

A legal-political commentary on the strained relationship between Africa and the International Criminal Court (ICC), and the prospects of the extended African Court of Justice and Human Rights (ACJHR)

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Abstract

The establishment of the International Criminal Court (ICC), the world's first and only permanent court for the investigation and prosecution of genocide, war crimes and crimes against humanity committed after 1 July 2002, has been hailed as the greatest event since the advent of the United Nations (UN). The relationship between some African states and the ICC has however become fragile and strained. The situation has worsened since the Al-Bashir controversy, (in particular South Africa's failure to arrest the former Sudanese President on visit in South Africa) to the extent that, in 2016, the South African government announced its intention to withdraw from the ICC. This, in South Africa, was followed by the publication of the Implementation of the Rome Statute of the International Criminal Court Act Repeal Bill (B23-2016) (which was later withdrawn) and the International Crimes Bill (B37-2017) (which later lapsed in terms of National Assembly rules). The bills provide important insights into the South African government's approach to international crimes and criminal justice, revealing an awkward U-turn in terms of immunity granted to heads of state and senior state officials. Against that backdrop, and further with reference to the African scholarship concerning both the strained relationship between Africa,

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generally and the extended jurisdiction of the ACJHR, this article examines the most cited reasons for this precarious relationship. Some explanations seem more valid than others: African states' claims that the ICC targets Africans and threatens state sovereignty on the continent simply do not hold water. On the other hand, Africa's unease with the UN system, particularly the vexed veto system, might carry more weight, suggesting that the continent's discontent with the ICC is less about the court itself, and more about the UN and Security Council system and composition. The article, in the last part, turns to an evaluation of the prospects of the extended African Court of Justice and Human Rights (ACJHR), which, in terms of the Malabo Protocol, would now have jurisdiction over international crimes also. Sadly, the Malabo Protocol reveals a stubborn insistence on immunity for heads of state and senior state officials, along with an ongoing fixation with state sovereignty. This does not bode well for the credibility and legitimacy of this court should it ever be formally operationalized. The continent's political leaders should realise that it is incumbent on them to seek justice for the victims of the countless human and humanitarian rights violations committed in Africa. Clinging to outdated notions of immunity and absolute sovereignty does not offer a credible and sustainable alternative to the ICC, but represents a setback to the development of international criminal justice.

1. Introduction

The author departs from a number of premises (positions) in addressing the issues set out in the title. South Africa in particular, has undergone momentous political change since 1994 and has accepted a democratic constitution, which places a high premium on human rights and the rule of law. It is therefore disconcerting to witness a regression in the adherence to these values if governments, (like the South African government in its failure to arrest former Sudanese President Al-Bashir), disobeys its own courts. In addition, the South African government by this conduct was also refusing to cooperate in terms of its legal international treaty obligations, as was implemented in national legislation. Progress in international law and

justice can only be achieved if individuals or groups of individuals, despite their status in government, are held accountable for human right violations. Heads of state and high-ranking government officials are usually responsible for these violations. Notions such as “state sovereignty” and “immunity” are in need of serious African contemplation, that is, if there exists the political will to be part of a credible international order of criminal justice. It is lastly also important to have a thorough look at what Africa currently proposes as an alternative judicial forum to the ICC and to contemplate whether such a court is sustainable. This contribution tries to make a small contribution to these ongoing debates in Africa and the international community.

Over many decades, the international community has often had to witness horrific violations of human and humanitarian rights committed by states and their agencies against their own people. Sadly, despite growing global awareness of human rights, the Human Rights Watch 2020 report paints a bleak picture of increasing and more daring violations, as well as unprecedented numbers of human rights martyrs across the world, including the African continent (Koigi 2020). Unsurprisingly, therefore, there is an ever stronger call for all political leaders to be held accountable in terms of a credible international, or even regional, criminal justice system for human and humanitarian rights abuses. Arguably, ordinary people who have exhausted their local remedies ought to be able to turn to such a system to pursue individual accountability for human and humanitarian rights abuses, irrespective of the alleged criminal’s official status. And indeed, as the world’s first and only permanent international criminal court for the investigation and prosecution of genocide, war crimes and crimes against humanity committed after 1 July 2002 (ABA 2020), the International Criminal Court (ICC) is said to be not only a “justice mechanism” (implying that justice for crime is achieved through prosecution), but also a vehicle to offer a voice to otherwise voiceless victims (Thipanyane 2018).

Yet the relationship between some African states and the ICC has become fragile and strained. In fact, in many instances, the African ruling elite has relied on their states’ sovereignty, along with “solidarity with their colleagues accused of gross human rights violations” (Shilaho 2018: 143), to sidestep the ICC’s jurisdiction. In the process, this has perpetuated a cycle of impunity for gross violations of human rights, “diminish[ed] human life

and impede[d] Africa's quest for security, peace and stability" (Shilaho 2018: 143).

South Africa too has grown increasingly aloof towards the ICC in recent years and subsequent to the Al-Bashir debacle. In 2016, the government moved towards withdrawing from the court by publishing the Implementation of the Rome Statute of the International Criminal Court Act Repeal Bill (B23-2016) ("the Repeal Bill"). This was followed by the International Crimes Bill (B37-2017) a year later. Although the first bill has since been withdrawn, and the second has lapsed in terms of South African National Assembly Rule 333(2) (Kemp 2017: 414), they may be reintroduced at any stage. Even more importantly, though, the bills provide key insights into the South African government's approach to international crimes and criminal justice.

In the paragraphs below, I assess the tenuous relationship between the ICC and some African states, with a special focus on South Africa. This is done through a review of academic literature and, to a lesser degree, applicable case law. The overall purpose is to consider the reasons for the tense relations, the (in)validity of some of the ideological and other criticisms levelled against the court and, ultimately, whether it would be in South Africa's national and regional interest to withdraw from the ICC.

2. The gist of the Repeal Bill and International Crimes Bill – an awkward U-turn

The background to the establishment of the ICC, Africa's role in establishing the court, South Africa's implementation of the Rome Statute as well as the South African jurisprudence that emanated from the country's international obligations as an ICC member state have been extensively covered before (see, for instance, Swanepoel 2018a: 173-184; 2018b: 161-174). The events surrounding Sudanese president Al-Bashir's infamous 2015 visit to South Africa, and government's failure to arrest him despite the head of state having been charged with crimes against humanity, war crimes and genocide, need no further elaboration. Suffice it to say, therefore, that following the Al-Bashir debacle, the South African government in 2016 gave notice of its intention to withdraw from the ICC. This was revoked by government following judgment in *Democratic Alliance v Minister of International Relations and Cooperation* 2017 3 SA 212 (GP), which declared

South Africa's notice of withdrawal to the United Nations (UN) secretary-general null and void.

Nevertheless, the notice of withdrawal was first followed by the publication of the 2016 Repeal Bill, which was later repealed, and then by the publication of the 2017 International Crimes Bill, which has lapsed. Towards the end of 2019, it was reported (Rapport, 10/11/2019) that the International Crimes Bill had been revived in parliament. Yet the media report did suggest that this might have been in a bid by the Ramaphosa government to appease comrades in the ANC that government was in fact complying with the resolution taken at the ruling party's elective conference in 2017 that South-Africa would be withdrawing from the ICC. According to the report, however, government had no serious intention to withdraw. Since an international agreement (such as a treaty or convention) is incorporated into South African law in terms of section 231 of the South African Constitution, the only lawful manner to exit such an agreement would be by application of the same section. That means that the withdrawal would need to be approved by both houses of parliament. Whether this could be achieved remains to be seen.

Both the 2016 and 2017 bills go to great lengths to confirm South Africa's commitment to international justice and, at the same time, cite the country's reasons for wanting to leave the ICC.

Both preambles, for instance, are mindful of the fact that South Africa is a founding member of the African Union (AU). Both stress that, as such, the country plays "an important role in resolving conflicts on the African continent" and encourages "the peaceful resolution of conflicts wherever they occur". Yet this commitment to resolving conflict on the continent and elsewhere was flagrantly absent when the UN Security Council counted on African nations to join in efforts to facilitate peace in the Sudan region, and was eventually compelled to refer the situation in Sudan to the ICC – a referral that ironically went unopposed by the African Union (Swanepoel 2018: 163 et seq.; Cole 2013: 676 et seq.). Therefore, declaring South Africa's commitment to the peaceful resolution of conflicts, wherever they occur, in a bill aimed at withdrawing from a regime of international criminal justice appears sanctimonious and hypocritical.

The same could be said for the additional lofty ideals expressed in the preamble to the International Crimes Bill, namely "that international crimes must not go unpunished and that their effective prosecution must be

ensured"; that South Africa has a duty "to investigate and prosecute international crimes", as these "threaten the peace, security and well-being of the world".

In an awkward U-turn, the legislator in the preamble to both bills then goes on to claim that the Implementation of the Rome Statute of the International Criminal Court Implementation Act 27 of 2002 ("the Implementation Act"), as informed by the Rome Statute, prevents South Africa from exercising its international relations with countries experiencing "serious conflicts". This, the legislator argues, is because the Implementation Act compels government to arrest heads of state charged with genocide, crimes against humanity and war crimes. The obvious absurdity in this statement is that South Africa willingly signed the Rome Statute on 20 November 2000, of which article 27 ("Irrelevance of official capacity") stipulates that the statute would apply to all persons, irrespective of official capacity, and particularly to the "head of state of a government or parliament". Article 27 unequivocally states that any such official status "shall in no case exempt a person from criminal responsibility". Deepening the irony is the fact that this was repeated in section 4(2) of the Implementation Act, which too states that official status, irrespective of customary international law, shall be no defence. In this regard, one is tempted to agree with Cannon and colleagues (2016: 9), who have stated that African states

have signed treaties or international agreements sometimes against their national interests. In other words they have lacked sophistication in conceptualizing and articulating sovereignty in ways that help them advance their national interests in an international order that is already stacked against them.

To eliminate any uncertainty, both preambles proceed to state that South Africa

wishes to give effect to the rule of international customary law which recognises the diplomatic immunity of heads of state in order to effectively promote dialogue and the peaceful resolution of conflicts wherever they may occur, but particularly on the African continent.

So, despite official capacity being deemed irrelevant, at least in terms of the Rome Statute of the ICC (article 27), the Statute of the International Criminal Tribunal for the Former Yugoslavia (article 7(2)), and the Statute of the International Criminal Court for Rwanda (article 6(2)), the South African

legislator is determined that serving heads of state and senior state officials shall remain immune against prosecution in national courts on charges of crimes against humanity, war crimes and genocide. This is stated unequivocally in section 3(1) of the International Crimes Bill, namely that, if signed into law, the act “will not apply to persons who are immune from the criminal jurisdiction of the courts of the Republic in accordance with customary international law, or as provided for in the Diplomatic Immunities and Privileges Act, 2001”.

Only time will tell whether this will ultimately become law. What is clear, however, is that the relationship between Africa and the ICC is precarious. In the following sections, I explore both the professed and potential underlying reasons for this, before I consider the sustainability of an African court of criminal law and justice as a possible alternative system for the continent.

3. Reasons for the strained relationship between Africa and the ICC

3.1 The criticism that the ICC targets Africa

It is common cause that most of the cases that have triggered the ICC’s jurisdiction concerned African states.² To Shilaho (2018: 121), this is partly a matter of timing. He remarks that, since the “European Holocaust”, gross violations of human and humanitarian rights have also taken place in Latin America, the Middle East and Eastern Europe, and are continuing unabated in these and other parts of the world. Therefore, had the ICC existed at the time when the mass atrocities occurred in Latin America, for instance, most ICC indictments would have been from that region. Yet the ICC only started in 2002, when Africa was plagued by “a legacy of autocratic regimes responsible for mass atrocities, and where, in spite of the shift to multiparty democracy in the early 1990s, egregious crimes still occurred” (Shilaho 2018: 121).

Allo, in turn, speaks more frankly, calling African states’ accusations of overt racism and undue targeting “somewhat exaggerated” and “clearly part of a self-serving ploy by the continent’s abusive leaders who oversaw

² According to recent statistics of the Coalition for the ICC, bar one ongoing investigation in Georgia (Europe) and another in Bangladesh (Asia), all remaining ongoing investigations, trials, pre-trials, reparations and cases concluded concerned the regions of Africa and Middle East-North Africa. See <http://www.coalitionfortheicc.org/explore/icc-situations-and-cases>, last accessed 26 April 2020.

atrocities of unimaginable magnitude and are seeking a get-out-of-jail-free-card". (Allo 2018:1)

Perhaps more telling, though, is the fact that the majority of cases from Africa were self-referrals, having been referred to the ICC by the very states where the violations had occurred (Cannon, Pkalya and Maragia 2016: 15; Cole 2013: 689). Cannon and colleagues (2016: 15) ascribe African states' "eagerness" to refer cases to the ICC to their inability or unwillingness to handle the cases themselves, which waters down these states' criticism that the ICC supposedly targets African nations. The authors further argue that African states themselves have been "partially responsible" for the prejudice they claim, triggering the complementary jurisdiction of the ICC by having "failed to create credible judiciaries that could adjudicate gross violations of human rights and diminish the relevance of an external court" (Cannon, Pkalya and Maragia 2016: 15).

In addition, African countries' voluntary participation in the establishment of the ICC, and their ratification of the Rome Statute, seems to point to a "gap" between the way in which some African states and their Western counterparts "view the system and define national interest" (Cannon, Pkalya and Maragia 2016: 17). This "gap" possibly also accounts for what I find most baffling about South Africa's reasoning for wanting to withdraw from the ICC. It is difficult to understand how the country could have signed a treaty that so explicitly excludes head-of-state immunity without realising the consequences of doing so (also see Muraya 2016).

3.2 The argument that African states' sovereignty is being threatened

According to Rukooko and Silverman (2019: 85 et seq.), the ICC represents "Western colonialism" to many African states. This perception has undoubtedly been stirred up by the political rhetoric of members of the African elite to serve their own interests (Borda 2016; Muraya 2016).

Yet when testing the validity of this claim among a sample of judges, lawyers, NGOs, journalists and other members of civil society in Uganda and Kenya, Rukooko and Silverman (2019: 103) found that most of the human-rights NGOs agreed that "juridical accountability is necessary to challenge the perceived impunity of leaders". Moreover, members of the study sample who had been victims of post-conflict violence felt excluded from the general debate about the relationship between the ICC and Africa (Rukooko and Silverman 2019: 103).

Shilaho (2018: 119) too acknowledges some African leaders' antipathy to the ICC. He cites the indictment of Al-Bashir as a clear turning point, having been perceived by African states "as an adjunct of imperialism encroaching on Africa's sovereignty". In reminding African leaders that sovereignty also entails "responsibility to protect", Shilaho wisely remarks:

It is therefore counter-intuitive to accede to international norms and concurrently invoke 'absolute sovereignty' as some African rulers attempt to do. Africa's conflicts are characterised by mass atrocities owing to weak states that are unable and often unwilling to protect citizens and dispense justice. In some cases these states are themselves perpetrators of heinous crimes, which necessitates intervention by the international community. (Shilaho 2018: 119; also see Mbori 2014)

Balancing this rebuke, Shilaho (2018: 120) also notes that many African leaders' fixation with African sovereignty stems from history, from realpolitik, from self-preservation and geopolitics – all issues that have marred the advancement of international criminal justice. Africa's relationship with the West may well be steeped in humiliation, making African rulers suspicious of "Western-dominated" institutions (Shilaho 2018: 120).

3.3 Africa's concerns with the UN system and the composition of the UN Security Council

The relationship between the ICC and the UN Security Council (UNSC) is inevitable: The UNSC is the only international body that has been assigned the responsibility to secure and maintain international peace and security. The ICC, in turn, although not a UN institution itself, has been established to ensure the criminal accountability of individuals accused of the most egregious international crimes where states are either unwilling or unable to prosecute these individuals themselves. Importantly, however, a number of UN member states are not members of the ICC and, therefore, in terms of the Vienna Convention on the Law of Treaties, are not bound by the Rome Statute. The problem that has arisen, particularly in the context of the Al-Bashir saga, is whether the ICC can lawfully assume jurisdiction over individuals from non-ICC member states who have been referred to the court by the UNSC, being one of the UNSC's powers in terms of chapter VII of the UN Convention (Swanepoel 2018b).

3.3.1 The relationship between the UNSC and the ICC: the inevitability of realpolitik

It would be hard to argue that an inevitable relationship between the UN and the ICC was not envisioned from the very start of the Rome negotiations to establish the court. Clearly, this was unavoidable for the following two reasons.

Firstly, up until World War II, public international law was perceived as a body of law applicable between states, excluding individual criminal liability – a position that changed dramatically after the war (Garcia-Mora 1962: 38; De Than and Shorts 2003: 273). The International Court of Justice, a UN body, had no jurisdiction over matters involving individual criminal liability, since it had been designed primarily to deal with disputes between states. So, through the UN regime, the international community pushed for the establishment of the ICC, while also accepting that the UNSC's chapter VII powers included the establishment of ad-hoc international criminal tribunals.

A second reason for the inevitable link between the two is the ICC's conservative jurisdictional base – not only in terms of the particular crimes falling within its jurisdiction, but also the contexts within which these crimes need to occur before the court's jurisdiction is triggered.³ In terms of the ICC's complementary jurisdiction, the court cannot achieve its purpose without substantially relying on the cooperation of member states, specifically UN member states. This principle is emphasised in the preamble to the Rome Statute. In terms of the complementarity of the ICC's jurisdiction, the primary responsibility for the prosecution of crimes still rests with member states.

From the start, many have been critical of the relationship between the ICC and the UN, and the risk of the court's independence being compromised. Elaraby (2002: 43), for instance, referred to the possibility of abuse of the veto right in the UNSC, which for many years “frustrated all hopes to consider the Council as the custodian for the application of the rule of law”. Kirch and Holmes (1999: 4) articulated similar concerns: “Without opposing

³ Article 5 of the Rome Statute provides: “The jurisdiction of the Court shall be limited to the most serious crimes of concern to the international community as a whole.” Article 7 defines crimes against humanity, and provides that a number of acts are within the court's jurisdiction “when committed as a widespread or systematic attack”. This principle is further asserted in article 17.

a role for the Security Council vis-à-vis the court ... many states believed that the Council could not be relied upon to administer justice in an impartial manner, and that care should be taken not to let the court's independence be undermined."

This early scepticism is shared by contemporary African scholars. Shilaho (2018: 130) states:

The fact that the five veto-wielding permanent members (P5) of the UNSC – the US, Russia, Britain, France and China – refer cases to the ICC is evidence that the ICC is not and cannot be entirely a judicial institution. Among them, the US, Russia and China have not ratified the Rome Statute but often use their privilege to block proceedings against them and their allies as the case in Syria demonstrates. The UNSC cannot refer Bashar al Assad and his forces to the ICC for crimes against humanity because Russia and China, his backers, would veto such a resolution.

Thus, the UNSC's role in relation to the ICC presents the following dilemma: On the one hand, the UNSC's interference could be seen as interference in the independence and impartiality of the court. On the other, certain difficult decisions may have to be made about the desirability of criminal prosecution while sensitive UNSC negotiations (or regional negotiations, as in the case of Africa in relation to Sudan) are under way, when any indiscreet action by the court may, in the right circumstances, be viewed as sabotage of measures aimed at promoting international peace and security (Schabas 2001: 65).

The international order represented by the UN system has other flaws as well, such as the snail's pace at which the international community responds to international humanitarian crises. UNSC Resolution 1593 (2005), which invoked the Security Council's chapter VII power to refer the situation in Sudan to the ICC, is a case in point: Although Resolution 1593 referred the matter to the ICC, it was preceded by another four resolutions, spread over the two years prior to the 2005 referral (1502 of 2003, 1547 of 2004, 1556 of 2004, and 1564 of 2004), in which the UNSC expressed its concern over the killings in Darfur. In addition, Resolution 1593 was informed by the 176-page *Report of the International Commission of Inquiry on Darfur to the United Nations Secretary-General*, which had established that the government of Sudan was responsible for serious violations of international

human rights and humanitarian law that amounted to crimes under international law.

Being the first UNSC referral to the ICC, the Al-Bashir matter seems to have brought African nations' latent unease with the UNSC-ICC relationship to a head. Prior to Resolution 1593, the UNSC relied on the establishment of ad-hoc international criminal tribunals to restore international peace and security. Aside from being unsuccessfully challenged in proceedings such as those before the International Criminal Tribunal for Rwanda (see, for instance, *The Prosecutor v Joseph Kanyabasi* ICTR case 96-15-T par 9), the UNSC's power to take measures such as these for the purpose of restoring international peace and security has never been seriously disputed. But when the UNSC rightfully referred the Sudan matter to the ICC, as provided for in article 13 of the Rome Statute, something shifted: This time, the UNSC knew and accepted that the "legal framework" of the Rome Statute would henceforth apply, as the ICC's legal framework was necessary to govern the process that would ensue (*The Prosecutor v Omar Hassan Ahmad Al-Bashir* ("the Al-Bashir matter") ICC-02/05-01/09-302 par 85). Based on this reasoning, it is difficult to accept a contrary argument that Resolution 1593 could not have implied the lifting of the immunity of a serving head of a non-ICC member state (Omorogbe 2017: 20).

It is important at this juncture, to remind ourselves that the UN is a political body, and not a court of law. For this reason, the UN previously, by resolution, set up ad-hoc criminal tribunals to deal with problems that only a court of law, and not a political body, was equipped to address. In fact, the ICC was established as a permanent international criminal court for the very reason that it had become too expensive to establish an ad-hoc tribunal every time the UNSC needed to hold the chief perpetrators of atrocities accountable in a court of law. In handing down judgment in the *Al-Bashir* matter (par 86), the ICC emphasised this and confirmed:

[I]n other words, the only legal regime in which this Court may exercise the triggered jurisdiction is the one which is generally applicable to it, its Statute *in primis*.

The UN is primarily concerned with maintaining peace and security through its organs established for this purpose, of which the UNSC is principal. In terms of article 25 of the UN Charter, the UNSC has the power to take decisions that are binding on all UN member states, and member states "agree to accept and carry out the decisions of the Security Council".

Of the 196 countries of the world, only three are not UN members (Rosenberg 2017).⁴ In article 103, the Charter also stipulates that, “in the event of a conflict between the obligations of the Members of the UN under the present Charter and their obligations under any other *international agreement* (own emphasis), their obligations under the present Charter shall prevail”.

3.3.2 The UNSC’s deferral powers: a particular thorn in the AU’s flesh

For some time, the AU has been discontent with the UNSC’s manner of handling AU requests for the deferral of situations (Okoth 2014: 196). One could safely conclude that this, and more specifically the UNSC’s refusal to accede to AU requests for the deferral of the Sudan situation, contributed to the current discord between the AU and the ICC (Okoth 2014: 196 et seq.; Du Plessis 2010: 13 et seq.). Dismayed at the UNSC’s Resolution 1593, which referred the Sudan matter to the ICC, the AU requested a deferral of the Sudan referral pursuant to article 16 of the Rome Statute. As motivation for this request, the AU cited the peace efforts they had initiated to find a solution to the Sudan conflict. Yet the UNSC did not invoke their deferral powers, and the ICC, in terms of article 13(b) of the Rome Statute, pushed ahead and issued two warrants of arrest against Al-Bashir.

In response, the AU in November 2009 adopted a list of “Recommendations by African States Parties to the ICC”, which culminated in South Africa’s repeated tabling of the following proposal for the amendment of the ICC referral system (UN 2009; Du Plessis 2010: vi; ICC-ASP 2014: 14):

Where the UN Security Council fails to decide on the request by the state concerned within 6 (six) months of receipt of the request, the requesting Party may request the UN General Assembly to assume the Security Council’s responsibility under paragraph 1 consistent with Resolution 377(v) of the UN General Assembly.

In an ideal world, one would struggle to argue against the logic of South Africa’s proposal. In essence, it calls for the General Assembly to become seized of a matter in instances where the UNSC, because of a lack of unanimity among its permanent members, is prevented from exercising its

⁴ These included a French judge’s indictment of state and military officials for their roles in the 1994 Rwandan genocide, and, in 2008, when a Spanish judge issued arrest warrants against 40 senior Rwandan state officers, also for their alleged involvement in the 1994 Rwandan genocide.

primary duty to maintain international peace and security. The proposal seems particularly reasonable and rational in view of the well-documented power politics at play in the UNSC (Tomuschat 2001).

To the AU's credit, it must be noted that very little has been done to alleviate the problems identified in the balance-of-power structure of the UN dating from 1950. To this day, the UN and its decisions as a political body are not subject to legal review. The South African proposal, therefore, attests to the fact that, as in 1950, states continue to seek a mechanism in terms of which UNSC resolutions may be challenged.

When drilling down to the essence of the problem, it would thus appear that the origin of Africa's seeming opposition to the ICC may not necessarily lie in the court itself, but in African states' dissatisfaction with the UN structure. This was also hinted at in the ICC's pre-trial chamber judgment in *On the Cooperation of the Democratic Republic of the Congo regarding Omar Al Bashir's arrest and Surrender to the Court* No ICC 02/05-01/09. In that matter (par 30), the chamber remarked that, instead of actual tension between the AU and the ICC, there was much rather a discernible tension between the AU resolution that no sitting head of state shall be required to appear before an international court or tribunal and the UNSC's Resolution 1593.

4. An African court with criminal case jurisdiction as an alternative to the ICC

4.1 The African preoccupation with state sovereignty

The Organisation of African Union (OAU) was intended to be established alongside the UN, and its constitution intended to be read in conjunction with the UN Charter and, more specifically, the Universal Declaration of Human Rights. Nevertheless, the protection, development and enforcement of individual rights against government abuse was not the triggering impulse behind the OAU and its charter (Udombana 2000: 55). Instead, the establishment of the OAU was

inspired by the anti-colonial struggles of the 1950s, [and] the Organization was dedicated primarily to the eradication of colonialism and the condemnation of abuse of the rights of Africans by non-Africans, such as in the case of apartheid (Udombana 2000: 55).

This has not always ended well, and has caused state sovereignty, independence and non-interference in other states' affairs to gain sacrosanct status in Africa (Udombana 2000: 56). This fixation with state sovereignty continues to influence Africa's general response to international criminal justice to this day, despite the fact that the notion of absolute state sovereignty is in fact declining the world over (Van der Vyver 1999: 9). On the prohibition of torture as an international norm of *ius cogens*, for instance, De Wet (2004: 106) argues that it would be illogical to uphold sovereign immunity when faced with *ius cogens* violations, as these violations are illegal under the laws of every sovereign nation. Others have described the concept of absolute sovereignty as outdated (Jackson 2003: 782; Cassese 2005: 21) and counter-intuitive (Shillaho 2018: 119), and have called for a new approach.

Despite the name change from OAU to AU, the purposes and principles in defence of state sovereignty, non-interference and the promotion of unity and solidarity largely remained, although the AU's Constitutive Act (more specifically, article 3(g) did introduce some nuanced changes. Importantly, the Constitutive Act permitted the AU to interfere in internal matters in exceptional circumstances (Dugard 2012: 550).

4.2 The African Court of Justice and Human Rights (ACJHR)

In 1981, the OAU adopted the African Charter on Human and Peoples' Rights, known as the Banjul Charter (Udombana 2000: 58; Mutua 2006: 5). During the drafting process of the charter, it was proposed that an African court be established to try human rights violations and crimes under international law. At the time, the proposal was favourably received, although the establishment of the court was regarded as premature.

It was nearly two decades later, in 1998, that – instead of the originally conceived African Court of Justice – the African Court on Human and Peoples' Rights (commonly known as the African human rights court) was established in terms of a protocol to the African Charter, which entered into force on 25 January 2004 (Amnesty International 2016; also see Du Plessis 2014a: 199 et seq.). According to September 2019 statistics published on the court's website, it has to date received 223 applications by individuals, 12 from NGOs and three from the African Commission on Human Rights. It has finalised 62 applications, transferred four to the African Commission on

Human Rights, and has 172 applications pending. Twenty-seven African states have ratified the protocol.

On the other hand, the protocol for the initially planned African Court of Justice, which entered into force on 11 February 2009 with 16 member states, “exists on paper only” and “has not been operationalized” (Amnesty International 2016: 14; Viljoen 2012). In July 2004, it was proposed that the African Court of Justice and the African Court on Human and Peoples’ Rights be merged. So, in July 2008, the AU Assembly adopted the Protocol on the Statute of the African Court of Justice and Human Rights (ACJHR). Again, there was a call for the merged court to, in future, include an international crime division (Amnesty International 2016: 8).

At this point, it seems appropriate to mention that individuals and NGOs with complaints regarding human and humanitarian rights violations currently have very limited access to the ACJHR. This has been criticised for prejudicing individuals who have exhausted their local remedies to appeal to an international court. Article 3 of the Protocol to the African Charter on Human and Peoples’ Rights on the Establishment of an African Court on Human and Peoples’ Rights provides that the court’s jurisdiction shall extend to “all cases and disputes submitted to it concerning the interpretation and application of the Charter, this Protocol and any other relevant Human Rights instrument ratified by the States”. In terms of article 5, the following parties may submit cases to the court: the African Commission on Human and Peoples’ Rights, a state party “who has lodged a complaint to the Commission”, a state party against which a complaint was lodged at the commission, a state party whose citizen is a victim of a human rights violation, and African intergovernmental organisations. In terms of article 5(3), read with article 34(6), the court may allow individuals or NGOs to bring cases before it prior to them resorting to the African Commission on Human and Peoples’ Rights. In the event of individual access to the court, however, the state where the individual hails from must first formally accede to the court’s jurisdiction, and the court itself must agree to apply discretion in exercising its jurisdiction. In effect, therefore, this limits the court’s jurisdiction to the examination of inter-state disputes (APT n.d.).

In this regard, the Association for the Prevention of Torture (APT n.d.) commented as follows:

The new judicial framework established for the African system for the protection of human rights would have been optimum had the individual been granted easy access to the Court. The drafters of the Protocol would have achieved a significant development in international procedural law in the field of human rights had they been able to make the African system progressive in this respect.

In my view, the stipulations making it more difficult for individuals to access the court in cases of human and humanitarian rights violations can be directly related to the African political elite's inflated notion of their states' sovereignty. Therefore, the fact that the Malabo Protocol, which aims to extend the ACJHR's jurisdiction to prosecute crimes under international law, perpetuates the impunity attached to serving heads of state and senior state officials does not surprise.

4.3 The Malabo Protocol extending the ACJHR's jurisdiction to prosecute crimes under international law

4.3.1 Background

According to Amnesty International (2016: 9), a few factors seem to have accelerated efforts towards establishing a criminal section at the ACJHR. These were (a) "the indictment of or arrest warrants issued by certain European states against senior African state officials" on charges of various crimes under international law,⁴ (b) the indictment and arrest warrants against Sudanese president Al-Bashir, and (c) the indictment and trial before the ICC of Kenyan president Kenyatta and Deputy President Ruto (Amnesty International 2016: 9).

Consequently, the AU mandated the Pan African Lawyers Union to examine the possibility of extending the ACJHR's jurisdiction over international crimes. In June 2010, the lawyers union reported back and submitted a first draft proposal for the prosecution of international crimes. In 2012 and again in January 2013, the AU requested the AU Commission to investigate certain aspects of the court protocol (Amnesty International 2016: 10). A major further impetus to the extension of the ACJHR's jurisdiction came when in October 2013, Kenya – with the AU's support – requested the UNSC to defer the ICC's prosecution of its president and deputy president by a year. The UNSC refused even a mere consideration of their request. Finally, on 27 June 2014, at the 23rd ordinary session of the AU Assembly in Malabo, Equatorial Guinea, the Protocol on Amendments

to the Protocol on the Statute of the African Court of Justice and Human Rights (or “the Malabo Protocol”) was adopted.

By 6 February 2019, 32 of Africa’s 55 states had signed the Malabo Protocol, while seven had ratified it. According to article 11, the protocol and statute will enter into force 30 days after 15 members states have deposited their instruments of ratification.

4.3.2 Immunity

Article 46A *bis* of the amended protocol that was finally adopted raises the contentious issue of immunity, which, from what has been said here so far, also represents the key reason for African states’ chilly attitude towards the ICC and its structures. The article stipulates:

No charges shall be commenced or continued before the Court against any serving African Union Head of State or Government, or anybody acting or entitled to act in such capacity, or other senior state officials based on their functions, during their tenure of office.

This, therefore, not only guarantees immunity against prosecution to a head of state or its government, but also introduces an undefined category of senior state officials who would be above prosecution from the crimes listed under the court’s jurisdiction (Amnesty International 2016: 11). The AU approved this immunity clause despite the fact that, during discussions, concerns were raised with regard to non-conformity with international law as well as states’ national laws and jurisprudence (Amnesty International 2016: 26).

The immunity provided for in article 46A *bis* is a step backward in the development of international criminal justice, and specifically in the fight against impunity. Its inappropriateness is especially evident when one considers that other international criminal courts – such as the International Criminal Court for the former Yugoslavia (ICTY) and the International Criminal Tribunal for Rwanda (ICTR) – and hybrid international courts – such as the Special Court for Sierra Leone – had done away with immunity claims before an international court or tribunal (Amnesty International 2016: 27).

This saddles the ACJHR with a credibility and legitimacy deficit even before it has opened its doors. In the words of Amnesty International (2016: 27):

The clause will effectively prevent the investigation and prosecution of serving Heads of State and Government who use their position or authority to order, plan finance or otherwise mastermind crimes against humanity, war crimes or acts of genocide.

5. Conclusion

The establishment of a permanent international criminal court has been hailed as the greatest event since the advent of the UN. The significance of the adoption of the Rome Statute was the fact that it suggested the notion of a social system built on universal respect for human rights. This system recognises that allowing impunity to the perpetrators of war crimes and crimes against humanity can never be justified.

Yet the extension of the ACJHR's jurisdiction to include the prosecution of international crimes is not eliciting a similar sentiment. The extended court's insistence on immunity for heads of state and senior state officials does not bode well for the credibility and legitimacy of its activities going forward. Along with many other criticisms that have been levelled against the extended ACJHR (see, for instance, Du Plessis 2014a: 199-209; 2014b; Ani 2018: 438-462), the immunity stipulation in the Malabo Protocol renders the sustainability and impact of the court highly unlikely.

As shown in this contribution, the rhetoric contained in the Repeal Bill and International Crimes Bill, declaring South Africa wholeheartedly committed to the prosecution of international crime and the resolution of conflict, is politically correct though senseless. After all, the country intends leaving a system of criminal justice that ensures that the usual cycle of impunity attached to serving heads of state and senior state officials is broken. And although, looking back in history, one fully understands why African states are fixated with their sovereignty, this does not make it any less true that state sovereignty is often used to hide egregious human and humanitarian rights violations and shield political leaders from accountability.

To Africa's credit, the UNSC system with its vexed veto structure (where three of the five permanent members are not even ICC member states) does render the principles of state equality and consensus in international law and relations incredible. It is not hard to understand that dissatisfaction with the UN system, and not necessarily with the ICC itself, might be at the root of the continent's hostile attitude towards the international court.

However, considering the role that Africa and particularly South Africa played in establishing the ICC, it is regrettable that our political leaders are not addressing their problems with the ICC and the UNSC positively and proactively, but would rather opt for exiting the ICC and its system. Ultimately, albeit not perfect, the ICC does strive to build a credible system of international criminal justice. In this regard Cole (2013: 693) believes one solution to the current impasse might be for the disgruntled African states to “commit to prosecuting international crimes in their domestic courts, rather than engaging in a prolonged confrontation with the ICC”. He correctly notes that the need for prosecution will remain “as long as there is ongoing impunity on the continent”, which dishonours the memory of ordinary people who suffered at the hands of repressive political regimes. In the end, seeking justice for the victims of the countless human and humanitarian rights violations committed in Africa will depend on the political will of the continent’s political elite.

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