Union* (n 1) 12 para 46.

6 *Atabong Denis Atemnkeng v The African Union, Application 014/2011,* Dissenting Opinion. [hereinafter dissenting opinion].

7 Id 5.

8 ibid.

9 See generally Richard Jackson, Eamon Murphy and Scott Poynting (eds), *Contemporary State Terrorism: Theory and Cases* (Routledge 2009); John Gearson, 'The Nature of Modern Terrorism' in Freedman (ed), *Superterrorism: Policy Responses* (Blackwell 2002); Gani Yoroms, 'Defining and Mapping Threats of Terrorism in Africa' in Wafula Okumu and Anneli Botha (eds), *Understanding Terrorism in Africa: In Search for an African Voice* (ISS 2007).

While access to judicial institutions does indeed constitute a legal premise for giving effect to the right to access to justice, this article focuses on states' non-compliance with decisions of international judicial bodies as a threat to access to justice in Africa. In the main, the contribution argues that access to international justice is not only constrained by the legal instruments establishing judicial organs in existence on the continent, but also by states' non-compliance with judicial outcomes, as well as their resultant appetite to disempower the 'offending' court. The suspension of the SADC Tribunal, Gambia's attempt at curbing the jurisdiction of the ECOWAS Court of Justice (ECJ) and the AU's hostility towards the International Criminal Court (ICC) will serve as sources of empirical illustrations in this context.

The contribution also explores a way forward for judicial organs in Africa, in light of the fact that they exist in a climate of non-compliance where a threat of extermination is real. Using realism as the guiding theory, the article cautions against judicial activism and urges contentment with the snail's pace at which the continental system is moving towards fully equipping the individual with the requisite *locus standi*. Although reference is made to scholarship on the European Court of Human Rights (ECtHR) (as far as this literature can be applied to the African system), it is noted that the ECtHR is a supranational, separate legal system with supremacy over domestic systems, attributes that the AU (and its institutions) and subregional organisations do not enjoy.

This article is presented in six parts. After the introduction, part II outlines the import of the right to access to justice. Because of the expansive scope of this right, there is a conscious bias in favour of the effective remedies (compliance) component. Part III turns to the question of compliance and briefly outlines enforcement mechanisms within the legal frameworks of the ACtHPR and the ECOWAS Court of Justice (ECJ). Part IV outlines the consequences of non-compliance by states, while part V proposes a way forward. Part VI is the conclusion.

## ACCESS TO INTERNATIONAL JUSTICE AS A FUNDAMENTAL RIGHT

The United Nations Development Program's Practitioner's (UNDP) Guide to a Human Rights-Based Approach to Access to Justice defines access to justice as 'the ability of people to seek and obtain a remedy through formal or informal institutions of justice, and in conformity with human rights standards.'[10] Contained in this definition are three important elements of what constitutes the right of access to justice. Firstly, by referring to formal or informal institutions, the UNDP made it clear that for the right to be properly exercised, there is a need for an institutional framework designed for dispute resolution. Secondly, by defining the right as an attribute that

[10] UNDP, 'Programming for Justice: Access for All: A Practitioner's Guide to a Human Rights-Based Approach to Access to Justice' Asia-Pacific Rights and Justice Initiative (2005) 5.

should be exercised in conformity with human rights standards, the definition incorporates procedural aspects of fair and just legal proceedings. Finally, the definition makes reference to the ability to obtain a remedy. This without a doubt constitutes the most important element of an individual's exercise of their right of access to justice. From the three elements of the right outlined above, it is clear that access to justice is twofold. Firstly, it entails that where one's rights have been violated, he or she has fair access to judicial institutions, which are legally bound to adjudicate upon the dispute fairly. Secondly, and more importantly, it entails that where a judicial institution has made a finding that a violation occurred, the offending party must abide by that finding and implement remedial action as decided by the said judicial organ. It is upon this second leg of the right that the effectiveness of international adjudication is evaluated. For example, Darren Hawkins and Wade Jacoby define effectiveness as 'the degree to which a legal norm induces the desired change in behaviour'[11] while Lawrence R Helfer and Anne-Marie Slaughter measure effectiveness in terms of a court's basic ability to compel or cajole compliance with its judgments.[12]

In international criminal justice, access to justice means the existence of an effective international criminal justice system capable of trying individuals accused of perpetrating serious violations of human rights. 'Effective' in this context refers to the system's ability to bring before its judges anyone fingered in the commission of crimes such as genocide, war crimes and crimes against humanity irrespective of their office and influence. From an African perspective, the rationale for evaluating any system of international criminal justice on its ability to try high-ranking individuals is obvious. As observed by Ademola Abass, while financial market fluctuations or a sudden decline in share value rank highly as threats to human security in Western societies, Africa grapples with violence and 'conditions of inhumanity long expelled from many parts of the world.'[13] More importantly, these conditions of inhumanity are often engineered by state leaders or armed militia who are not answerable to anyone. Because 'the strong and those with the relevant instruments of power, tend to dominate the weak and those who are unable to defend themselves',[14] it follows that any international criminal justice system must be able to provide at the international level, what victims of mass atrocities cannot obtain in their respective countries.

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[11] Darren Hawkins and Wade Jacoby, 'Partial Compliance: A Comparison of the European and Inter-American Courts of Human Rights' (2010–2011) VI (1) Journal of International Law and International Relations 35 39.

[12] Lawrence R Helfer and Anne-Marie Slaughter, 'Toward a Theory of Effective Supranational Adjudication' (1997–1998) CVII Yale LJ 273 278.

[13] Ademola Abass, 'An Introduction to Protecting Human Security in Africa' in Ademola Abass (ed), *Protecting Human Security in Africa* (Oxford University Press 2010) 10.

[14] Rowland JV Cole, 'The African Court on Human and Peoples' Rights: Will Political Stereotypes Form an Obstacle to the Enforcement of its Decisions?' (2010) XLIII CILSA 23 23.

The notion that an individual can approach an international judicial body to seek redress for the violation of their rights found its origins in the post WWII human rights instruments that sought to protect the individual from state excesses.[15] Although a right to compensation for human rights abuses existed prior to the post WWII human rights movement, this right existed between states, as only countries could seek redress for the abuse of their nationals.[16] Driven in large parts by Western Europe, the individual-centred approach to reparation developed in leaps and bounds and now enjoys consensus amongst scholars that extending *locus standi* to the individual in international adjudication is the best way of promoting international justice, specifically for victims of serious violations of human rights.[17]

The right of an individual to access to judicial institutions, as well as the right to have proceedings conducted in a procedurally fair manner is entrenched. This is reflected in various international normative frameworks, including the Universal Declaration of Human Rights,[18] the International Covenant on Civil and Political Rights (ICCPR)[19] and the Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power. In Africa, the right is extensively enunciated in the Principles and Guidelines on the Right to a Fair Trial and Legal Assistance in Africa,[20] as well as the Guidelines and Measures for the Prohibition and Prevention of Torture, Cruel, Inhuman or Degrading Treatment or Punishment in Africa, also known as the Robben Island Guidelines.[21] The second leg of access to justice, which is the right to an effective remedy, has also found prominence in international human rights instruments.[22] For example, the Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law[23] outlines in sufficient detail what the right entails and how its enforcement can be achieved. Similarly, the UN Commission on Human Rights' Updated Principles for the Protection and

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15 See generally Cherif M Bassiouni, 'International Recognition of Victims' Rights' (2006) VI Human Rights Law Review 203.

16 Id 213.

17 Eva Dwertmann, *The Reparation System of the International Criminal Court: Its Implementation, Possibilities and Limitations* (Martinus Nijhoff 2010) 17.

18 Article 10.

19 Articles 14 and 16.

20 DOC/OS(XXX)247.

21 ACHPR, 'Guidelines and Measures for the Prohibition and Prevention of Torture, Cruel, Inhuman or Degrading Treatment or Punishment in Africa' <www.achpr.org/files/special-mechanisms/cpta/rig_practical_use_book.pdf.>

22 These include Art 8 of the Universal Declaration of Human Rights, Art 2 of the International Covenant on Civil and Political Rights, Art 6 of the International Convention on the Elimination of All Forms of Racial Discrimination, Art 14 of the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, and Art 39 of the Convention on the Rights of the Child.

23 GA Res. 60/147 adopted by the UN General Assembly on 16 December 2005.

Promotion of Human Rights through Action to Combat Impunity[24] also expounds on reparation as an umbrella term that encompasses restitution, compensation, rehabilitation and satisfaction, as provided by international law.[25] Within the African system, the ACtHPR, after finding that there has been a violation of human rights, is empowered to 'make appropriate orders to remedy the violation, including the payment of fair compensation or reparation.'[26]

Despite this impressive articulation of the right to remedies, the enforcement of remedial action presents a towering challenge for international law. This enforcement crisis goes to the heart of the international criminal justice agenda, because, as noted by Brown, 'obtaining a remedy is a significant reason for commencing international proceedings.'[27] Within the context of international criminal justice, the value of remedial action is best captured by Article 15 of the 2005 Victims' Principles, which states that 'reparation is intended to promote justice by redressing gross violations of international human rights law or serious violations of international humanitarian law.' Beyond the victims, reparation eliminates the desire for revenge attacks, thereby setting a firm foundation for post-conflict reconstruction in societies emerging from violent strife. The ICC reparation system is an affirmation that indeed, reparation is integral to international justice. The Rome Statute's reparation feature, as outlined in Articles 75 and 79, places victims at the heart of the ICC's function. Pursuant to these provisions, the Assembly of State Parties (ASP) adopted the Resolution on the Establishment of a Fund for the benefit of victims of crimes within the jurisdiction of the court, and the families of such victims.[28]

## BEYOND ADJUDICATION: THE QUESTION OF COMPLIANCE

Ole Kristian Fauchald and André Nollkaemper assert that the proliferation of international courts and other supervisory bodies 'strengthens the adjudicatory process in international law and may be seen as strengthening the international rule of law.'[29] This assertion cannot be faulted. However, although important advances have been made in the formulation of progressive legal norms and international institutions and civil society have devoted time and resources to promote them, there remains a huge chasm between these substantive norms in theory and their enforcement in practice. As Fiona McKay notes, 'not all victims are able to access remedies, the

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24 E/CN.4/2005/102/Add.1, 8 February 2005.

25 Principle 34.

26 Article 27 of the Protocol on the Establishment of the ACtHPR (n 2).

27 Chester Brown, *A Common Law of International Adjudication* (2007) 186.

28 Adopted on 9 September 2002, ICC-ASP/1/Res.6 (2002).

29 Ole Kristian Fauchald and André Nollkaemper, 'Introduction' in Ole Kristian Fauchald and André Nollkaemper (eds), *The Practice of International and National Courts and the (De-) Fragmentation of International Law* (Hart Publishing 2002) 3.

outcomes are not always to their satisfaction', and at times 'implementation may come late or not at all'.[30] Indeed, states the world over are notorious for disregarding judicial decisions of international institutions where they perceive such decisions to be contrary to their national interests. Sadly, the international system is devoid of an enforcement mechanism similar to that of municipal systems. Because compliance is after all the essence of legality,[31] this lack of enforcement mechanisms provides a launching pad for critics of international law, who in their cynicism dismiss international justice as a mirage and the pursuit of a transnational legal order as an elusive ideal.[32] Commenting on the infamous question of whether or not international law is indeed law, Mary Ellen O'Connel asserts that 'the analogy to domestic law is false' and adds that the 'international system has little in common with unitary government systems.'[33] Although international law practitioners and like-minded scholars have done a good job at defending their trade, the question has not gone away. However, beyond theoretic arguments, the sad reality is that a victim of human rights violations armed with a judgment of an international court is in no better position, if the said judgment is not implemented owing to international law's deficiency.

Although non-compliance is indeed a global challenge, international judicial bodies that have jurisdiction over African states have found it very difficult to secure states' compliance with not only their judgments but preliminary proceedings as well.[34] In 2013, the ECOWAS Court of Justice's (ECJ) Chief Registrar stated that a few of the ECJ's decisions had been implemented.[35] From its inception to 2012, the ECJ witnessed a sixty percent non-compliance, while as recent as February 2015, twenty-five cases awaited implementation from fourteen ECOWAS member states.[36] This high rate of non-compliance with the ECJ's orders does not come as a surprise, as the court has unlimited human rights jurisdiction and allows

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30 Fiona McKay, 'What Outcomes for Victims' in Dinah Shelton (ed), *The Oxford Handbook of International Human Rights Law* (Oxford University Press 2013) 921 922.

31 Alexandra Huneeus, 'Compliance with Judgments and Decisions' in Shelton (n 30) 437 440.

32 See generally Matthew Parish, *Mirages in International Justice: The Elusive Pursuit of a Transnational Legal Order* (Edward Elger 2011).

33 Mary Ellen O'Connel, 'Enforcement and the Success of International Environmental Law' (1995) III (1) Indiana Journal of Global Legal Studies 47.

34 For example in *International PEN and Others v Nigeria*, African Commission of Human and Peoples Rights, Comm.Nos. 137/94, 139/94, 154/96 and 161/97 (1998) Nigeria ignored the Commission's demands to refrain from harming the defendant pending the trial. The country went ahead and executed him only for the Commission to rule that he was not guilty. Paras 8 and 9.

35 Tony Anene-Maidoh, 'The Mandate of a Regional Court: Experiences from ECOWAS Court of Justice' (Paper presented at the Regional Colloquium on the SADC Tribunal, Johannesburg, 12–13 March 2013).

36 Chinelo Chikelu, '27 ECOWAS Court Decisions Awaiting Compliance from Member States—Odinkalu' *allafrica.com* (5 February 2015) <http://leadership.ng/news/409745/27-ecowas-court-decisions-awaiting-compliance-member-states-odinkalu> accessed 15 May 2017.

direct access for individuals who are at the same time not required to exhaust local remedies.[37] In the SADC region, the sub-regional body's Tribunal's only exercise of a human rights mandate against Zimbabwe was met with ridicule and ultimately led to its demise.[38] In the sphere of international criminal justice, the ICC's arrest warrant for Sudan's Al Bashir[39] has been ignored by several African states who are party to the Rome Statute.[40] To add insult to injury, the AU adopted a policy of non-cooperation with the ICC[41] and has threatened to mobilise its members who are party to the Court to withdraw *en masse*. This resistance to a human rights based adjudication system is of course not an unexpected outcome. Writing in 1960, fifteen years after the International Court of Justice (ICJ) first opened its doors for business, Oscar Schachter warned that 'obviously, any extension of international adjudication into the area of more "vital" questions would also increase the risk of non-compliance.'[42] He added that 'these legal excuses for non-performance will, on a wider view, usually be seen as associated with political reasons for refusing execution.'[43] Four years later, Wilfred C Jenks, confronted by the same question asked the following: 'must the enforcement of such decisions and awards necessarily remain a political matter or is it possible to conceive of procedures of execution analogous to judicial proceedings.'[44] More than fifty years later, these 'other' procedures still have not been conceived. Instead, true to Schachter's warning, state sovereignty has emerged as the worst enemy of international justice. In attempting to explain the high levels of non-compliance by African States, Chidi Odinkalu argues that while the lack of a political will is indeed a factor, many of the countries on the continent 'genuinely lack the skills, personnel and resources required to comply with the complex web of

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37 The 2005 Protocol extending the jurisdiction of the court does not require individuals to first exhaust local remedies in their respective countries.

38 Addressing party supporters at an occasion to celebrate his 85th birthday, Zimbabwe's President Robert Mugabe dismissed the SADC Tribunal's ruling as nonsense. He was quoted saying 'no one will follow that… our land issues are not subject to the SADC Tribunal.' See Cris Chinaka, 'Mugabe Says Land Seizures will Continue' *Mail & Guardian* (Johannesburg, 28 February 2009) <https://mg.co.za/article/2009-02-28-mugabe-says-zimbabwe-land-seizures-will-continue> accessed 15 May 2017.

39 *The Prosecutor v Al Bashir*, Decision on the Prosecution's Application for a Warrant of Arrest against Omar Hassan Ahmad Al Bashir, ICC-02/05-01/09 Pre-Trial Chamber 1, 4 March 2009.

40 These are Chad and Kenya in 2010, Djibouti and Malawi in 2011, and most recently South Africa in 2015.

41 Decision on the Meeting of African States Parties to the Rome Statute of the International Criminal Court (ICC) Doc. Assembly/AU/13(XIII), AU Doc. Assembly/AU/Dec. 245(XIII) Rev. 1 (July 2009) para 10.

42 Oscar Schachter, 'The Enforcement of International Judicial and Arbitral Decisions' (1960) LIV American Journal of International Law 1 5.

43 Id 4.

44 Wilfred C Jenks, *The Prospects of International Adjudication* (Stevens & Sons 1964) 10.

obligations and norms undertaken by them through these treaties.'[45] While this may be true of reporting obligations emanating from human rights treaties, it fails to explain non-compliance with, for example, orders to pay restitution, compensation or damages, as well as orders to prosecute individuals accused of human rights violations.

The absence of enforcement mechanisms leaves judicial organs looking to states for the enforcement of their decisions. For example, the ECJ depends on national implementation mechanisms set up in accordance with Article 24 of the Supplementary Protocol. While this stands a chance of succeeding where the decisions in question relate to administrative findings such as the unconstitutionality of national laws, the same cannot be said of instances where the court makes damning findings of human rights violations against high-ranking state officials. The ACtHPR on the other hand depends firstly on the undertaking by states under Article 30 of the Protocol establishing the Court[46] that they will abide by its judgments. Secondly, in the absence of cooperation, the Court in its report to the AU Assembly can bring to the latter's attention cases that have not been complied with.[47] By so doing, the Court shifts the burden to the Assembly, which is after all the political body responsible for the institution's creation. Once seized with the report, the Assembly can act in accordance with Article 23(2) of the Constitutive Act, which provides for the imposition of sanctions against states that fail to comply with decisions and policies of the organisation. Commenting on the net effect of Article 30 of the Protocol establishing the ACtHPR and Article 23(2) of the Constitutive Act, Rowland Cole notes, correctly so, that the former is clearly not an enforcement mechanism, as it is nothing more than a mere promise by states that they will abide by the outcomes of the Court.[48] He notes further that Article 23(2), in so far as it can be termed an enforcement mechanism, is not an effective mechanism in respect of the ACtHPR's decisions as it is a provision of general application, designed for all forms of non-cooperation by member states.[49] Indeed, Article 23(2) refers generally to sanctions in relation to states that refuse to comply with policies and decisions of the AU. Consequently, the provision does not operate as a direct consequence of non-compliance with the court's judgments.[50]

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45 Chidi Odinkalu, 'Back to the Future: The Imperative of Prioritising for the Protection of Human Rights in Africa' (2003) XLVII (1) Journal of African Law 1 24.

46 Protocol Establishing the ACtHPR (n 2).

47 This is in accordance with Art 31 of the Protocol establishing the ACtHPR.

48 Cole (n 14) 41–42.

49 ibid.

50 ibid.

## CONSEQUENCES OF NON-COMPLIANCE: THE BIGGER PICTURE

This section explores consequences of states' non-compliance with court decisions. While it is tempting to confine the effects of non-compliance to the prejudice suffered by victims in each case on an individual basis, there is certainly more to it. Apart from violating their treaty obligations, the refusal by states to comply with judicial decisions has far-reaching consequences. These include victory without justice for victims, the creation of impotent/ineffective judicial institutions as well as the reversal of the gains of the international justice agenda (including the international criminal justice agenda). These are discussed in detail below.

### Victory without Justice

One obvious consequence of states' non-compliance with judicial decisions is the denial of satisfaction for litigants. As observed above, 'obtaining a remedy is a significant reason for commencing international proceedings',[51] therefore, a victim of human rights violations armed with a court order is in no better position if the said order is not implemented. Alexandra Huneeus argues that even in the absence of implementation, a decision in one's favour still constitutes victory. [52] While it is indeed true that a judicial decision carries some moral significance, this significance must not be overstated. In the absence of implementation, a court order is victory without justice. For victims of human rights abuses, compensation is a symbolic gesture of the restoration of their dignity. Although the harm suffered from experiences of torture or unlawful detention cannot be undone, the payment of damages or compensation provides solace and indeed goes a long way in appeasing victims.

The experience of the ECOWAS Court of Justice places the victory without justice argument into perspective. Since assuming human rights jurisdiction in 2005, the court has issued numerous orders for compensation, but sadly, some of these orders have simply been ignored. In 2008, the ECJ ordered The Gambia to pay Chief Ebrimah Manneh US$100 000 in damages following his unlawful detention.[53] Two years later, the same court awarded Musa Saidykhan US$200 000 against the same respondent following the Applicant's arrest and torture by state security agents.[54] In 2014, the ECJ again ordered the same Respondent to pay the Applicants in *Hydera v The Gambia* US$50 000 in compensation for that country's failure to investigate the assassination of their father by suspected state agents.[55] All of these orders have simply been ignored by The Gambia. 10 June 2016 marked two years since the *Hydera* order and eight years since the *Manneh* judgment,

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51 Brown (n 27) 186.
52 Huneeus (n 31) 439–440.
53 *Manneh v The Gambia* (2008) AHRLR 171 (ECOWAS 2008) para 44.
54 *Saidykhan v The Gambia*, Case No. ECW/CCJ/APP/11/07, Judgment, para 47 (2010).
55 *Hydara and Others v The Gambia* Case No. ECW/CCJ/APP/30/11, Judgment (2014).

and there are no signs that The Gambia intends to comply with the court's orders in the foreseeable future.

In Southern Africa, prior to its indefinite suspension, the SADC Tribunal found against the government of Zimbabwe following the latter's racist land redistribution programme and ordered compensation in favour of white farmers who had been violently driven off their farms.[56] This order was not suspended or set aside and yet Zimbabwe simply ignored the Tribunal's findings and thereafter went on a mission to discredit the institution. Although Zimbabwe managed to mobilise enough support within the sub-region to suspend the Tribunal, its orders still stand. Consequently, the victimised farmers who were the applicants in *Campbell v The Government of Zimbabwe,*[57] are yet to receive justice for the violations they endured at the hands of Robert Mugabe's regime.

## Breeding Tigers without Teeth

The second consequence of states' non-compliance with judicial decisions is the resultant creation of ineffective institutions. This creation of 'tigers without teeth' flows directly from states' desire to avoid accountability for human rights violations. The African Commission on Human and Peoples' Rights, the continent's first human rights monitoring body, has almost been consigned to insignificance because of the contempt with which its recommendations are treated. Although not a judicial body, the little encroachment into state sovereignty that the Commission enjoys has alienated states and reduced the significance of its work. The vast scholarship on the institution indicates a settled position that it is ineffective and useless,[58] perhaps its only relevance to date is its power to refer cases to the ACtHPR, which power is magnified by the bar that Article 34(6) places on an individual's direct access to the court. While commenting on the African human rights system, more than ten years before the ACtHPR was established, Wolfgang Benedek bemoaned the Commission's ineffectiveness and suggested the creation of a court to remedy that shortcoming.[59] However, writing in the aftermath of the adoption of the protocol establishing the court, Frans Viljoen argued that the success of the institution would be 'determined primarily by the way in which it deals

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56 *Mike Campbell and Another (PVT) Limited v The Government of Zimbabwe* SADC (T) 2/2007.

57 ibid.

58 See for example Nsongurua J Udombana, 'Toward the African Court on Human and Peoples' Rights: Better Late Than Never' (2000) III Yale Human Rights and Development Law Journal 45 64; Wolfgang Benedek, 'The African Charter on Human and Peoples' Rights' (1993) I Netherlands Quarterly of Human Rights at 25; Claude E Welch, 'The African Commission on Human and Peoples' Rights: A Five Year Report and Assessment' (1992) XIV Human Rights Quarterly 43.

59 Id 32.

with individuals as its natural and logical constituency.'[60] Although the court's decision in the *Atemnkeng* application rejuvenated the debate on the restrictive nature of Article 34(6), the restrictive effect of this provision had already been queried by some scholars immediately after the adoption of the protocol establishing the court.[61] For example, Julia Harrington observed that 'the limitation on *locus standi* must be understood as a cynical move to diminish what power the Court might have over States by making it less accessible to those most likely to bring cases',[62] while Rebecca Wright noted that the move by states was more about avoiding accountability and less about protecting human rights.[63]

In 2008, the AU adopted a protocol establishing an African Court of Justice and Human Rights.[64] Sadly, a restriction similar to Article 34(6) exists in this new protocol.[65] One struggles to understand the value that this yet to be operationalised institution will add to the African human rights protection system, as the status quo will simply be transferred to the new court, complete with all its restrictive provisions. The non-ratification of the 2008 protocol has itself come under intense scrutiny. For example, Nsongurua Udombana credits the states' reluctance towards ratifying the protocol to the simple reason that 'many African states are not comfortable with a supranational independent judicial institution that will give binding decisions against states.'[66]

The creation of ineffective institutions in response to a judicial outcome is best illustrated by the experiences of the SADC Tribunal and the ECJ. Following the former's suspension in 2010, SADC member states adopted a new protocol in 2012, which expressly excludes individuals from the list of parties who can submit applications to the institution. In the case of the ECJ, following the Court's decision in the *Manneh* case, The Gambia actively attempted to have the courts' jurisdiction constrained. Firstly, the country sought to introduce the exhaustion of local remedies requirement. Secondly, it proposed that the court's human rights jurisdiction be limited

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60 Frans Viljoen, 'A Human Rights Court for Africa, and Africans' (2004–2005) XXX Brook. Journal of International Law 1 4.

61 Gina Bekker, 'The African Court on Human and Peoples' Rights: Safeguarding the Interests of African States' (2007) LI (1) Journal of African Law 172.

62 Julia Harrington, 'The African Court on Human and Peoples' Rights' in Malcom D Evans and Rachel Murray (eds), *The African Charter on Human and Peoples' Rights: The System in Practice, 1986–2000* (Cambridge University Press 2002) 308 319.

63 Rebecca Wright, 'Finding an Impetus for Institutional Change at the African Court on Human and Peoples' Rights' (2006) XXIV (2) Berkeley Journal of International Law 463 483.

64 Protocol on the Statute of the African Court of Justice and Human Rights, adopted on 1 July 2008 (2008) [Not yet in force].

65 See Art 30(f) of the Protocol.

66 Nsongurua J Udombana, 'Can These Dry Bones Live? In Search of a Lasting Therapy for AU and ICC Toxic Relationship' (2014) I (1) African Journal of International Criminal Justice 57 68.

to those treaties already ratified by the respondent state. Finally, it called for an amendment to Article 76(2) of the Revised ECOWAS Treaty to create an appeals procedure for all decisions of the community court.[67] The cumulative effect of these proposals was that the ECJ would have been significantly watered down if they had been implemented. Fortunately, the Registered Trustees of the Socio-Economic Rights and Accountability Project (SERAP) and the Centre for Defence of Human Rights and Democracy in Africa (CDHRDA) actively campaigned against the Gambia's attempts and this culminated in the ECOWAS experts as well as the ECOWAS Heads of Government rejecting the proposals.

In light of the widespread human rights abuses in Africa, the creation of ineffective international institutions deals a heavy blow to the regional international justice agenda. The continental human rights protection system, just like other regional systems, is complementary to national human rights protection mechanisms. In the absence of effective national protection mechanisms, victims of human rights abuses have nowhere to run if the international justice system is equally redundant. African states have often been excused on the basis that their conduct is a consequence of colonialism, which indirectly created regimes that display an exaggerated importance of state sovereignty.[68] Before the ACtHPR became operational, Fatsah Ouguergouz, now a judge at the court, warned that the court would definitely put the AU to the test given 'the strong and traditional attachment of the African States to the principle of non-interference in internal affairs and their extreme reluctance to entrust the resolution of their disputes to a third body, even of a non-judicial nature.'[69] Although the effects of colonialism cannot be ignored, the tendency to always point a finger at Africa's former colonialists is slowly losing its moral force. Judicial institutions in existence on the continent were created by Africans, for Africans, yet the powers that be still found it necessary to constrain the power that these institutions wield. One cannot even assign such conduct to ignorance, because states are aware that they ought to empower the institutions they create for these to make a difference. For example, the

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67 Karen J Alter, Lawrence R Helfer and Jacqueline R McAllister, 'A New International Human Rights Court for West Africa: The ECOWAS Community Court of Justice' (2013) CVII The American Journal of International Law 737 761.

68 See generally Arthur E Anthony, 'Beyond the Paper Tiger: The Challenge of a Human Rights Court in Africa' (1997) XXXII Texas International Law Journal 511*;* Ben Kioko, 'The Road to the African Court on Human and Peoples' Rights' Annual Conference of the African Society of International and Comparative Law (1998) 70*;* André Stemmet, 'A future African Court of Human and Peoples' Rights and Domestic Human Rights Norms' (1998) XXIII SAYIL 233*;* Erica de Wet, 'The Present Control Machinery under the European Convention on Human Rights: Its Future Reform and the Possible Implications for the African Court' (1996) XXIX (3) CILSA 338.

69 Fatsah Ouguergouz, 'The Establishment of an African Court of Human and Peoples' Rights: A Judicial Premiere for the African Union' (2003) XI African Yearbook of International Law 79 81

preamble to the AU Constitutive Act records member states' determination 'to take all necessary measures to strengthen our common institutions and provide them with the necessary powers and resources to enable them to discharge their respective mandates effectively.'[70] It follows, therefore, that the creation of semi-useless institutions is a deliberate move designed to withhold any significant transfer of authority to international judicial bodies.

### Turning the Tide against the Access to International Justice Agenda

The global human rights agenda has many facets, amongst them international criminal justice and international humanitarian law. In its various forms, the international human rights movement is constantly in collision with state sovereignty, an attribute that states have diligently used to thwart any perceived threat to their existence or more specifically, to regime security. A more serious consequence of states' non-compliance with judicial decisions is their subsequent desire to completely detach themselves, whether individually, or as a collective from institutions that advance human rights causes that they perceive to be hostile to their policies.

Following the ICC's arrest warrant for the Sudanese President Omar Al Bashir in 2008, the AU voiced its concern against this decision arguing that the strongman's indictment risked derailing peace negotiations in Sudan.[71] After the United Nations Security Council's refusal to defer Al Bashir's prosecution and the subsequent indictments of Kenya's President and his deputy, the relationship between the ICC and the AU deteriorated irretrievably, with the latter's member states adopting a position of non-cooperation with the ICC.[72] Although the grievances of the AU are not without merit, the regional organisation went beyond merely registering its displeasure with the ICC and hastily adopted a protocol extending criminal jurisdiction to the African Court of Justice and Human Rights in respect of the crimes that fall under the ICC's jurisdiction.[73]

This decision by the AU must be interpreted as turning the tide against the international criminal justice agenda in Africa for two reasons. Firstly, the objective to end impunity in Africa relies heavily on the existence of an international institution that carries a sufficient threat to would-be perpetrators of serious human rights violations. The AU's position of non-compliance with the ICC eliminates the only institution that currently exerts some pressure on African leaders and armed militias to desist from wanton violations of human rights. Secondly, the protocol extending criminal

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70 AU Constitutive Act preamble para 10.

71 See PSC Communique, AU Doc. PSC/Min/Comm(CXLII) (July 2008) paras 10 and 11.

72 See Decision on Meeting of African States Parties to ICC Statute, 2009 para 10.

73 Protocol on Amendments to the Protocol on the Statute of the African Court of Justice and Human Rights, adopted by the Twenty-Third Ordinary Session of the AU Assembly, held in Malabo, Equatorial Guinea on 27 June 2014 [Not yet in force].

jurisdiction to the ACtJHR clearly turns the hands of time in relation to the advancement of international criminal justice. Article 46A*bis* of the protocol expressly re-introduces immunity for heads of state and government, an attribute that is largely responsible for the abuse of civilians that has characterised post-colonial Africa. As Nsongurua Udombana correctly notes, 'this provision is not only at odds with the legal regime under the ICC Statute, but it strengthens the hands of leaders who use impunity as a governance password.'[74] To add insult to injury, this provision does not only protect heads of state or government, but it extends to 'anybody acting or entitled to act in such capacity, or other senior state officials based on their functions, during their tenure of office.'[75] If this is not turning the tide against the gains made by proponents of international criminal justice, then one wonders what is.

The magnitude of the threat posed to the gains achieved to date is magnified by South Africa's refusal to arrest Al Bashir when he visited that country in 2015, as well as the ruling African National Congress' (ANC) subsequent utterances that the ICC no longer represents its interests and as such withdrawal from the court is being considered at the highest level.[76] While such utterances are expected from countries like Zimbabwe and Sudan whose human rights records are textbook examples of how not to govern, South Africa's recent public denunciation of the ICC is an alarming development. Prior to Al Bashir's visit, the country was credited for being one of the few states in Africa that had opposed the AU's policy of non-cooperation with the ICC[77] and its hegemony in southern Africa and indeed in Africa was viewed in positive light. Since the advent of democracy in 1994, the country is often cited as a beacon of democracy in Africa, hence its threats to dissociate itself with the ICC contextualises the damage that the international justice agenda in Africa has suffered.

## The Way Forward

While discussing the progress and challenges confronting the international justice agenda in the context of impunity, Yves Beigbeder notes that:

> Preaching for the rule of law, as the rule of reason and justice, over war and the use of force, may in the current international climate of violence and fear, appear futile and derisory. Preaching for international justice in an anarchic world where the UN collective security system seems to be crumbling, thus

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74 Udombana (n 66) 59.

75 See Article 46A *bis* of the Protocol.

76 See 'South Africa Plans to Leave International Criminal Court' *Reuters* (11 October 2015) <www.reuters.com/articles> accessed 15 May 2017.

77 Henry J Richardson, 'African Grievances and the International Criminal Court' in Vincent O Nmehielle (ed), *Africa and the Future of International Criminal Justice* (Eleven International Publishing 2012) 81 83–84.

> releasing the unilateral, pre-emptive use of military power may be more than utopian, useless.[78]

However, despite acknowledging these realists' objections, he adds that rather than acknowledging defeat, these obstacles should be taken as a challenge to intensify the fight for the rule of law at both national and international level.[79] Although Yves Beigbeder's concern revolves around the unilateral use of force, the same factors that lead to what he terms the 'crumbling of the collective security system' mirror impediments to access to international justice in Africa. In mapping a way forward for judicial institutions on the continent, and indeed victims of human rights abuses, one needs to engage the sovereignty conundrum and how the constraints it imposes on access to justice may be circumvented. In this exercise, realism offers a sound premise. Although the theory has its imperfections, its main thesis captures the bare truth about international law and politics in Africa and thus provides a good starting point.

In its simplest form, realism dismisses the idea that international law can meaningfully constrain states' pursuit of their individual self-interest. To that end, realists consider the principal motivating factor in state's decisions to be self-interest, arguing that states pursue nothing more than their own self-preservation and self-aggrandisement.[80] For Matthew Parish, international law is an industry, one driven not by the demand for justice, but by the pursuit of its own self-propagation.[81] He charges that international law achieves remarkably few of the goals it purports to advance and is at best 'a bogus and important bureaucracy' and 'at worst a rhetorical cloud that obscures naked exercise of political power.'[82] Because self-preservation and self-aggrandisement is often pursued in the name of defending sovereignty, Africa inevitably plays host to all forms of human rights violations flowing from the prevalence of dictatorships and poor governance. When challenged for falling foul of acceptable standards of governance, most leaders plead sovereignty. However, despite their scathing criticism of international law, realists concede that it is here to stay and is liable to grow.[83] In view of this admission from international law's most ardent critics, it is obvious that the interplay between political organisations and the laws they create calls for serious academic scrutiny.

As observed above, states' non-compliance with decisions of judicial organs has the potential of doing much more than merely depriving aggrieved

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78 Yves Beigbeder, *International Justice against Impunity: Progress and New Challenges* (Martinus Nijhoff 2005) 1.

79 ibid.

80 See generally Kenneth N Waltz, *Theory of International Politics* (Waveland Press 1979).

81 Parish (n 32) 1.

82 ibid.

83 ibid.

individuals of justice. In light of these serious consequences, what then is the way forward for Africa's international judicial organs? Because the enforcement of judicial decisions is affected by various factors, the scope of this contribution is limited to what role judges can play in improving compliance. To that end, this article argues that judges must be content with the snail's pace at which Africa's normative framework is evolving in the direction of granting individuals *locus standi*. It adds further that in carrying out their adjudicatory functions, judges must refrain from any form of judicial activism. The reasons for these submissions are interconnected and are explored in detail below.

The power that international courts exercise is delegated authority, extended to them for a specific purpose. As noted by David Chuter, the key to understanding the rise of international judicial institutions 'lies in politics, because without political support—no idea, no matter how brilliant or morally compelling, will ever get implemented.'[84] However, this statement also tells a half-truth. What it does not say, which is important in understanding a fundamental prerequisite for an amicable co-existence between states and courts, is that the latter must cabin their functions within the limits set by states. This by no means suggests that courts must exist solely for the furtherance of states' interests, what it means rather, is that courts must not unilaterally impose obligations upon states. Fuad Zarbiyev warns in this regard, that 'indeed judges' political interlocutors are unlikely to be passive observers of judicial decision-making given the political costs of many judicial decisions.'[85] The ICJ has repeatedly held that no state can be compelled to submit to any dispute resolution mechanism,[86] what is more, where limits have been imposed on what courts are allowed to do, they must abide by those limitations. That international courts are capable of creatively extending the scope of their reach is common cause.[87] However, Ole Kristian Fauchald and André Nollkaemper observe that although courts apply general international law, each court operates within its own regime and will interpret the applicable law within that particular regime.[88] More importantly, they note that 'the interpretations that they often offer will be limited and coloured by that particular regime.'[89] Judges in Africa's international courts must follow this trend. Where *locus standi* is not extended to individuals, they must interpret the law as drafted by states and hope that this injustice will gradually be addressed, as opposed

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84 David Chuter, 'The ICC' in Nmehielle (n 77) 162.

85 Fuad Zarbiyev, 'Judicial Activism in International Law—A Conceptual Framework for Analysis' (2012) III (2) Journal of International Dispute Settlement 247 254.

86 *Corfu Channel,* ICJ Reports 1948, 27; *Anglo-Iranian Oil Co,* ICJ Reports 1952, 103; *Monetary Gold,* ICJ Reports 1954, 32; *Continental Shelf,* ICJ Reports 1984, 22; *Land, Island and Maritime Frontier Dispute*, ICJ Reports 1990, 133.

87 Zarbiyev (n 85) 248.

88 Fauchald (n 29) 28.

89 ibid.

to attempting to force states into doing what they are not prepared for. This brings up the aspect of judicial activism.

Sterling Harwood defines judicial activism as including amongst other things refusing to take an attitude of judicial deference.[90] In the political climate in which African judicial organs operate, such an approach to adjudication would threaten their very existence, as African states are famed for defending their 'sovereignty' at all cost. The disbanding of the SADC Tribunal and the ongoing anti-ICC agenda serve as reminders of what Africa's political organisations are capable of. From a strictly legal perspective, the dissenting opinion in the *Atemnkeng* case is compelling and reflects the transformation that international justice elsewhere has undergone. However, the majority's decision conforms to the geopolitical factors attendant upon the court and its existence and functions. That African states would move to constrain expressly the court if attempts were made to adopt an expansive approach to jurisdiction in conflict with Article 34(6), is not in doubt. While discussing treaty revision in response to an unwanted judicial outcome, Mark Pollack states in relation to the EU Court that 'the threat of treaty revision is essentially the "nuclear option"—exceedingly effective, but difficult to use—and is therefore a relatively ineffective and non-credible means of Member State control.'[91] Fuad Zarbiyev makes a similar argument and states that it would be very difficult for a disgruntled state in the EU to mobilise enough support for treaty revision purposes.[92] Sadly, the opposite is true in Africa. The ease with which Zimbabwe single-handedly mobilised for the disbanding of the SADC Tribunal, as well as the hostility being directed at the ICC, are chilling examples. Indeed, the same way that African states moved to extend criminal jurisdiction to the ACtJHR, is the same way that they could very easily amend treaties and provisions perceived to be 'abused' by judges in fulfilling their adjudicatory functions.

The call for judicial restraint does not by any means suggest that other stake-holders must refrain from actively seeking the extension of *locus standi* to individuals, as well as the conception of better enforcement mechanisms. Because of the constant question whether international law is indeed law, the temptation for scholars to encourage judicial activism is high as this legitimises their trade. However, such a temptation must be resisted. Apart from the obvious threat of extermination, judicial organs exacerbate the problem of non-compliance when they actively extend rights beyond what states conceived when the organs in question were created.

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90 Sterling Harwood, *Judicial Activism: A Restrained Defense* (Austin & Winfield 1996) 2.

91 Mark A Pollack, 'Delegation, Agency, and Agenda-Setting in the European Community' (1997) LI (Winter) International Organisation 99.

92 Zarbiyev (n 85) 263. See also the same argument by Karen J Alter, 'Who Are the "Masters of the Treaty?": European Governments and the European Court of Justice' (1998) LII International Organisations 121 123.

As noted by Karen Alter and her colleagues, 'the manner by which an international court acquires a human rights jurisdiction matters.'[93] Where states willingly grant a judicial organ jurisdiction over human rights, prospects of compliance with its resultant decisions improve significantly, while the threat of being disbanded diminishes considerably. For example, the ECJ acquired human rights jurisdiction through a coordinated campaign by NGOs, bar associations and ECOWAS officials as opposed to judicial activism. Whether the resultant unlimited jurisdiction was by design or merely a result of an oversight by ECOWAS is unclear but a welcome development nonetheless. Because of the manner through which the ECJ acquired its human rights jurisdiction, The Gambia's attempt as discussed above to significantly reduce the court's powers was resisted by the ECOWAS community.[94] On the other hand, the SADC Tribunal's attempt at 'grabbing' human rights jurisdictions proved fatal to its existence. From a legal perspective, the Tribunal was correct in its application of international law and its interpretation of the relevant legal instruments, particularly 'its implied powers', as validated by the International Court of Justice (ICY) in the *Reparations Advisory Opinion*[95] in 1949. Even scholars are unanimous in their analysis that indeed, the Tribunal was correct in finding that it enjoyed jurisdiction over human rights claims by individuals from SADC member states.[96] Sadly, this was not enough to save it from the Harare orchestrated onslaught, and one can attribute its demise to a lack of an explicit provision granting it jurisdiction over human rights matters.

Judicial restraint will no doubt preserve the little progress that the international justice agenda has achieved so far. Although this progress is largely in the mere existence of judicial organs as opposed to their effectiveness, any drastic measures aimed at accelerating this process risks achieving the opposite. In 2010, Adama Dieng, who was the Registrar of the International Criminal Tribunal for Rwanda at the time, noted that international law being at the confluence between law and politics, some clashes between the two have the potential of wiping away decades of progress.[97] He added that the political tough stance induced by Al Bashir's

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93 Alter (n 67) 739.

94 Id at 738. Although the court's judges actively sought the support of member states, this was not done through judgments.

95 *Reparation for Injuries Suffered in the Service of the United Nations, Advisory Opinion of 11 April*, 1949 ICJ Reports 1949, 174.

96 Laurie Nathan, 'The Disbanding of the SADC Tribunal: A Cautionary Tale' (2013) XXXV Human Rights Quarterly 870; Ben Chigara, 'What Should a Re-constituted Southern African Development Community (SADC) Tribunal Be Mindful of to Succeed?' (2012) LXXXI Nordic Journal of International Law 341; and Frederick Cowell, 'The Death of the Southern African Development Community Tribunal's Human Rights Jurisdiction' (2013) XIII (1) Human Rights Law Review 153.

97 Keynote Address by Mr Adama Dieng at the International Conference on Africa and the Future of International Criminal Justice organised by the Wits Programme in Law, Justice and Development in Africa (14–16 July 2010) in Nmehielle (n 77) 417 420.

indictment has called into question all the progress that has been made so far in relation to progressive norms designed to fight impunity.[98] The reasons for this unfortunate debacle are succinctly captured by James Nyawo who observes that 'African leaders accept the international criminal justice system when it serves their own interests against political enemies, and oppose it when it threatens their autonomy and hold on power.'[99] He tenders as evidence the fact that the deterioration of the relationship between the AU and the ICC was not triggered by the indictment of Charles Lubanga, nor the Lord's Resistance Army, but by the bringing of charges against high profile government officials.[100] No doubt this defensive reflex by African leaders adds credence to arguments that AU heads of state are only prepared to accommodate a system that is either dysfunctional or simply focuses on opposition figures.[101]

Because of the AU's bias in favour of state sovereignty, its commitment to progressive norms is always called into question. While discussing the possibility of the establishment of an African Criminal Court (ACC), Pacifique Manirakidza hastens to point out that those opposed to the idea base their objections on amongst other things the risk of political manipulation of the institution.[102] This fear is of course justified. The fact that the African Commission on Human and Peoples' Rights has almost been reduced to insignificance is evidence that African leaders care more about self-preservation than anything else.[103] Even when the deficiencies of the Commission had become common cause and a court was contemplated, states still found it necessary to insert Article 34(6), in order to cushion themselves against individuals alleging human rights abuses. However, although sovereignty as understood and applied by most African states[104] has proved to be a mammoth hindrance to the implementation of progressive norms on the continent, the attitude of Africa's leaders cannot be countered through

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98 ibid.

99 James Nyawo, 'Historical Narrative of Mass Atrocities and Injustice in Africa' in Nmehielle (n 77) 125 138.

100 ibid.

101 Id 135.

102 Pacifique Manirakiza, 'The Case for an African Criminal Court to prosecute International Crimes Committed in Africa' in Nmehielle (n 77) 375 400.

103 See Cole (n 14); Gina Naldi, *The Organisation of African Unity: An Analysis of its Role* (2 edn, Mansel 1999) 147; Gina Naldi and K Magliveras, 'The Proposed African Court of Human and Peoples' Rights: Evaluation and Comparison' (1996) VIII African Journal of International and Comparative Law 944; Bekker (n 61) 153

104 This point is made in light of the changing nature of sovereignty. Previously, absolute sovereignty reigned supreme and the international community could not interfere with how states treated their citizens, as this was viewed a purely domestic matter. No doubt, this position has shifted significantly, thanks to human rights and humanitarian law norms that have sought to place human security at the core of governance. For example, Deng and his colleagues have argued for 'sovereignty as a responsibility'. See Francis Deng et al, *Sovereignty as Responsibility: Conflict Management in Africa* (The Brookings Institution 1996).

judicial activism. After all, judicial activism, as Richard Steinberg notes, is almost exclusively pointed to in the spirit of accusation rather than praise.[105]

## CONCLUDING REMARKS

This contribution has shown that in Africa, access to effective remedies is not only constrained by provisions barring individuals from directly accessing courts, but also by states' non-compliance with decisions of international judicial bodies. Drawing from the experiences of the now defunct SADC Tribunal, the ECJ and the ICC, this article has shown that in addition to denying reparation to victims of human rights abuses, states' non-compliance has other more grievous consequences, namely the creation of impotent institutions and the reversal of the gains made by the international justice movement. Because of the multiplicity of functions of international judicial organs vis-à-vis the divergent expectations of their different constituencies, chronic tensions between states and courts are not uncommon.[106] Armed with the political authority, which they exercise over these judicial organs, states invariably emerge victorious. For this reason, Africa's judicial organs, as well as other judicial institutions with jurisdiction over African states, ought to understand the centrality of sovereignty in the interplay between states and courts. The decision to extend criminal jurisdiction to the African Court of Justice and Human Rights, as well as the call echoing across the continent for African states to withdraw from the ICC *en masse,* are a stark reminder of the need for a careful approach to international human rights enforcement in Africa. That states in general and leaders in particular are 'victims' of human rights enforcement, creates an environment of suspicion and cautionary approaches to the extreme. While individuals fanatically pursue unfettered access to judicial organs, political leaders on the other hand find themselves collectively conceiving strategies to thwart this growing 'enemy'. However, where states willingly grant human rights jurisdiction to international courts, it places members of that community, as well as civil society organisations in a stronger position in lobbying for compliance. Because there are judicial and political mechanisms for demanding compliance, where a judicial organ exercised powers expressly assigned to it, a reminder to the offending state about the values to which it has ascribed places the lobbying process on a firmer footing. The same cannot be said in instances where the judgment that is being disregarded was based largely on 'implied powers'. It follows, therefore, that judicial organs on the continent must desist from any form of judicial activism, as this will simply increase non-compliance and further threaten their very existence.

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[105] Richard H Steinberg, 'Judicial Lawmaking at the WTO: Discursive, Constitutional, and Political Constraints' (2004) CIIX (2) American Journal of International Law 247 248.

[106] Fauchald (n 29) 28.