Claiming Agency

Reflecting on TrustAfrica's first decade

Edited by

Halima Mahomed and Elizabeth Coleman

WEAVER PRESS

TRUSTAFRICA

3

African Agency in Contested Contexts: A reflection on TrustAfrica's work in international criminal justice

Humphrey Sipalla

'The world supply of disinterested altruists and unconditional aid is very small indeed.'

Julius Nyerere[1]

Introduction

In 2016, TrustAfrica celebrates its first decade as an African foundation and leader in shaping African philanthropy on the continent. Its work is built on a commitment to African agency, the conviction that Africans are the rightful drivers of efforts aimed at the transformation of their condition. This notion of agency is complicated, however, in the case of TrustAfrica's International Criminal Justice (ICJ) Fund. In this field, which seeks international justice for victims of crimes such as atrocity,

1 Nyerere (1970).

opinions are sharply divided over what it means for Africans to support Africa. This chapter discusses TrustAfrica's work in this contested setting, where a truly African theory and practice of philanthropy is emerging.

The ICJ Fund is a multi-donor fund whose vision is an Africa without impunity for perpetrators of international crimes.[2] The fund seeks to strengthen the capacity of local African civil society organisations (CSOs) to combat impunity through supporting social movements, elevating the voices of victims, and concerted advocacy for domestic, regional and international accountability mechanisms. The fund works to generate improved knowledge and understanding of international criminal justice and related issues. Its theory of change is that a well-informed citizenry and concerted civil society advocacy will provide the impetus for African leaders to address the scourge of impunity.

The fund was created in 2012 as a response to the growing backlash in Africa against the International Criminal Court (ICC), depicting the ICC as a pro-Western, imperialist organisation that disproportionately targeted Africans. Such depictions had overshadowed the need to secure justice on the continent. Although originally established to bolster African support for the ICC, the fund's understanding of what it means to be an African grant maker supporting African agency in a polarised setting has evolved, become more nuanced. This chapter sets out to discuss this evolution.

A history of the notion of African agency

The colonial enterprise, which any reflection on Africa's present and future can only ill-advisedly ignore, was built around denigrating the colonial subject (Fanon, 1963). Early assertions of African agency like the Negritude movement, which arose in the 1930s, relied on artistic expressions of cultural pride to reject the denigration of Africans and their descendants. It was not long, however, before Africans began to point

2 In our present context, these are genocide, war crimes, and crimes against humanity. The atrocities such crimes entail are considered so grievous as to 'deeply shock the conscience of humanity' and thus are of 'concern to the international community as a whole' especially as they 'must not go unpunished' with a view to 'end impunity and [thus] contribute to their prevention'. See Preamble of the Rome Statute of the International Criminal Court. However, international crimes may, in a larger context, also refer to crimes that threaten international peace and security, such as the crime of aggression, or crimes that necessarily occur beyond the normal jurisdiction of one state, such as piracy.

to the future of African agency, where spoken affirmations of cultural self-worth alone would not suffice. For instance, Wole Soyinka sharply criticised Negritude thus: 'A tiger does not proclaim his tigritude, he pounces.'

In the 1950s, as Africans fought for political independence, so urgent and necessary a task was it to assert African agency that Kwame Nkrumah, in his 'Motion of Destiny' speech in 1953, argued for the right of Africans to make their own mistakes as all peoples do.

The establishment of the Organisation of African Unity (OAU) embodied this conviction that official African action would be directed by Africans. However, while the elimination of oppression and discrimination had been a 'major factor in the African drive to self-determination and independence, the initial post independence [human rights] record of African states was generally unsatisfactory' (Jallow, 2012). It was sadly not unusual for African states to focus on the evils of apartheid while ignoring the 'massive and systemic violations, sometimes of a genocidal scale', amongst OAU members.

With Africans exercising their right to make mistakes, people began to demand more from African agency than rebuttals of cultural inferiority and recitals of lofty dreams.

African agency as improving the lot of Africans

In the academy, Wole Soyinka was insisting that the tiger ought pounce more than roar. Among statesmen, Julius Nyerere was already in 1970 showing dissatisfaction at the then prevailing trend of speaking in dreamy solidarity:

> [I]t is no longer enough […] to meet and complain to each other and to the world. […] Simply to meet and repeat our goals and intentions is, therefore, meaningless. Worse, it would imply that we have doubts about ourselves, and our ability to continue along the path that we have chosen for ourselves.[3]

Léopold Sédar Senghor, speaking in 1979, exemplified the decidedly introspective turn in assertions of African agency: 'Unfortunately, independent Africa hardly teaches a thing or two on human rights. Let us admit our weakness. It is the best method of getting over it.'[4] From Nkrumah fighting for a right to make mistakes, it was now time to own

3 Nyerere (1970).

4 At the opening the first meeting of the Drafting Committee for the African Charter on Human and Peoples' Rights in Dakar (Jallow, 2012: 62).

up to those failures.

On the official level, the most momentous change was that of replacing the OAU with the African Union (AU) in 2001. This was far from a simple name change. The OAU had been focused on eliminating colonialism and apartheid, and it considered state sovereignty as an absolute. The AU, on the other hand, has been described as the product of a paradigm shift in African official thinking, from OAU's policy of non-interference to a policy of non-indifference. Institutionally, the AU envisioned the creation of a court of justice to hold African states to account for international obligations, and a parliament that would progressively take over legislative powers from the Assembly of Heads of State and Government. It envisioned a wider set of institutions to engage in policymaking, such as the AU Peace and Security Council. Significantly, it absorbed the institutional vision of the 1991 African Economic Community Treaty that aimed to revamp and integrate African economies. On the accountability front, fresh with the memory – and guilt – of the 1994 genocide in Rwanda, the AU appropriated the bold legal right of the Union to intervene in any member state to stop the commission of international crimes – genocide, war crimes or crimes against humanity – under Article 4(h) of the Constitutive Act.[5]

Beyond responsibility: African agency as accountability

In the few years of the twenty-first century, the question of the true nature of African agency has become nuanced, especially in the context of Senghorian candour about Africa's human rights failings. Clearly, African agency must start with Africans being in charge of the decisions that affect their lives, even if this may involve making mistakes. But does African agency include African accountability for any such mistakes? How does Africa assert pride in itself while being frank about its failings? Are the old ideas of absolute African state sovereignty and non-interference valid? Who among the Africans, between perpetrator and victim, governor and the governed, holds rights to speak on our behalf? How do well-meaning Africans confront state failure while working with the authorities? What is an authentic African response to impunity for egregious human rights violations? And, are those who denigrate Africans necessarily non-African? These questions

5 To be sure, in the past African states had, haphazardly and in national self-interest, intervened in other countries, even militarily, as Tanzania did in 1979 to oust Idi Amin and ECOMOG, led by Nigeria, did in Liberia and Sierra Leone. But these were mostly exceptions to OAU policy.

are central to any conception of African philanthropy.

African agency without African money?

The implicit North-South divide that characterised assertions of African agency from the earliest times seems to have a tenacious hold, especially as concerns the question of sources of finance. Benjamin Mkapa, speaking on peace-building and transitional justice in Africa in 2014, offers this reflection:

> African mediators constitute an essential part of the post Cold War pattern of local and regional actors seeking solutions to local and regional problems. […] Although there has been significant movement in reducing the competition between African and international actors over management, organisation, and ownership of mediation, a lot more needs to be done to establish functional and fruitful collaborative governance in mediation. *Resource imbalances between African and international mediators are not going to go away soon.* And when some international actors deride the capacity of African mediators, hostilities between local and international mediators deepen. On the other hand, some African actors have the tendency to diminish the significance of international contributions particularly in the event of successful mediation outcomes (Mkapa, 2016 [emphasis added]).

Issa Shivji (2005) captured the evolution of global political economy and the challenges to African agency that it poses to African philanthropy. Shivji distinguishes between civil society actors and non-governmental organisations,[6] locating the African NGO at the 'crossroads of the defeat of the national project and rehabilitation of the imperial project',[7] which recalls the century of evolving debate on African agency recounted above.

---

6 Civil society is traditionally defined as the space between the individual in private life and the state. Philanthropy necessarily acts within this space, which encompasses a wide variety of actors, from small community associations to trade unions and national and international networks. However, in twenty-first century Africa, this space, Shivji points out, has become dominated by the donor-funded NGO. He characterises NGO self-perception as a 'non-governmental, non-political, non-partisan, non-ideological, non-academic, non-theoretical, not-for-profit association of well-intentioned individuals dedicated to changing the world to make it a better place for the poor, the marginalised and the downcast'.

7 See Shivji (2005) 'By Way of a Preface'.

Shivji's is admittedly a 'ruthless self critique'.[8] He laments the 'false bi-polarity or dichotomy between the state and civil society' in Africa. In the context of resource imbalances, Shivji wonders whether the donor-funded African NGO is conscious of the ideological undercurrents of social change activism or is an unwitting player in what he calls a new-age civilising mission.[9]

Concurrent to the North-South divide is the divide within African societies. The African NGO form dominates the civil society space. Yet, does this NGO form adequately express the concerns of the lowly African, who in the context of international criminal justice, is the victim of atrocity crimes? To be sure, in the early years of African agency, it was assumed that any African spoke for all Africans. In twenty-first century Africa, this is not always the case. Are the views of local movements such as neighbourhood associations, victims' groups or rural communities influential in setting agendas and forming policy? Is a bottom-up model possible if these local voices remain dependent on resources outside their communities?

A prominent official African challenge to accountability advocacy is the peace versus justice debate that argues that conflict-weary communities prioritise an end to conflict. Seeing international criminal justice as a component of justice and reconciliation efforts, the African NGO is challenged to 'pursue holistic approaches that ensure justice for victims of gross human rights violations' (TrustAfrica and MacArthur Foundation, 2011). To achieve this, the civil society space ought allow for other CSO actors beyond the urban, sophisticated African NGO, so as to represent better the complex diversity of African societies.

An overview of the ICJ Fund

At the turn of the century, African NGOs and intelligentsia had viewed the AU's policy shift to non-indifference, the establishment of the Afri-

8 Shivji centres his critique of the African NGO form around five points he calls 'silences': a self-definition that emphasises a non-state bi-polarity; prioritising activism before understanding the phenomena to be changed; accepting the present state as permanent; the depoliticisation of civil society action that disregards the complexity of social interests and social justice; and ambiguous change theory that separates African activism from African intellectualism.

9 In this battle for the African soul, Shivji's arguments seem echoed by Gathii (2011), who posits that, insofar as neo-liberal trade agreements are concerned, developing countries are no longer hapless victims of Western imposition, but eager and willing adopters.

can Court on Human and Peoples' Rights and the strong official African support for the ICC, as heralding a new dawn for respect for human rights and fighting impunity. Yet, between 2005 and 2010, the sharp reversal in official support for existing accountability mechanisms raised concern among Africa's human rights community.

In November 2011, a meeting was organised by TrustAfrica, the Centre for Citizen Participation in the African Union (CCPAU) and the MacArthur Foundation in Nairobi to reflect on this troubling trend. The 58 participants were drawn from African NGOs, think tanks, donor institutions and African intellectuals, and sought to define an effective advocacy response to the ICC backlash. Participating donor institutions agreed to explore the possibility of joint funding in order to leverage the impact of individual donors and reach a more diverse group of African CSOs working on international criminal justice. The resulting fund, the TrustAfrica International Criminal Justice Fund, became operational in 2012.

The fund sets out its strategy thus: to strengthen the capacity of human rights organisations to contribute to transitional justice policymaking at the national level; and to develop informed and concerted advocacy strategies to promote international criminal justice at the regional and international levels. This strategic choice envisioned the following outcomes: 'Increased knowledge and understanding of the African international criminal justice landscape; Improved advocacy capacity of civil society organisations; Discernible improvements in responses to atrocity crimes' (TrustAfrica, 2015: 13).

The fund engages in three classes of activities: technical assistance (commissioned research mapping out the ICJ landscape in Africa, nationally, regionally and internationally); peer learning convenings; and grants, which constitute the principal activity of the fund.

A fiery baptism in 2012

The fund's earliest strategy statement had an almost exclusively ICC focus. In 2012, the fund planned to make two main clusters of grants: for national campaigns on ratification, domestication and monitoring implementation of the Rome Statute; and for regional and international campaigns on developing cooperation policies with the AU organs, or urging the ICC Prosecutor and the UN Security Council to consider cases from elsewhere in the world. The fund aimed to support the following activities: advocacy training and skills building; Rome Stat-

ute ratification and domestication campaigns and media outreach; dialogues and partnerships between states and advocacy organisations; and networking and coalition building among advocacy organisations. In addition, the fund planned rigid funding caps for its two classes of grants: $50,000 for national projects and $100,000 for regional or international projects.

A project was supported for civil society advocacy during the July 2012 AU Summit in Malawi. The Summit did not materialise, because Malawi refused to invite Sudanese President Omar al-Bashir. It was moved at the last minute to Addis Ababa, resulting in tensions that made for a particularly hostile ICC advocacy environment; the project was thus changed to support domestic public interest litigation, research and a conference on accountability for atrocity crimes in South Africa.

This very first project became emblematic of the politically charged and highly fluid nature of international criminal justice advocacy. If ever the fund had expected to apply its initial strategy rigidly, the circumstances of this project made it evident that a more nuanced approach was necessary.

During the course of 2012, TrustAfrica took two important steps. First, it recruited dedicated staff for the ICJ Fund. Second, it commissioned local experts to conduct eleven scoping studies on the international criminal justice landscape in ten specific countries and the AU. These studies became the foundation of the fund's model of knowledge management, which favours local expertise and promotes proximity to local concerns. The fund did not issue its second grant until October 2013.

Scoping studies as knowledge from the periphery

The fund spent the period between late 2012 and mid-2013 conducting scoping studies in Kenya, Uganda, the Democratic Republic of Congo, Egypt, Nigeria, Ivory Coast, Senegal, Guinea, Mali, Uganda, Sudan and the AU. The studies depicted each country's (and the AU's) specific political and legal issues and made recommendations of potential areas of action and local partners. Some, such as the Egypt report, presciently foresaw a significant reversal of democratic gains following the 2011 Arab Spring.

The studies affirmed the value of local expertise. Some also identified local actors who may not have been well known to international donors, but who stood to be potential partners and grantees.

In 2015 and 2016, the fund commissioned additional studies, on the implications of the unexpected arrest of former Lord's Resistance Army commander Dominic Ongwen, the situation in Uganda, and the ICJ landscape in Cameroon and the Central African Republic.

Principles of a nuanced and evolving grants policy

Attention to local context

In contrast to the initial grants policy described earlier, the fund's current practice seems more contextually appropriate. In Nigeria, for instance, given the high probability of pursuing Rome Statute domestication[10] and the need for documentation of victims as identified in the scoping study, the fund supported the work of the Nigerian Coalition for the ICC (NCICC). In Uganda, the political climate allowed for a first-ever attempt to bring together war victims across several decades to a national platform. On the other hand, as opposed to the situation before 2011, with the election of two Kenyan indictees to the highest political offices, Kenya replaced Sudan as the source and locus of a sustained state-driven campaign to delegitimise the ICC. Funding to Uganda and Kenya projects has reflected this, and has included a mix of regional and international advocacy by Kenyan and other African NGOs, engaging the national discourse on domestic prosecution (the proposed International Crimes Division of the High Court of Kenya), pro-active media engagement to balance the public narrative, and raising the profile of the victims who consistently get lost in the highly politicised Kenyan environment.

Victim centredness

The fund's early documentation did not mention 'victim' even once, but it has since placed significant focus on victim-centred projects; indeed, the first two grants approved in 2013 were entirely victim-centred. All grants currently incorporate an element of victim promotion, such as coalition building that involves victims' groups, litigation or advocacy that raises aspects of victims concerns, and research or documentation

10 'Domestication' is the process by which states convert international treaties they have ratified into locally enforceable laws. This is traditionally seen as a requirement in countries that follow the English common law tradition which sees international law as separate from national law. Such legal systems are thus termed 'dualist'. Most other countries however follow a 'monist' system by which the ratification of a treaty automatically makes it enforceable by local courts. Nigeria, being of dualist Common Law tradition, applies the 'domestication' requirement.

work that similarly incorporates victim-centred approaches. It is safe to say the fund has made victim-centred project design central to its work. Fund documentation from 2016 makes the focus on victims a necessary theme rather than a simple sub-category.

Flexible funding limits

Current practice now regards the $50,000 and $100,000 as guidelines rather than rigid limits. The lower category of grants is issued to new grantee partners to allow the fund to either acquire first-hand experience of their organisational capacities or grow such capacities where pre-funding assessments have noted weaknesses. First-time partners may receive more than $50,000 on the strength of excellent reviews.[11] At present, grants range from $30,755 to $150,000. The highest grant amounts so far approved for first-time partners are $110,000, $103,000 and $100,000.

While it would have been easier to retain rigid funding caps, the fund attempts to instead make its evaluation on a case-by-case basis, prioritising the project needs and organisational capacity over fixed internal limits. This has allowed for more effective projects, such as AYINET's 2014 National War Victims Conference, which was the first time that local victims' associations had been afforded a platform to share among themselves and directly voice their aspirations to state officials.

Civil society movement building

Another benefit of this move away from rigid funding caps is seen in the fund's focus on civil society movement building (including a media constituency), with sometimes small but bold grants.[12] Such a focus is central to the idea of TrustAfrica supporting African agency. In fact, the proportion of total investment devoted to movement building was 42% between 2012 and 2015, and this could only have been achieved with flexible funding. The fund applies a progressive growth principle that facilitates its commitment to going off the beaten path to identify under-

11 Factors include recommendations by other donors who have worked with the organisation in question, previous handling of grants of a similar value, and evidence of sound financial and project management systems.

12 Grants to ***Coalition malienne des défenseurs des droits humains*** (COMADDH), Southern Africa Litigation Centre (SALC), Kenya Chapter of the International Commission of Jurists (ICJ-K), ***Association des femmes africaines pour le recherche et le développement*** (AFARD), Nigerian Coalition for the ICC (NCICC), African Youth Initiative Network (AYINET) and Journalists for Justice (JFJ) are notable examples.

served constituencies and grow their capacities with incremental multi-year grants. The fund thus serves as a facilitator, providing support and expertise in grant application and execution to small organisations and allowing them time and opportunities to grow.

Movement building is approached from national and regional levels. In Mali, for instance, grants have included support to strengthen a national network of human rights advocates, facilitating the national secretariat's efforts to work with rural affiliates. By illustration, women's groups from across the country engaged in research data collection that valorised their local knowledge but also strengthened their connections to the national network. In Uganda, support for follow-up activities from the war victims conference focused on cementing the incipient victims' movement that had for decades been split into regional groupings.

Peer learning

The fund applies a peer learning approach to the meetings and conferences it supports. For instance, when supporting the 2014 AYINET conference, the fund ensured that grantee partners from other African countries attended, to see what best practices could be learnt from their Ugandan fellows. Uganda has one of the longest running conflicts in Africa, and was the first country in the world to set up a truth commission, in 1974, as well as the first to refer cases to the ICC.

This event made deep impressions on some of the fund's grantee partners from Kenya, Ivory Coast and Mali; the relative youth of their conflicts means victims' associations remain deeply divided along the same sectarian lines that fuelled the conflicts in the first place.

Similarly, the Southern Africa Litigation Centre (SALC) incorporated fund partners in its workshop to reflect on the status of international criminal justice at the continental level and in national litigation. ICJ Kenya and the Council for the Development of Social Science Research in Africa (CODESRIA) have been supported to nurture other African NGOs by involving them in their advocacy missions at the AU and ICC Assembly of State Parties. Other peer learning activities include the annual international criminal justice convening, which provides a platform for partners to share experiences. These activities enable the fund to build the capacity of its partners while itself learning from the participants.

The basket fund principle

As at end of 2015, the fund had seven primary donors: the John D. and Catherine T. MacArthur Foundation, the Oak Foundation, the Open So-

ciety Human Rights Initiative, the Open Society Foundation, Humanity United, the Sigrid Rausing Trust and an anonymous donor. These seven, together with TrustAfrica, pool their resources in a basket fund. In the case of the ICJ Fund, TrustAfrica is both grantee and equal partner. It does not simply serve as an outsourced administrator for the primary donors but as an active driver of policy and practice. A Steering Committee composed of these eight sets policy and manages the work of the fund.

Advantages of the basket fund approach

According to members of the Steering Committee, this resource pooling helps eliminate duplication when donors operate separately and allows for better trends analysis to avoid over-concentration in thematic or geographical areas. It also enhances the impact of overall interventions, and serves to build consensus on the best possible approaches to challenging impunity for atrocity crimes. This also helps prepare the fund for the long-term nature of international criminal justice advocacy.

The diversity of donors enables the rich range of innovative approaches the fund is currently engaged in. While one donor may emphasise documentation, and another prioritise movement building, a third may focus on pro-ICC advocacy. Interventions range from a focus on international structures of criminal accountability, through promotion of continental and national accountability structures, to support for victim concerns and overall transitional justice actions (documentation, truth telling, reconciliation, reparations).

By working in concert within the fund, grant makers are challenged to consider supporting activities that would otherwise have fallen outside their purview. The AYINET conference, for instance, was supported by the fund despite it having been earlier rejected by one of the fund's basket donors.

With small staff and large portfolios, grant makers are not always able to fund as many interventions as they would like. The diversity of local contexts, grant makers' location far from said contexts and administrative bottlenecks mean their involvement in Africa has often been far from optimal. The fund allows them to expand their reach and support the type or depth of projects they may not have supported if working individually.

Challenges of operating as a basket fund

No worthy endeavour is without its challenges. For the basket fund, these proceed from two key factors: first, the presence of several primary donors means that several distinct approaches have to be harmonised; second, the power dynamics within the Steering Committee require constant diplomacy from all concerned, and especially TrustAfrica, as both a grantee of and equal partner to its primary donors.

A key task for TrustAfrica in the basket fund is one of harmonising these diverse interests. But it also requires each donor to seek the common interest. This is not always easy. For instance, peer learning among grantee partners, which promotes the fund's efficacy, also requires increased expenditure on meetings, something that is not always popular among donors. Also, finding and supporting new CSO actors is time- and capital-intensive.

The Steering Committee faces the challenge of continuous introspection of its role. Should it make overall policy or participate in specific decision making? Should a donor be allowed to veto an approach or place upon a meeting's agenda, a review of an intervention that does not fit its preferred approach? Ought a donor be allowed to know what proportion of their investment in the basket goes into a particular project? And how does a donor conduct oversight of its own grant making in such a basket fund effort?

TrustAfrica mitigates these challenges by maintaining stringent internal administrative controls, as it is a trustee of its primary donors' funds. TrustAfrica must also maintain a constant diplomatic poise, using carefully crafted meetings to hear and respond to any queries from its donor partners. This is not always easy: a simple conference call from Dakar can be difficult to organise, given poor connectivity and varied time zones. Fund staff must also synthesise documentation from all the fund's activities to be discussed at SC meetings.

Certain attributes of the ICJ Fund

Close relationships with partners

The fund's secretariat has developed working methods which funded partners have described as respectful, conducive to capacity-building and sensitive to local needs. It is this strength that affords the fund its ability to respond effectively to the dynamic and complex circumstances it works in. Staff of the fund take time to get to know their prospective

partners, to understand their weaknesses, and in some cases to help them draft their applications.

Such an approach is fraught with pitfalls. A grant maker must, by definition, sit in judgement over its partners, not only at the application stage, but throughout the grant period. The fund needs to support weak prospective partners without compromising objectivity. This applies both substantively and administratively. Expanding grant making to underserved communities also adds critical administrative questions such as monitoring project costs, which can only poorly be assessed from outside their context.

Seeking out underserved communities and NGOs

The African landscape of human rights advocacy and, by extension, international criminal justice, is largely dominated by the urban NGO, staffed by well-educated, soft-skilled[13] Africans in mostly English-speaking Africa. The donor community acting in African human rights advocacy is dominated by players from the Anglo-Saxon world. By contrast, French, Portuguese and Arabic non-African donors are scarce. And the typical civil society actor, particularly in French-speaking Africa, is a national association of many grassroots associations, with a limited national secretariat. Their constituency and staffing is likely to lack the soft skills needed to penetrate the English-speaking philanthropy world.

The fund has focused on reversing this trend by seeking out small, poorly resourced NGOs with a strong grassroots constituency, and deploying larger ones to support capacity building among them. The fund has taken affirmative action to facilitate the incorporation of poorly resourced NGOs that do not fit the dominant characteristic of the urban sophisticated English-speaking NGO.

The fund shuns the usual 'call for proposals' model, which tends to favour the well-resourced, experienced NGO, not least because they would be connected by internet to the virtual networks where such calls are distributed. Instead, the fund invites potential organisations to conversations aimed at synergising common aims.

Thanks to this approach, the fund's partners include a number of non-urban associations from English-speaking Africa and even larger number of associations from French-speaking Africa that had hitherto

13 By 'soft skills', we mean the intangible cultural understandings, demonstrated in language, etiquette and general diplomatic manner that would endear one, at a personal level, to interlocutors. Such skills better dispose a person to multicultural exchanges, which are necessary for inter-personal relations with Western donors.

been unable to attract significant funding. Coupled with a multi-year funding approach, a number of initially weak associations have grown in capacity and skills; they implement ever larger projects, and can apply their new skills to approach other donors with more stringent entry requirements. The fund thus becomes both benefactor and facilitator.

African identity versus African money

In international criminal justice advocacy, where the prevailing official narrative is that international mechanisms seeking accountability for mass atrocities are neo-imperialist, the fund's African identity bears great import. A number of the fund's partners have indicated that simply being funded by an African donor makes advocacy before state authorities more feasible. In their words, it 'opens doors' that would otherwise be locked. But as we have seen, TrustAfrica is itself funded by Western donors. This then begs the question of whether African identity necessarily requires African money.

In its 'Africanness', the fund presents one viable response to the conundrum of African philanthropy, given the very limited supply of disinterested altruists that Nyerere described, and the even more limited share of African philanthropists supporting human rights work, disinterested or otherwise. While Africa must progressively build its own 'bank' of indigenous philanthropy to build African civil society, Nyerere's call can also be seen as a challenge of substance. African money can be used to the detriment of Africa. Further, donor finance, regardless of its source, may cement top-down approaches, where the local and the periphery lose even the little say over their lives that they already have. If African philanthropy can apply models that empower the African periphery while utilising Western sources of finance, then the greater the benefit for Africans.

One answer may lie, if the fund's practice is anything to go by, in the model that is applied by African states themselves. The true disinterested altruist is one who listens to and responds to the needs of the subaltern, rather than dictating terms because they hold the purse strings. African states themselves seek funding from beyond the continent. What makes their action Afrocentric is not therefore the source of funding but where the decision-making agency lies. The African state can claim a mandate to govern, but good governance demands, of the state, the philanthropist and the NGO, not simply to speak for the periphery, but to allow themselves to be changed by the priorities of these

peripheral communities.

Bridging NGO-academy, NGO-state dichotomies

The fund has made efforts to ensure that an intellectual understanding of the phenomena it seeks to act in favour of is at the core of and precedes its action. We have explored some examples above. In addition, the fund has sponsored projects seeking to bring African activism together, not only with the intelligentsia, but also with the state. It has been helpful that international criminal justice is itself ripe for such encounters. There is significant public discussion of the complexities of accountability for atrocities in Africa across the intelligentsia, NGOs and states. In fact, a good number of the thought leaders in this regard can be seen as intellectuals who work with state (nationally or internationally) and/or civil society. CODESRIA, for example, is arguably the premier African centre for social sciences scholarship, and is an inter-governmental organisation as well. CODESRIA's continental conference on International Criminal Justice, Reconciliation and Peace in Africa: the ICC and Beyond, held on 10-12 July 2014 in Dakar, brought together intellectuals, activists and state authorities to debate the complexities of international criminal justice in Africa.

Opportunities for the future

Official hostility to ICJ in Africa is far from universal

African diversity is also evident at the official level. African countries such as Botswana, Tanzania, Zambia and Malawi have shown a willingness to uphold their Rome Statute obligations. Further, African countries also practice a different foreign policy as individual countries as opposed to when acting within the AU. The Seychelles, Tunisia, Cape Verde and Côte d'Ivoire ratified the Rome Statute after 2010.[14] Botswana ratified the amendment to Rome Statute Article 8 and the amendment on the crime of aggression in 2013.[15] Gabon, Senegal and Uganda have ratified the Agreement of ICC Privileges and Immunities in 2010, 2009 and 2014 respectively.[16] These sovereign actions have occurred despite

14 https://asp.icc-cpi.int/en_menus/asp/states%20parties/african%20states/Pages/african%20states.aspx; https://www.icc-cpi.int/cdi Accessed 24 July 2016.

15 https://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=X-VIII-10-a&chapter=18&lang=en Accessed 1 July 2015.

16 https://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=X-VIII-13&chapter=18&lang=en Accessed 1 July 2015.

repeated AU decisions resolving non-cooperation with the ICC. Attention to this diversity can help cultivate a healthier democratic space in continental affairs where divergent views are not necessarily seen as disloyalty to Africa. The fund has for instance engaged the goodwill of the Senegalese state – given the election of Senegalese Justice Minister Sidiki Kaba to the ICC-ASP Presidency, and the trial of Hissène Habré – towards greater African state support for accountability efforts.

Arguing against de-funding pro-ICC engagement

After a decade of persistent African official hostility to accountability for international crimes, and the collapse of the dockets relating to Sudan and Kenya in 2015 and 2016, there is currently little appetite in the donor and NGO communities for pro-ICC engagement, unlike in 2011. Rather than divest from ICC advocacy, the fund may well consider sustaining its initial limited pro-ICC support long enough for it to bear fruit, at least in those countries where incumbent high-ranking officials are not indictees, which essentially means the vast majority of African cases before the ICC. As Uganda's experience demonstrates, by the close of 2013 a lack of movement in the LRA indictments had led the ICC Office of the Prosecutor to begin withdrawing active work in Uganda. This all turned around with the unexpected arrest of Dominic Ongwen, which reinvigorated interest in the ICC in Uganda, as well as rekindling concern for all the other victims of conflicts not covered by ICC action in Uganda.

Reversing the sidelining of the African human rights system

Accountability for mass atrocities can be seen to involve the two interrelated concerns of victim protection and redress, traditionally the province of human rights law,[17] and individual criminal responsibility. The history of recent international law shows that victims are more likely to be redressed in the flexible arms of international human rights law than the stringent walls of international criminal law.[18]

17 'The international protection of human rights should not be confused with criminal justice. […] The objective of international human rights law is not to punish those individuals who are guilty of violations, but rather to protect the victims and to provide for the reparation of damages resulting from the acts of the States responsible.' (Inter-American Court of Human Rights, 1988).

18 Charles Cherno Jalloh, in his presentation at the 2014 CODESRIA conference, laments the 'unrealistic goals' set for criminal tribunals, including UNSC Res 1315(2000), which authorised the Special Court for Sierra Leone to call for 'a credible court that will contribute to peace, justice and reconciliation' (Wamae, 2014:7).

At the time of the rise of international criminal law and its controversies in the early 2000s, the African Court on Human and Peoples' Rights was gearing up for operationalisation. Its first bench was appointed in 2006. Equally, regional economic community (REC) courts were themselves coming to life. An amendment to the ECOWAS Treaty in 2005 granted the ECOWAS Community Court of Justice a human rights jurisdiction. The Tribunal of the Southern African Development Community, established in 1992, was inaugurated in 2005. The East African Court of Justice, established in 1999, was inaugurated in 2001. These African courts occasionally issued bold pro-victim decisions. Coupled with the new focus on human rights and abhorrence of mass atrocity evident in the Constitutive Act of the African Union, the 2000s held great promise for the concretisation of human rights protection and its victim-centred bias.

While the foregoing seeks not to challenge the currency of individual accountability for mass atrocity in the political economy of fighting impunity in Africa, as concerns victim-centredness, the sidelining of Africa's human rights system at its critical expansion phase would not have been helpful.

One clear opportunity for the future is the task of constructing an African human rights system that can effectively redress victims and advance the cause of accountability, usual[19] and manageable state resistance considered. The fund's origins and nomenclature, 'International Criminal Justice Fund', may have restricted its action to international criminal justice. Yet the central focus of this work – concern for the African victim of mass atrocity – calls on the fund, and indeed civil society, to at the very least consider the bird in hand as well as the two in the bush. It is testament to the fund's capacity to listen to its constituency and evolve, that in March 2016 it hosted a convening in Arusha, at the margins of the Ordinary Session of the African Court on Human and Peoples' Rights to precisely consider the role of human rights law in redressing victims of mass atrocities.

19 It is not unusual for states to resist and indeed defy international courts. The UK is currently (2016) defying the European Court of Human Rights demand for a repeal of a blanket ban on prisoner voting rights. The US defied the International Court of Justice's 1986 reparations demands for invading Nicaragua. Colombia withdrew from the ICJ's compulsory jurisdiction over its award of disputed islands to Nicaragua. The Inter-American Court of Human Rights has been defied by Trinidad and Tobago and Venezuela over the death penalty and judicial independence.

Conclusion

The fund has thus far succeeded in being nimble, risking to work outside the usual circuit of English-speaking African NGOs and promoting engagement in a wide array of aspects of atrocity accountability in Africa. It has also brought together the major grant makers to act in concert, and has provided a fresh and universally (among its donors and partners) welcome approach to grant making, proving that close and interested working relationships with partners need not threaten objectivity but rather provide for more intelligent grant making.

While leveraging Western donor resources, it has built a reputation of harmonising diverse interests, as was the vision of its founding donors. Its example demonstrates that donors having 'an agenda' does not necessarily mean that they act to the detriment of African agency. The fund's constituency (donors, grantees and other partners) laud the fund's value proposition and its contribution to the vision of a continent respectful of human rights and fighting impunity. Partners are universal in praising the fund's preparedness, its knowledge of local contexts, its willingness to listen to grantee perspectives and its proactive participation in preparation of grant seeking documentation.

The fund is not the first or only African grant maker, nor is it the only collaborative basket fund. It is not the only actor in international criminal justice, and is not the only one to seek out underserved communities in its field of work. In its first three years of operation, the fund has remained open to knowledge from the periphery, allowing its partners to influence its interventions and broadening its scope from solely supporting one institution to a range that is sensitive to each situation's peculiarities. The fund's successes need be seen from the point of view of its own origins and aims. Its example, being young and fully seizing the African right to act, even at the risk of making mistakes, still has a long way to go. However, it has begun forcefully.

In seeking out the unbeaten path, the fund has started to build up movements, and within these has encouraged the growth of NGOs with weak capacities. Its next task lies in appropriately determining its exit strategy from specific communities. It must remain long enough to achieve its aims and allow its partners to develop, but it must, as with all grant makers, avoid debilitating dependence.

So, what then is an authentic African response to the impunity for egregious human rights violations? African agency has always been mul-

tifaceted, complex and operating from a position of reference to Western resources. African philanthropy in the twenty-first century will be no different. Yet African agency has always evolved, its strength being not the right to make mistakes, but to learn from these mistakes and reanimate African faith in Africa rising. Atrocity accountability is among Africa's most potent debates today. It is fitting therefore that African agency, so described, is active here, as well.

References

Fanon, F. (1963) ***Wretched of the Earth.*** London, Penguin.

Gathii, J.T. (2011) 'The neo-liberal turn in regional trade agreements' ***Washington Law Review,*** 86 (3).

Inter-American Court of Human Rights (1988) ***Velásquez Rodríguez v Honduras***, Judgment of 29 July 1988, (Ser. C) No. 4.

Jallow, H.B. (2012) ***Journey for Justice.*** Bloomington, AuthorHouse.

Mkapa, B.W. (2016) 'The role of African leaders in conflict resolution and peacebuilding', in J.R.Stormes SJ, E.O. Opongo SJ, K. Wansamo SJ and P. Knox SJ (eds), ***Transitional Justice in Post-Conflict Societies in Africa.*** Nairobi, Paulines Publications.

Nyerere, J.K. (1970) 'Non-Alignment in the 1970s: Opening Speech to the Preparatory Conference of the Non-Aligned Movement' 12 April.

Shivji, I.G. (2005) 'Silences in the NGO Discourse: The Role and Future of NGOs in Africa' Symposium on NGOs Keynote Address at the MS-Training Centre for Development Cooperation in Arusha, Tanzania, 28-29 November. Later republished as Shivji, I.G. (2007) ***Silences in the NGO Discourse: The Role and Future of NGOs in Africa***. Nairobi, Fahamu Books.

TrustAfrica (2015) ICJ Fund Mid Term Evaluation Report (September), p. 13.

TrustAfrica and MacArthur Foundation (2011) Advancing International Criminal Justice in Africa: State Responsibility, the African Union and the International Criminal Court Report of Conference, 14-16 November 2011, Nairobi – Kenya, organised by Centre for Citizens' Participation on the African Union (CCP-AU), TrustAfrica and MacArthur Foundation.

Wamae, N. (2014) Conference Report, International Criminal Justice, Reconciliation and Peace in Africa: The ICC and Beyond, 10-12 July, Hotel Novotel Dakar.