Article

International Criminal Court and Human Rights in Africa; Untangling the Impasse of African States.

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Abstract
Africa has been thrown into a quagmire amidst global efforts towards operating an international criminal court with criminal jurisdiction over international war crimes such as genocide, human trafficking and crimes against humanity. The International Criminal Court considered as an inevitable reality due to endemic conflict has recently come under serious criticisms as it is perceived as being biased against African countries and their leaders. The focus of this paper was to explore the contending arguments on the politics of prosecutions in the International Criminal Court with specific emphasis on arguments advanced by African countries. This paper utilized selected ICC cases for empirical verification. Adopting the Consenters Theory of International Law, we contended that the non-involvement of African states in the formation and development of international law as well as its application especially concerning cases in Africa, poses a serious concern to its genuine intention of accommodating the interest of African states. We thus, suggest collective action among African states (including those who are yet to be directly affected) in rendering total support towards having a continental legal framework that could genuinely look into cases of human rights violation, crimes against humanity and other issues pertaining to relations among African states.

Keywords
International Criminal Court, Human Rights, Genocide, War Crimes, Criminal Jurisdiction

Introduction

In spite of the fact that issues of human rights violation and crimes against humanity have been palpable in Africa, measures of addressing this menace remain a subject of controversy. While African leaders remain firm that International Criminal Court (ICC) has a concealed intention of re-colonizing Africa, a

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civil society maintains that ICC's onslaught on African leaders is a development long overdue in the region.

The claims by African leaders arose from the searchlight the ICC has persistently beamed on Africa without doing the same to other continents with similar or even worse cases of human rights abuse, and crime against humanity. Generally, countries from the global south frequently complain of skewed power relations in the UN Security Council, the imbalance that has affected the ICC. Under the Statute of the ICC (the Rome Statute), the Security Council has the power to refer cases to the court. In using this power, the Security Council has referred some cases - Libya and the Sudanese region of Darfur - but not others, such as Israel and Syria. The fact that the two situations that have been referred come from Africa tends to support the suggestion that there is an anti-African bias (Plessis, Maluwa and O' Reilly, 2013). Further arguments to this are contained in John Dugard's take on Palestine's cases and the International Criminal Court (Dugard, 2013).

The contention of the civil society has been that there are good reasons to pursue the cases that are under investigation or prosecution before the ICC. For one thing, Africa has experienced a large number of atrocities and, statistically speaking, the rate of atrocities and crimes committed on the continent would make it a natural focus for the court. The victims of those crimes want justice. The people who complain about the bias tend to be African political elites, not the victims, who appear to be almost universally relieved that somebody - anybody -is paying attention to their plight (Plessis, Maluwa and O' Reilly, 2013).

This paper intends to get at the crux of the arguments with the aim of untangling the impasse of the international jurisdictional and criminal justice process in Africa. The paper is thus, subdivided as follows: introduction, the creation of the International Criminal Court, Human Rights, Africa's position on the ICC, cases of ICC response to human rights violation in Africa, theoretical framework towards untangling the impasse and conclusion.

The Creation of the International Criminal Court

The history of the establishment of the International Criminal Court (ICC) spans over a century. The "road to Rome" was a long and often contentious one. While efforts to create a global criminal court can be traced back to the early 19th century, the story began in earnest in 1872 with Gustav Moynier - one of the founders of the International Committee of the Red Cross - who proposed a permanent court in response to the crimes of the Franco-Prussian War. The next serious call for an internationalized system of justice came from the drafters of the 1919 Treaty of Versailles who envisaged an ad hoc international court to try the Kaiser and German war criminals of the World War I. Following the World War II, the allied states set up the Nuremberg and Tokyo tribunals to try Axis war criminals (Coalition for the International Criminal Court n.d). In 1948, the United Nations General Assembly (UN GA) adopted the Convention on the Prevention and Punishment of the Crime of Genocide in which it called for offenders to be tried "by such international penal tribunals as may have jurisdiction" and invited the International Law Commission (ILC) "to study the desirability and possibility of establishing an international judicial organ for the trials of persons charged with genocide." While the ILC drafted such a statute in the early 1950s, the Cold War stymied these efforts and the General Assembly effectively abandoned the effort pending agreement on a definition for the crime of aggression and an international code of crimes (Coalition for the International Criminal Court n.d).

In June, 1989, motivated in part by an effort to combat drug trafficking, Trinidad and Tobago resurrected a pre-existing proposal for the establishment of an ICC and the UN GA asked that the ILC resume its

work on drafting a statute. The conflicts in Bosnia-Herzegovina and Croatia as well as in Rwanda in the early 1990s and the mass commission of crimes against humanity, war crimes, and genocide led the UN Security Council to establish two separate temporary ad hoc tribunals to hold individuals accountable for these atrocities, further highlighting the need for a permanent international criminal court (Coalition for the International Criminal Court n.d).

In 1994, the ILC presented its final draft statute for an ICC to the UN GA and recommended that a conference of plenipotentiaries be convened to negotiate a treaty and enact the statute. To consider major substantive issues in the draft statute, the General Assembly established the Ad Hoc Committee on the Establishment of an International Criminal Court, which met twice in 1995.

After considering the Committee's report, the UN GA created the Preparatory Committee on the Establishment of the ICC to prepare a consolidated draft text. From 1996 to 1998, six sessions of the UN Preparatory Committee were held at the United Nations headquarters in New York, in which NGOs provided input into the discussions and attended meetings under the umbrella of the NGO Coalition for an ICC (CICC). In January, 1998, the Bureau and coordinators of the Preparatory Committee convened for an Inter-Sessional meeting in Zutphen, the Netherlands to technically consolidate and restructure the provisional articles into a draft.

Based on the Preparatory Committee's draft, the UNGA decided to convene the United Nations Conference of Plenipotentiaries on the Establishment of ICC at its fifty-second session to "finalize and adopt a convention on the establishment" of an ICC. The "Rome Conference" took place from 15th June to 17th July, 1998 in Rome, Italy, with 160 countries participating in the negotiations and the NGO coalition closely monitoring these discussions, distributing information worldwide on developments, and facilitating the participation and parallel activities of more than 200 NGOs. At the end of five weeks of intense negotiations, 120 nations voted in favour of the adoption of the Rome Statute of the ICC, with seven nations voting against the treaty (including the United States, Israel, China, Iraq and Qatar) and 21 states abstaining (Coalition for the International Criminal Court n.d).

The Preparatory Commission (PrepCom) was charged with completing the establishment and smooth functioning of the Court by negotiating complementary documents, including the rules of procedure and evidence, the elements of crimes, the relationship agreement between the Court and the United Nations, the financial regulations, the agreement on the privileges and immunities of the Court.

On 11th April, 2002, the 60th ratification necessary to bring the entry into force of the Rome Statute was deposited by several states in conjunction. The treaty came into force on 1st July, 2002 (Coalition for the International Criminal Court n.d).

Following the completion of the PrepCom's mandate and the entry coming into force, the Assembly of States Parties (ASP) met for the first time in September, 2002.

Conceptualizing Human Rights

Human rights are both a cultural and value laden concept, which symbolizes rights, which a person is entitled to for no reason other than his or her humanity. Human rights emanate from two broad conceptions of rights, namely negative and positive rights. Negative rights, according to Weisheity & Morn (2004), seek to protect the individual from the coercion of the state and from other individuals. The

Bill of Rights of the United States Constitution they note seeks to protect the individual from the power of the state.

However, the positive rights doctrine argues that individuals have "rights to food, clothing, medical care, education, and housing" (Weisheit and Morn, 2004: 31). The underlying assumption here is that active and meaningful participation in the affairs of the community is possible when the individual is not constrained by hunger, poverty, illiteracy and fear. Weisheit and Mom (2004) observe, however, that these rights represent statements of entitlements rather than protections, which are actionable by the individual.

The concept of human rights assumed international status with the emergence of the United Nations Universal Declaration of Human Rights on December 10, 1948, whose objective is to act "as a common standard of achievement for all peoples" (as cited in Alderson, 1984:9). There are two parts to the United Nations Declaration of Human Rights. The first part, also known as the first generation of rights, protects the individual's civil and political rights, which include the right to life, freedom from torture and inhuman treatment, the right to liberty and security, equality before the law, and freedom of thought. The Covenant on Economic, Social and Cultural Rights is referred to as the second generation of rights. According to the UN Bill of Human Rights, the second generation rights protect such rights as the right to work, the right to favourable conditions of work, the right to social security, the right to education, and the highest attainable standard of physical and mental health. The focus of the first and second generation of rights is on the individual as a human being with inalienable rights, and with integrity and dignity. Moskowitz describes it best, thus:

> *Because there is but a single definition of man, so there can be but a single measure of man .... Its dimensions are the fixed drives of human nature and all the elemental pleasures and pains of the flesh; the human spirit, with all its intuitions, feelings, fantasies and impulses, which seek the good, the true and the beautiful; and the power of the human mind, which is the basis of man's claim to dignity and worth, to freedom and justice (as cited in Mahmoud, 1993: 487).*

Human rights, therefore, is a 'negotiated package.' In other words, it is a process whereby the ruled bargain with rulers over rights and the extent of the powers of the sovereign. Basically, human rights are about limited government. Human right is concerned with the relationship between people and their political authority. It raises questions about the responsibility of the political authority with respect to the protection of the individual and the scope of the claims that the individual can make from his or her sovereign. In sum, "...it is protections against arbitrary deprivations of life and liberty; it, therefore, includes notions of due process (that is, fair trial, right to confront witnesses and present evidence, appeal, etc." (Pena, 1994: 212). Further, Lauren (1998:11) asserts that "the issue of human rights addresses age-old and universal questions about the relationship between individuals and their larger society, and thus, is one that has been raised across time and across cultures."

The Africa's Position on the ICC

A, large number of African states are parties to the ICC's Rome Statute but the AU is very critical of the ICC and has adopted a number of resolutions reflecting this. Yet, most African states at one time strongly supported the ICC. They were very active in the negotiation of the Rome Statute in the late 1990s. This was a time of great optimism, particularly because the statute had not just the backing of African

governments but also of African NGOs, grouped under the International Coalition for the ICC (Plessis, Maluwa and 0' Reilly, 2013).

The turning point came in 2000 when Belgium issued an arrest warrant for the DRC's then-Minister of Foreign Affairs, Abdoulaye Yerodia Ndombasi (Arrest Warrant, 2000). This was not well received in Africa and began to sour relations between Africa and Europe over the issue of sovereign immunity. Later in 2008, the Chief of Protocol to President Paul Kagame of Rwanda, Rose Kabuye, was arrested in Germany pursuant to a French arrest warrant in connection with the shooting down of the former Rwandan president's plane, which triggered the 1994 genocide (The Guardian, 2008). Kagame took up the issue at the UN, framing it as an abuse of universal jurisdiction by European states aimed at humiliating African political leaders. These are just two examples in a series of cases in which European states relied on universal jurisdiction to harass, in the eyes of some observers, African leaders.

In 2008, the AU reacted to the increased use of universal jurisdiction in European states by adopting a resolution denouncing certain Western governments and courts for abusing the doctrine of universal jurisdiction and urging states not to cooperate with any Western government that issued warrants of arrest against African officials and personalities in its name.

The watershed moment for the AU's relationship with the ICC came in March, 2009, following the issuance of the first arrest warrant for President Omar al Bashir of Sudan (International Criminal Court, Warrant of Arrest for Omar Hassan Ahmad al Bashir, 2009). For states, parties to the Rome Statute, this transformed it from a 'paper commitment' with no real consequences into a very real commitment with potentially serious consequences.

The Bashir arrest warrant caused the relationship between the ICC and the AU to deteriorate for two reasons. First, members of the AU felt that the issuance of the arrest warrant was an impediment to the organization's regional efforts to foster peace and reconciliation processes in Sudan, and that the ICC failed to appreciate the effect that its actions were having on these efforts. Secondly, diplomatic umbrage was taken over the indictment of a sitting head of state, which sparked a debate over whether the Rome Statute can legitimately extinguish diplomatic immunity in states that are not parties to it, such as Sudan (Article 27 of the Rome Statute).

The AU's opposition to the ICC in consequence created a legal conflict for states that are parties to both institutions; different governments have chosen to resolve it in different ways. For instance, when President Jacob Zuma was due to be inaugurated in South Africa, invitations were sent out to all African Heads of State, including President Bashir. As a party to the Rome Statute, South Africa would be required to arrest President Bashir, if he attended the event. Overnight, this created a diplomatic scandal that was very difficult for South Africa to deal with. After two or three days' silence from the South African government on the issue, civil society representatives threatened to request declaratory relief from a court that if President Bashir were to arrive in South Africa, there would be an arrest warrant issued for him. The government eventually took the position that it would be under an obligation to arrest Bashir if he arrived in South Africa, and the Sudanese president did not attend the inauguration. South Africa's position - that it is bound by the Rome Statute - has been clear and consistent since then. But it is likely that many other African states faced with a similar choice would side with the AU, not the ICC.

In October, 2011, when Binguwa Mutharika was Malawi's president, Bashir attended a Common Market for Eastern and Southern African States summit in that country. Malawi issued a formal memorandum in support of its decision to host Bashir, in which it relied on (i) the AU's resolution, passed in response to President Bashir's arrest warrant, urging states not to cooperate with the ICC, (ii) the customary

international law doctrine of Head-of-State immunity and (iii) the fact that Sudan was not a party to the Rome Statute and could, therefore, not be bound by its suspension of immunity, to demonstrate that it was not under obligation to arrest him (Case No. ICC-02/05-01/09, 2011). However, in June, 2012, another former President of Malawi, Joyce Banda, refused to allow Bashir to attend an AU meeting in Malawi, forcing the organizers to move the meeting just three weeks before it was scheduled.

The National Transitional Council (NTC) in Libya in 2011, allowed Bashir to visit Tripoli but, surprisingly, NATO states made no attempts to intervene in the matter. Indeed, Bashir was the first foreign Head of State to visit the NTC in Libya after the fall of the Gaddafi regime, as the Sudanese president provided assistance to the rebels in Benghazi as 'payback' for Gaddafi's assistance to rebels in Sudan's Darfur region. The fact that Libya is not a party to the Rome Statute partly explains the NTC's failure to arrest Bashir, but it does not explain why NATO member states such as the United States and the United Kingdom which undoubtedly had a moral responsibility to take action failed to intervene.

Cases of International Criminal Court's (ICC) Response to Human Rights Violation in Africa

Despite the above mentioned challenges, the ICC was able to prosecute individuals that committed war crimes, crimes against humanity and genocide. So far, the ICC has opened investigation into nine situations indicated here: the Democratic Republic of the Congo, Uganda, The Central African Republic I Dafur, Sudan, the Republic of Kenya, Libya, The Republic of Cote d' Ivoire, The Republic of Mali and the Central African Republic II. The ICC has publicly indicted 39 people, issued arrest warrants for 31 individuals and summoned eight others. Eight persons are in detention while proceedings against 25 are ongoing. Nine persons are at large as fugitives, four are under arrest but not in the Courts' custody, four are in pre-trial phase, and eight are at trial. Proceedings against 12 have been completed: two have been convicted, one has been acquitted, four have had the charges against them dismissed, two have had the charges against them withdrawn, one has had his case declared inadmissible, and three have died before trial (ICC, 2012).

A selection of individual cases handled by ICC includes the following:

Bahr Abu Garda

Bahr Abu Garda was indicted on 7th May, 2009 on a three-count charge of war crimes with regard to the situation in Darfur, Sudan. Abu Garda was alleged to have been the commander of a splinter group of the Justice and Equity Movement (JEM), a rebel group fighting in the Darfur conflict against the Sudanese government. He was accused of leading JEM forces under his command (in conjunction with other rebel forces) in a raid on the Haskanita base of the African Union Mission in Sudan (AMIS) on 29th September, 2007, in which 12 AMIS peacekeepers were killed and eight were seriously injured; the base was also extensively damaged. Abu Garda was accused of being criminally responsible for murder, pillage and intentionally directing attacks against personnel, installations, materials, units and vehicles involved in a peacekeeping mission. Abu Garda was summoned to appear before the court on 18th May, 2009 and the confirmation of charges hearing was held from 19th to 30th October, 2009. On 8th February, 2010 Pre-Trial Chamber 1 ruled that the charges against him would not be confirmed. On 23rd April, 2010 Pre-Trial Chamber 1 rejected the Prosecutor's application to appeal its decision, thus ending the proceedings in the case (ICC, 2015).

Mohammed Ali

Mohammed Ali was indicted on 8th March, 2011, on a five-count charge of crimes against humanity with regard to the situation in the Republic of Kenya. Ali, who at the time was the Commissioner of the Kenya Police, was alleged to have conspired with Francis Muthaura, an adviser of Kenyan President MwaiKibaiki, to order the police forces that he commanded not to intervene in stopping violence perpetrated by Mungiki forces loyal to President Kibaki during post-election violence from 27th December, 2007 to 29th February 2008. Ali was alleged to be criminally responsible for murders, deportations, rapes and other forms of sexual violence, persecutions, and other inhuman acts perpetrated by Mungiki against civilians who were perceived to be loyal to the Orange Democratic Movement (the political party of President Kibaki's rival) in the towns of Kibera, Kisumu, Naivasha, and Nakuru. Ali was summoned to appear before the court on 8th April, 2011 and confirmation of charges hearing was held from 21st September, 2011 to 5th October, 2011, in conjunction with the cases against Mathuara and Uhuru Keyatta. On 23rd January, 2012, Pre-Trial Chamber II decided not to confirm the charges against Ali, thus ending the proceedings against him (ICC, 2015).

Omar al- Bashir

Omar al- Bashir was indicted on 4th March, 2009, on a five-count charge of crimes against humanity and two counts of war crimes with regard to the situation in Darfur, Sudan; on 12th July, 2010 he was additionally charged with three counts of genocide. During the Darfur conflict (specially from April, 2003 to 14thJuly, 2008), al-Bashir from his position as President of Sudan, is accused of implementing a government policy that used the state apparatus (the military, police, security and Janjaweed forces) to attack Fur, Masalit and Zaghawa populations that were perceived to be sympathetic to rebel groups. Al Bashir is accused of ordering the rape, murder, extermination, forcible transfer, and torture of civilians, as well as the pillaging of numerous villages and camps. Additionally, he is accused of intending to partially destroy the Fur, Masalit and Zaghawa ethnic groups by killings, causing serious bodily or mental harm and deliberately inflicting conditions of life calculated to bring about physical destruction of the ethnic groups. The court has issued two arrest warrants for al-Bashir and he is currently a fugitive openly living in Sudan, where he serves as President. As such Sudanese state policy has been not to cooperate with the Court. Since the warrants have been issued, al-Bashir has travelled to several other countries and has not been arrested. Among the countries he travelled include Chad, Kenya, Djibouti and Malawi, which are states parties to the Rome Statute, and were, therefore, obligated to have arrested him. On 26th March, 2013, Pre-Trial Chamber II made a finding that Chad had failed to cooperate with the Court and, therefore, referred the non-compliance to the Security Council. On 5th September, 2013, however, Pre-Trial Chamber II found that a similar visit to Nigeria did not constitute non-compliance, but it requested Nigeria to immediately arrest Omar al Bashir and surrender him to the Court should a similar situation arise in the future (ICC, 2015).

Jean Pierre Bemba

Jean-Pierre Bemba was indicted on 23rd May, 2008, on a two-count charge of crimes against humanity and a four-count charge of war crimes with regard to the situation in the Central African Republic (CAR). On 10th June, 2008, the arrest warrant was amended and the charges changed to three counts of crimes against humanity and five counts of war crimes. Bemba is alleged to have led the Movement for the Liberation of the Congo (MLC) a Congolese rebel group, into the CAR after Central African Republic President Ange-Felix Patasse sought Bemba's assistance in suppressing a rebellion led by Francois

Bozize. Bemba was accused of being criminally responsible for acts of rape, torture, acts of outrage on personal dignity, murder and pillage that occurred in the towns and cities of Bangui, Bossangoa, Bossembele. Damara and Mongoumba from 25th October, 2002 to 15th March, 2003,
Bemba was arrested in Belgium on 24th May, 2008, transferred to the Court's custody on 3rd July, 2008, and first brought before the court the next day. The confirmation of charges hearing was held from 12th to 15th January, 2009,and on 15th June, 2009 Pre-Trial Chamber II partially confirmed the charges against Bemba, finding that he would stand trial for two counts of crimes against humanity and three counts of war crimes. Specially, Pre-Trial Chamber II declined to confirm the charges of torture or outrages upon personal dignity. The trial against Bemba began on 22nd November, 2010 (Schabas, 2011).

Laurent Gbagbo

Laurent Gbabo was indicted on 23rd November, 2011, on four counts of crimes against humanity with regard to the situation in the Republic of Cote dlvoire. As the President of Cote dlvoire, Gbagbo is alleged to have organized, along with members of his inner circle, systematic attacks against civilians during post-election violence that began on 28th November, 2010. National security forces, the National Armed Forces, Militias, and mercenaries under the command of Gbagbowere alleged to have murdered, raped, persecuted, and inhumanly treated civilians who were perceived to be supporters of Alassane Quattara, Gbagbo's opponent .in the 2010 presidential election. According to the arrest warrant for Gbagbo, the crimes occurred in and around Abidjan, including the vicinity of the Golf Hotel, and in the western part of the country from 16th December, 2010 to 12th April, 2011. Gbagbo was detained by forces loyal to Quattara in the presidential residence on 11th April, 2011. On 29th November, 2011, Gbagbo was transferred to the Court. On 5th December, 2011, he made his first appearance before the Court and the confirmation of charges hearing took place from 19th to 28th February, 2013, before pre-trial chamber and on 12th June, 2014, it confirmed all the charges against him. On 11th March, 2015, the trial chamber joined the cases against Charles BieGoude and Laurent Gbagbo (ICC, 2015).

Theoretical Framework

This paper adopts the Consenters school of thought as the framework of analysis. Scholars of this persuasion hold that international law is law because nations enter into it by consent (Onuoha, 2008). Consenters see international law as a form of social control based on international consent. This consent may be expressed in a formal treaty or implied by way of generally accepted conduct. The adherents agree that the states cannot be bound without their consent but insist that once consent is given they are bound without infringement of their sovereignty because the limitations were voluntarily accepted. More generally, it is held that states enter the comity of nations with the assumption that they accept its laws, and that the continued general observance of certain rules of conduct implies a tacit acceptance of those rules. To the Consenters, law goes beyond the subject of legal regulation or sanction. It allocates and defines responsibilities and obligations, establishes institutions and authorities, activities and programmes and ultimately serves as a tool of social engineering. The Consenters theory is found useful here because of its emphasis on voluntary submission as the basis of states involvement in international law under whatever guise. It is, thus, a potent theory to explain the position of African states in international law, it can, thus, be argued that the non-participation of African states in the framing of international law and worst still, its ratification by the colonial administrations on their behalf exposes a reasonable degree of absence of consent of African states in being party to international law. These

elements of compulsion on African states to be party to international law and its institutions, explain why African states are placed at the disadvantaged position in the practice of international law. The theory could serve as a good guide towards searching for a solution for the African impasse.

Towards untangling the Impasse

The commitment of African states towards international law as demonstrated by their role in the Rome Convention notwithstanding, Africa at regional level also set up a regional court to entertain cases of abuse on human and peoples' rights - the African Court on Human and Peoples' Rights. The seat of the court is in Arusha, Tanzania and the instrument for the establishment of the court is Protocol to ACHPR which began operations since 2006.

The African Court on Human and Peoples' Rights (AfCHPR) is a regional human rights tribunal with advisory and contentious jurisdiction concerning the interpretation and application of the African Charter on Human and Peoples' Rights, which is also referred to as the Banjul Charter. Its jurisdiction extends to those states that have ratified the Protocol to the African Charter on Human and Peoples' Rights on the establishment of an African Court on Human and Peoples' Rights. The AfCHPR decided its first case in December, 2009 and has taken up over two dozen other cases since then (International Justice Resource Center, n.d.).

Complaints against any state that has accepted the Court's jurisdiction may be referred to the Court by: the African Commission on Human and Peoples' Rights, States Parties (as respondent or petitioner in a case before the Commission, or on behalf of an individual citizen), and African intergovernmental organizations. As at March, 2016, thirty states had accepted the Court's jurisdiction. These states are: Algeria, Benin, Burkina Faso, Burundi, Cameroon, Chad, Cote dlvoire, Comoros, Congo, Gabon, Gambia, Ghana, Kenya, Libya, Lesotho, Mali, Malawi, Mozambique, Mauritania, Mauritius, Nigeria, Niger, Rwanda, Sahrawi Arab Democratic Republic, South Africa, Senegal, Tanzania, Togo, Tunisia, and Uganda.

The Court also has jurisdiction to hear cases instituted by individuals and non-governmental organizations with observer status before the African Commission, provided that the relevant state has made the necessary declaration under Article 34 of the Protocol to allow these complaints, described in Article 5(3). To date, eight states have accepted the Court's jurisdiction to receive complaints referred by individuals and NGOs; these are: Benin, Burkina Faso, Cote dlvoire, Ghana, Malawi, Mali, Rwanda, and Tanzania. In February, 2016, Rwanda announced it would withdraw its acceptance of the Court's jurisdiction over individual and group complaints. The impact of this withdrawal is yet to be determined.

The eleven judges of the court are elected for renewable, six-year terms. The Protocol to the African Charter on Human and Peoples' Rights on the establishment of an African Court on Human and Peoples' Rights, along with the AfCHPR's Rules of Court, set out the Court's functions and operating procedures.

Additionally, the states of the African Union have agreed to establish an African Court of Justice and Human Rights, intended to hear disputes arising under all African Union instruments, including the human rights agreements, and to prosecute individuals for serious international crimes. This new tribunal would replace the African Court on Human and Peoples' Rights. However, the protocol must be ratified by 15 states before the African Court of Justice and Human Rights is formally established.

Some observers wonder whether the African Union is trying to undermine the ICC by establishing its own court or mechanism to try international crimes. In response to an AU decision in 2009, on whether

to create an African substitute for the ICC, the AU Commission began a process in February, 2010, to amend the protocol on the statute of the African Court of Justice and Human Rights to expand the court's jurisdiction to include international and transnational crimes. The resultant draft protocol adds criminal jurisdiction over the international crimes of genocide, war crimes and crimes against humanity, as well as several transnational crimes such as terrorism, piracy, and corruption.

By May, 2012, African government legal experts, ministers of justice and attorneys general had considered and adopted the draft protocol (except Article 28E relating to the crime of unconstitutional change of government, which presents definitional problems that require more attention). What essentially remains is for the AU Assembly to formally adopt the draft protocol.

It would be incorrect to assume that the genesis of the current process to create an international criminal jurisdiction for the African Court lies exclusively in the contemporary debates about Africa's relationship with the ICC. This process actually began before the issuance of an arrest warrant against President Bashir in 2009. This is not to deny that he has benefitted from this process, in the sense that, ultimately, African states' reservations about international criminal justice generally have been conflated with the desire to invest their own regional court with competence over international crimes.

The establishment of an international criminal court to try the crime of apartheid arose during the discussions on the adoption of the International Convention on the Suppression and Punishment of the Crime of Apartheid in the early 1970s, a proposal that was not successful. In 1980, when the draft of African Charter on Human and Peoples' Rights was articulated, the government of Guinea proposed the establishment of a court to try violations of human rights and other international crimes. This proposal was rejected, mainly because it was decided to establish a human rights commission rather than a human rights court. So, the idea of an international criminal court or tribunal of some kind in Africa pre-dates the establishment of the ICC or the indictment of al Bashir.

In its current form, the earliest suggestion for an international criminal jurisdiction for the African court was made by a group of (African) experts, commissioned by the AU to advise it on the 'merger' of the African Court on Human and Peoples' Rights with the Court of Justice of the AU in 2004. Initially, the recommendation was not widely supported within the AU, but the situation has indeed changed.

Three points help explain this. First, the emerging discourses within the AU on the perceived abuse of the principle of universal jurisdiction by courts in some European countries targeting high-level African officials and politicians, both the Assembly of Heads of State of the AU and the Pan African Parliament decried this emerging trend (The Johannesburg Declaration of Pan African Parliament, 2008). Upon a decision of the Assembly, the AU formally initiated a dialogue on the issue with the European Union, which resulted in the establishment of the Ad Hoc AU-EU Expert Group on the Principle of Universal Jurisdiction in January, 2009. One of the recommendations of the group was to examine the possibility and implications of giving the African court jurisdiction over genocide, war crimes and crimes against humanity (ICC Report, 2009). Meanwhile, in its decision in this regard adopted in February, 2009, the AU Assembly, in part, requested the

> *[AU] Commission, in consultation with the African Commission on Human and Peoples' Rights, and the African Court on Human and Peoples' Rights, to examine the implications of the Court being empowered to try*

> *international crimes such as genocide, crimes against humanity and war crimes, and report thereon to the Assembly in 2010 (ICC Doc. 2009:15).*

The second factor is the challenge faced by the AU over Senegal's repeatedly stalled efforts to prosecute the former president of Chad, HisseneHabre. AU member states have for a long time now been frustrated with the slow pace of the proposed trial of Habre, in Senegal, under the principle of universal jurisdiction. Empowerment of the African court at Senegal has achieved in convicting Habre. He was convicted in a judgment delivered on Monday, 30th May, 2016.

The HisseneHabre trial began on 20th July, 2015, and was presided over by the African Extraordinary Chambers (AEC). It is the first time in the history of African jurisdiction that a former head of state has been tried by an African Court. It is worth also recalling that the AEC is a special mechanism set up by the AU and the Government of the Republic of Senegal to try those most responsible for war crimes and crimes against humanity allegedly committed in Chad during the reign of President Habre from 1982 to 1990.

The decision was made at the Summit of AU Heads of State and Government, in Khartoum, Sudan, in January, 2006. The Assembly decided to establish a Committee of Eminent African Jurists who deliberated on the case and recommended that the AEC try the case with the help of the Government of Senegal (African Union, Directorate of Information and Communication Press Release, 2016).

Third, there was a need to give effect to Article 25(5) of the African Charter on Democracy, Elections and Governance, which requires the AU to formulate a novel international crime of 'unconstitutional change of government.' Article 25(5) requires the AU to formulate this new international crime and that it be tried at the African Court of Justice. For this reason, the jurisdiction to try this (and other) crimes was suggested for the proposed merged African Court of Justice and Human Rights, with the expansion of its jurisdiction to include international crimes (African Charter on Democracy, Elections and Governance, 2007).

There is no doubt that some countries and their leaders in Africa support the proposal for an African criminal court or mechanism to undermine the ICC because they hope it will replace the ICC. The current accusations of selective justice and alleged regional, ethnic or regional bias by the ICC against Africa have animated the current debate regarding this proposal. However, the extent that the idea of establishing a court or mechanism within Africa to try certain types of serious international crimes predatesthe establishment of the ICC, it is too simplistic to claim that the proposal for such a mechanism is simply or purely motivated by a desire to undermine the ICC at least, that was not the original intent. Overtly, there has never been a discussion in the AU on the need to create a regional mechanism precisely for the purpose of undermining or supplanting the ICC.

Given the continent's record of human rights atrocities, some have argued that vesting the African court with international criminal jurisdiction is a worthy development to end impunity (Deya, 2012). In principle, it is a laudable goal, but its likely practice is a challenge, and at what cost?

The first issue is the drafting process. On paper technically, this process has taken three years, but in reality, government's legal experts had just over one year to properly consider the draft protocol. Civil society and external legal experts were given little opportunity to comment; and the draft protocol was

never made available on the AU's website, or publicly posted for comment in other media (African Roundtable Report, 2012). The AU would have benefitted from a broader process of consultation since questions about jurisdiction, the definition of crimes, immunities, institutional design and the practicalities of administration and enforcement, as well as the impact on domestic laws and obligations, require careful examination (du Plessis, n. d.).

The second concern is with the African court's ambitious jurisdictional reach. Legitimate questions can be asked about the court's capacity to fulfill not only its new found international criminal law obligations, but also about the effect that such stretching will have on its ability to deal with its general (existing) and human rights obligations. The subject matter of the court's proposed criminal jurisdiction means it is expected not only to try the established international crimes, but also various other social issues that affect some African countries. A related difficulty involves funding. To ensure that justice can be done to the court's wide jurisdiction, a vast amount of money will be required to ensure proper staffing and capacity to run international criminal trials, as well as to perform the court's existing administrative tasks and to act as the continent's regional human rights court. The fiscal implications of vesting the court with criminal jurisdiction raise serious questions about the effectiveness, independence and impartiality of such a court - and the motive for rushing the international criminal adjudication chamber into existence. By way of example, the current ICC's budget - is mainly for investigating just three criminal offences and not the range of other offences the African court is expected to tackle. This actually is more than 14 times that of the present African Court without a criminal component; and in consequence doubles the entire budget of the AD (du Plessis, n. d.).

Finally, due to the fact that the African Court will be occupying the same legal universe as the ICC, it is necessary to consider the relationship (if any) between these two courts. Thirty-four African states are now parties to the ICC, and at least six of them have adopted implementing legislation to give effect to their obligations to it. It, thus, seems imperative that the relationship between the ICC and the African court be addressed (Letter for Expansion of the Jurisdiction of the African Court of Justice and Human Rights, 2012). In the first place, which court will have primacy? Careful thought would also have to be given to the question of domestic legislation and establish a relationship with International Criminal Jurisdiction. Given these difficulties, it is surprising that the draft protocol nowhere mentions the ICC, let alone attempts to set a path for African states that must navigate the relationship between these two institutions. A useful comparison here is the careful thinking that has gone into drafting the proposed International Convention on the Prevention and Punishment of Crimes against Humanity, which similarly would envisage a new system for the prosecution of such crimes as a complement to the ICC's Rome Statute.

Conclusion

It is important to note that experiences of states with similar, economic, political and social background could determine their collective position on the nature, character and enforcement of international law. It is on the basis of these that arguments of the advanced capitalist nation, communist/socialist states and newly independent states including Africa are aptly captured. These arguments range from gradual and steady reforms, emphasis on municipal laws to radical reforms. It can be stated in a nutshell that international law has a Eurocentric character with its enforcement biased against weak states.

This Eurocentric character found in international law determines the content and manner of enforcement of international law which bred tension and apprehension among other parties and hence the heated

debate. African states, for instance, have found themselves in deadlock, as to whether they should continue surrendering themselves to it or take a radical approach. This is even more pressing as their attempts at revisiting the framing and application of international law are yielding no result and its manner of implementation continues to have more repercussions on them. In appreciation of the ongoing efforts by the African states towards establishing a regional court that could take care of issues bothering on human rights violations and crimes against humanity like war crimes and other related offences whether as a complementary effort to the existing International Criminal Court, or a giant step towards asserting their self-determination, a palpable solution has naturally emerged. To effectively maximize this, African states deserve sound unity, those states that are directly affected by the spate of prosecutions by International Criminal Court and other insidious measures of capitalist manipulations could equally join the train of African movement to self-determination.

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