

Review

The contentious relationship between Africa and the International Criminal Court (ICC)

Emmanuel Okurut¹ and Hope Among^{1,2*}

¹Sterling Afrika Training and Consultancy, Hatfield, South Africa.

²Department of Public Law, Faculty of Law, Gulu University, Uganda.

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The International Criminal Court (ICC) established in 2002 under the Rome Statute with significant support from African States, comprise thirty percent of the ICC's total membership. After nearly two decades in operation, the ICC has issued a number of indictments to both sitting and ex-African leaders. The African Union has criticized these indictments citing that the court seems to be overly concentrating its efforts on the African continent. African leaders have claimed that the ICC had ignored the atrocities committed by western superpowers especially in the various wars on terror around the world. Another notable concern is the absence of these major powers from the membership of the Rome Statute. In response for example, several African states including Chad, Uganda, South Africa and Malawi have defied the ICC's requests to arrest and extradite Sudan's Omar al-Bashir for prosecution. The latest of such defiance was Rwanda's refusal to arrest al-Bashir when he visited the country in March 2018. This article traced the origin of African dissent against the ICC and examined its implications on justice for victims, international law, as well as the future of the court. This article examined some of the most prominent ICC investigations of African Heads of State and the criticisms against such action for example, state sovereignty and immunity of Heads of State. The article also analyzed the role of the ICC in creating accountability for atrocities in Africa. It concluded that although the ICC has its deficiencies, it remains a very important avenue for ensuring accountability and justice for serious crimes in Africa. This exercise was achieved by extensive review and analysis of international law instruments, national legislation, textbooks, academic articles as well as reports pertaining to the formation and operation of the ICC.

Key words: International Criminal Court (ICC), African Union, accountability, human rights, crimes against humanity.

INTRODUCTION

In July 1998, one hundred and twenty states adopted the Rome Statute, which establishes the International

Criminal Court (ICC). The ICC became the world's first permanent international criminal tribunal. According to

*Corresponding author. E-mail: hope.chodry@gmail.com. Tel: +256773516180.

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Article 1 and 5 of the Rome Statute, the role of the ICC is to prosecute individuals accused of committing the most serious crimes of international concern including genocide, crimes against humanity, war crimes and crimes of aggression. When the ICC was established in 2002, there was anticipation that it would be an avenue for ensuring accountability and justice for the most serious crimes. The creation of the Court was primarily embraced in Africa because most states had and continued to experience atrocious crimes for example, the Rwandan genocide of 1994 which resulted in almost one million deaths (Eltringham, 2004). It was inevitable that 47 states participated in the drafting process of the Rome Statute, and the majority approved its adoption (Murithi, 2013). To-date, 44 African states are signatories and 34 of them have further ratified the statute making Africa the most represented continent making up thirty percent of the ICC's total membership (Bradley, 2002).

It is undisputable that the ICC has become a fundamental avenue for preventing and ending impunity for human rights violations on the African continent. However, there is discord as to the prosecutorial policy of the court, which is allegedly inclined towards the prosecution of Africans especially sitting Heads of States (Maru, 2014). This concern is even more pronounced in comparison to offenders from any other continent for example, United States of America, Britain, and Russia that have enjoyed unprecedented impunity for crimes committed in countries like Afghanistan and Syria during the war against terror (Holvoet and Mema, 2013). Moreover, these superpowers have exploited their veto power at the United Nations Security Council to obstruct ICC prosecution of crimes of aggression committed especially in Syria (Roth, 2017). In fact, the United States has enacted a law that prohibits its government or agencies from cooperating with the ICC, responding to requests of cooperation, extraditing to and supporting the ICC in any form including financing it (22 U.S. Code § 7423 – Prohibition on cooperation with the International Criminal Court). In addition, the United States has signed bilateral non-surrender agreements with more than 90 states prohibiting them from extraditing US citizens to the ICC (McGoldrick, 2004). This position taken by the United States towards the ICC is indeed a hostile one and also presents a double standard in cases where the same US has facilitated the prosecution of other individuals in the ICC.

Such positions have raised concerns as to the partiality of the ICC as an institution which has supposedly undermined the sovereignty of African States (Holvoet and Mema, 2013). The focus on the African continent can be justified by the fact that the ICC only has jurisdiction over countries that have ratified the Rome Statute, and through a referral from the UN Security Council for non-state parties (Article 1 and 13, Rome Statute). Although perceptions of the ICC's biasness towards African leaders exist, it is important to note that

African governments themselves (Arieff et al., 2010; Zavis, 2016) requested a substantial number of investigations and prosecutions by the Court. Moreover, the ICC operates within the parameters of admissibility of cases subject to the complementarity principle, which provides that the jurisdiction of the ICC is complementary to national courts rather than substitutionary (Article 17, Rome Statute; *The Prosecutor v. Thomas*, 2006). It may therefore be disputable and inaccurate to conclude that the ICC is entirely a busybody that is meddling in African affairs.

However, African states have and continue to defy the ICC for example in the prominent case of the arrest warrant against President Omar al-Bashir (Arieff et al., 2010). There is therefore a need to ascertain what this resistance means for the effectiveness of the ICC and its implications on human rights in Africa. The most recent development was Rwanda's decision not to arrest and extradite al-Bashir when he travelled to the country for the AU Trade Summit in March 2018 regardless of the warrant for his arrest (AfricaNews, 2018). This standoff between the ICC and African leaders largely symbolizes deterioration of relations and lack of confidence in the Court. It is therefore important to briefly examine some of the most contentious indictments of African leaders by the ICC.

PROSECUTION OF AFRICAN LEADERS IN THE ICC

The introduction highlighted a growing concern that the ICC seems to be unfairly targeting African Heads of States as opposed to presidents from other continents. This has inspired a mounting wave of defiance against ICC orders by several African leaders who appear to have lost confidence in the court as an impartial forum for the attainment of justice. Notwithstanding these sentiments, a seemingly undeterred ICC has continued in its mandate to investigate and prosecute individuals who are responsible for the most serious crimes, including former and sitting heads of state. There are several African and non-African leaders that have been successfully investigated and indicted by the ICC while others are still undergoing trial. However, this section focuses on the cases of two sitting African leaders these being, President Uhuru Kenyatta of Kenya and President Omar Al-Bashir of Northern Sudan who have both been indicted for crimes against humanity. Kenyatta's case exemplifies significant cooperation of an African Head of State with the ICC while al-Bashir's is a tale of complete and unified African defiance against the authority of the court.

President Uhuru Kenyatta of Kenya

President Uhuru Kenyatta became the first sitting Head of

State to be subjected to the jurisdiction of the ICC on charges of crimes against humanity, which he strongly denied (Bowcott, 2014). President Kenyatta was indicted on five counts of crimes against humanity for his role in the post-election violence between 2007 and 2008. The post-election violence in Kenya resulted in the death of approximately one thousand two hundred people, and the displacement of about six hundred thousand others (*The Prosecutor v. Uhuru*, 2015). In an unprecedented move, Kenyatta handed the presidency over to the Deputy President William Ruto, in order to go and attend the hearing at The Hague in October 2014 (Namunane, 2014). The President invoked Article 147(3) of the Constitution of Kenya which provides that in cases where the President is absent or temporarily incapacitated, and in cases where the President so decides, the Deputy President shall act as President. The effect of this move was that he would answer to the charges against him in his personal capacity and not as a Head of State. President Kenyatta explained that his decision to hand power to his deputy was to preserve Kenya's sovereignty during his trial (Mosoku, 2014). The President refuted claims that he may have used his position to interfere with cooperation between the Kenyan government and the ICC regarding his case. He alleged that the charges against him had political motivations from imperialists who viewed African leaders as incompetent. He concluded that his conscience was and had always been clear and that he was not guilty of any of the charges that were premised on internalized negative assumptions about Africa's political landscape (Holligan, 2014).

The case against President Kenyatta was postponed several times while the prosecutor attempted to build the case against him (Deutsche, 2016). There were serious allegations that the Government of Kenya was interfering with prosecution witnesses through bribery and intimidation in order to prevent them from testifying against President Kenyatta. The prosecutor also claimed that the Government was not complying with requests from the ICC to release relevant financial records which were crucial pieces of evidence for the trial. According to the Judges of Trial Chamber V (B) of the International Criminal Court (International Criminal Court, 2014);

... [it] finds that, cumulatively, the approach of the Kenyan Government [...] falls short of the standard of good faith cooperation and that this failure has reached the threshold of non-compliance as obliged under the Rome Statute.' Furthermore, the Chamber in its ruling found that, '[...] that the Kenyan Government's non-compliance has not only compromised the Prosecution's ability to thoroughly investigate the charges, but has ultimately impinged upon the Chamber's ability to fulfill its mandate under Article 64, and in particular, its truth-seeking function in accordance with Article 69 (3) of the Statute.

This interpretation rightfully falls within the meaning of

non-cooperation by a state party under Article 89 and 93 of the Rome Statute. In addition, the Court's investigation process was tarnished with false media reports of malicious prosecution of the President, social media campaigns to expose the identity of the protected prosecution witnesses, and various efforts to intimidate, bribe and frustrate prospective witnesses (Hodgins, 2015). These actions frustrated all efforts to attain critical evidence to support the charges brought against President Kenyatta. This resulted in the withdrawal of all the charges brought against him in 2014 (*The Prosecutor v. Uhuru*, 2015). However, the victims of these atrocities expressed disappointment, betrayal, and abandonment by the ICC. Many voiced disappointments in the Court's decision which was regarded as a grave injustice to the victims (Hodgins, 2015). Despite these setbacks, the President of the Court recently appointed Judges Robert Fremr, Reine Alapini-Gansou and Kimberly Prost to the cases against President Kenyatta, Deputy President Ruto and former journalist Joshua arap Sang (Oteng, 2018). There is a glimmer of hope for the victims of the post-election violence that not all may be lost after all.

It is evident that the Kenyan situation was impeded by several setbacks that fundamentally obstructed the justice process. However, it set a precedent in which a sitting head of state appeared before the ICC to answer to the charges levelled against him. It also affirmed the authority of the Court and its role in ensuring accountability and justice for serious crimes under international law. The case against President Kenyatta is significant in that it showed a level of willingness of an African leader to cooperate with the ICC regardless of the allegations of non-cooperation. On several occasions, Kenyatta expressed displeasure and accused the court of biasness towards African states. This sentiment resonates with several other African leaders, which will be clearly be illustrated in al-Bashir's case discussed hereunder.

President Omar al-Bashir (Sudan)

Omar al-Bashir is the current President of the Republic of Sudan, also known as North Sudan since the independence of South Sudan in 2011. As was noted in the previous section, Kenya displayed a considerable level of cooperation with the ICC in President Kenyatta's case although it was overshadowed by allegations of withholding evidence and witness tampering. On the other hand, Sudan's President Omar Hassan al-Bashir has and continues to bluntly defy summons to appear before the ICC to answer the charges against him (UNSC Res. 1593). Al-Bashir's latest act of defiance was his travel to Rwanda in March 2018 to attend the African Union Trade Summit despite a warrant out for his arrest by the ICC (AfricaNews, 2018). These warrants were issued on 4 March 2009 and subsequently updated on 12 July 2010. The warrants detail ten charges which include

five counts of crimes against humanity, two counts of war crimes, and three counts of genocide (The Prosecutor v. Omar al-Bashir, 2010).

The ICC has repeatedly requested for cooperation from African member states to arrest al-Bashir should he travel out of Sudan to a country, which is a signatory to the Rome Statute. To this end however, the ICC has not received any cooperation from several African states. In fact, African leaders have repeatedly scoffed at the ICC's directives to arrest the Sudanese leader. For her failure to arrest al-Bashir in March 2018 at the AU Trade Summit, Rwanda joins a long list of African countries that have defied the request of the ICC to arrest and hand the infamous president over to the Court for prosecution (AfricaNews, 2018). Africa's defiance against President al-Bashir's arrest warrant begun in July 2009 at the thirteenth AU Heads of State summit in Libya where African leaders made a commitment not to arrest and extradite President al-Bashir of Sudan to the ICC whenever he traveled to their territories (Abdulai, 2010). This defiance speaks volumes of their growing displeasure and disgruntlement with the court. Following this resolution, al-Bashir has visited several African states with the confidence that he will not be betrayed. This confidence is inspired by the assurance that most Africa leaders share in the sentiment that the court has ceased to be an independent and impartial forum.

Chad was one of the first African states to refuse a request to arrest and transfer al-Bashir to the ICC for prosecution. Al-Bashir visited the Republic of Chad in August 2011 to attend a meeting of Heads of State of the Sahel-Saharan States (Rice, 2010). Just before the meeting, human rights CSOs and NGOs called upon Chad to arrest al-Bashir. Chad's Interior and Security Minister responded to those calls stating that his country was not under any obligation to arrest a current head of state on travels to the host nation (International Criminal Court, 2005). On December 2011, the Pre-Trial chamber decided that Chad had defied its duty in failing to arrest al-Bashir and the matter was referred to the UN Security Council for further action (Van Zeijest, 2011). In February 2013, Chad did not extend cooperation to the ICC when al-Bashir visited the country for the second time. Yet again, the ICC could not do much regarding the situation but refer the matter to the UN Security Council as it had done in 2011 for further appropriate action (Decision on Non-compliance, 2013).

In October 2011, Malawi also ignored requests from the ICC to arrest and extradite al-Bashir when he visited the country for a Common Market for Eastern and Southern Africa (COMESA) meeting (City Press, 2011). The Pre-Trial chamber in December 2011 found that Malawi had consequently failed in its duty under the Rome Statute (Van Zeijest, 2011). Just like in the case of Chad's refusal to arrest al-Bashir, the ruling was transmitted to the UN Security Council and Assembly of State Parties to the Rome Statute for further action. This exact situation

of African leaders refusing to arrest al-Bashir has played out in other African countries including the Democratic Republic of Congo, Uganda, Djibouti and South Africa (The Prosecutor v. Omar al-Bashir, 2010).

It is also worth noting that it is not only African states that have refused to cooperate with the ICC regarding al-Bashir's arrest. On 29 March 2017, the Hashemite Kingdom of Jordan also declined to arrest al-Bashir when he visited the State for the twenty-eighth Arab League Summit Meeting in Amman. This happened regardless of the Registry's *note verbale* to Jordan on the 21 February 2017, reminding the country of its obligation to cooperate by arresting and surrendering Mr al-Bashir upon his entry into Jordan (International Criminal Court, 2017). This conduct indeed signifies that dissent against the ICC and its requests for cooperation is not peculiar to Africa alone.

The love-hate relationship between African leaders and ICC

The cases of African defiance against the directives from the ICC to arrest al-Bashir discussed in the previous section seem to create an all too familiar pattern. Firstly, the African state hosting al-Bashir refuses to arrest and extradite him to the ICC, the ICC rules against the defiant country, and the ICC finally refers the matter to the UN Security Council and the Assembly of State Parties of the Rome Statute for further action in accordance with Article 87 of the Rome Statute (Van Zeijest, 2011). It appears that after the matter is referred to the UNSC and the Assembly of State parties, it meets an unceremonious and abrupt end with no further action. This highlights a major impediment to the scope of authority of the ICC. The effectiveness of the Court's operations and decisions is heavily dependent on the willingness of state parties to cooperate in the proceedings (Article 86, Rome Statute). In instances where state parties fail or refuse to cooperate with the ICC contrary to Article 87 of the Rome Statute, it ultimately paralyzes the Court in such a way that it becomes unable to proceed on the matter in question. Such refusal to cooperate with the ICC on the part of a state would ultimately constitute a breach of its treaty obligation.

This consideration gives rise to another concern that African leaders seem to support the ICC when they refer their adversaries like rebel leaders and political opponents to the Court. However, when the Court institutes investigations or prosecutions against one of their peers, they immediately become uncooperative and dismissive in an effort to protect each other from accountability (Mills, 2012). The practice of African leaders protecting each other from investigation and possible prosecution undermines the authority of the ICC. These scenarios can be properly illustrated by the case of Uganda discussed hereunder.

The Republic of Uganda signed the Rome Statute in

1999 and later in 2002 deposited its instrument ratifying the treaty. The signing and ratification of the Rome Statute demonstrated Uganda's commitment and submission to the authority of the Court, and the obligations imposed by the Rome Statute. Uganda has had a long history of armed conflict against armed groups for example the Allied Democratic Forces (ADF), Holy Spirit Movement, and Lord's Resistance Army (LRA) (Doom and Vlassenroot, 1999; Van Acker, 2004). In 2004, the Government of Uganda referred the LRA conflict to the ICC for investigation over crimes against humanity, war crimes and human rights violations perpetrated during the armed conflict (The Prosecutor v. Joseph Kony and Vincent Otti, 2005; The Prosecutor v. Dominic Ongwen, 2015). The President of Uganda, Museveni even had a meeting with the Prosecutor in London to pave way for cooperation between the ICC and Uganda. High on that meeting's agenda was tracking down the LRA leaders, apprehending them and extraditing them to the ICC to face prosecution (Situation concerning LRA, 2004). From these actions, it signified that the Government of Uganda endorsed the authority of the ICC. Indeed, the Ugandan government had confidence that the Court would hold these accountable for the atrocities committed during the armed conflict. Just like Uganda, several African states that ratified the Rome Statute welcomed the establishment of a permanent criminal court in an attempt to bring an end to genocide, war crimes, gross systematic human rights violations and crimes against humanity. Why then would these very states compromise their commitments in defense of their peers who are accused of committing these crimes? This defiance exodus can only be rationalized by the fact that many African Heads of State themselves have been accused of perpetrating crimes against humanity in their respective countries.

With this consideration in mind, President Museveni has joined the regiment of African leaders opposing the authority of the ICC in African States (Yukhananov, 2008). The Ugandan President embarked on an offensive against the ICC in which he repeatedly called out the Court for being biased towards African leaders. In 2013 while attending the inauguration of President Kenyatta in Nairobi, Museveni referred to the ICC as an arrogant and shallow actor that was being used to eliminate unpopular African leaders (Hatcher, 2013). Museveni also congratulated the Kenyan people for defying Court's interference in domestic affairs and abuse of authority for Western gains. Museveni's biggest defiance against the ICC was perhaps during his own inauguration in May 2016, which was also attended by the Sudanese President al-Bashir who is still wanted by the Court (Liu, 2016). In a move, which was interpreted as protecting al-Bashir, the Ugandan President referred to the ICC as a bunch of useless people who had lost his support completely (Associated Press, 2016). With regard to arresting and surrendering al-Bashir to the ICC, he

referred to such an act as, '...very un-African. It is uhuni (buyaye).' He further remarked that '... we don't treat visitors like that' (Katunzi, 2017). These remarks prompted a walkout by delegates from North America and Europe in attendance of the inauguration who interpreted his comments as a condonation and protection of perpetrators of crimes against humanity (Associated Press, 2016). In reference to the Kenya situation, President Museveni reasoned that the problems in Kenya and other African countries are ideological and for the ICC to handle such issues as legal matters is the 'epitome of shallowness' (The New Vision, 2015). This love and hate relationship will continue to unfold as we observe the extent to which President Museveni will cooperate with the ICC investigations of the 2017 Kasese killings in Uganda, in which he is considered one of the perpetrators (Human Rights Watch, 2017).

This example clearly depicts a situation in which African heads of state support the mandate of the ICC, and are confident enough to refer situations in their own countries to the court, as long as it does not hold them or their peers accountable for any wrongdoing. It goes without saying that African leaders' practice of openly defying, challenging and denouncing the authority of the ICC has strained relations between the two. Some African leaders have even initiated the process of withdrawing from the ICC in an effort to preserve sovereignty of their countries, and to insulate themselves from prosecution as discussed subsequently.

AFRICAN UNION DECISION TO WITHDRAW FROM ICC

There is a wealth of literature, rightfully or otherwise, depicting Africa's rocky relationship with the ICC which plays right into the rhetoric that the court is targeting Africans, and is being used as a tool for the enforcement of neo-colonialism by Western powers (Kasande et al., 2017; Murithi, 2013). There is a sentiment which resonates with several African leaders that the court is being abused to push self-serving agendas like unconstitutional regime change (Hatcher, 2013). To date, a total of nine African leaders have been charged in the ICC for various crimes. These include: Former Ivory Coast president Laurent Gbagbo; former Ivory Coast Youth Minister Charles Ble Goude; former Liberian President Charles Taylor; Kenyan President Uhuru Kenyatta; Kenya's Deputy-President William Samoei Ruto; former Vice President of the Democratic Republic of Congo Jean-Pierre Bemba Gombo; former President of Libya Muammar Gaddafi; former Minister of Defense of Sudan Abdel Raheem Muhammad Hussein; and Sudanese President Omar Al-Bashir's indictment (International Criminal Court, Defendants).

Several African leaders have argued that the ICC has digressed from its original mandate of ensuring

accountability and justice for the most serious crimes under international law, to a political tool used by the west to promote a neo-colonial agenda (Kasande et al., 2017). The significant statistics of African leaders who have been indicted in the ICC ultimately inspires a perception that Africans are being targeted by the court regardless of the fact that some of the individuals charged were actually found to be responsible for the most serious crimes against humanity. The ICC has on several occasions denied allegations that they are discriminating against and systematically targeting Africans. In March 2017, the ICC president Judge Silvia Fernández de Gurmendi admitted that most of their investigations were concentrated in Africa (BBC News, 2017). However, these investigations and prosecutions were in line with the Court's responsibility of administering justice (Ocungi, 2017). Despite such assurances from the ICC, African leaders seem disgusted by what they perceive as a biasness and treatment as though they are still colonies (Abdulai, 2010). It is no wonder that there has been strong advocacy around African states withdrawing from ICC to protect their sovereignty.

The year 2017 was expected to be the period where the mass exodus of African States away from the ICC would finally materialize. This would effectively cripple the operations of the court, considering that it depends on state cooperation in order to assert its authority (Maasho, 2017; Art. 87, Rome Statute). In February 2017, African leaders agreed on a 'strategy of collective withdrawal' from the ICC (Maasho, 2017). African Union leaders premised this decision on the widespread disapproval of the ICC. The resolution to leave the ICC was non-binding on AU members and two states, Senegal and Nigeria, opposed the proposal to withdraw (BBC News, 2017). The subsequent discussion focuses on three countries that have championed the break away from the ICC. These are South Africa, Gambia, and Burundi.

South Africa's failed withdrawal from ICC

The Republic of South Africa played a pivotal role during the negotiation of the Rome Statute and formation of the ICC in 1998 (Jordaan, 2010). However, South Africa's fall out with the ICC came in June 2015 when the Sudanese President Omar al-Bashir who is wanted by the Court on charges of crimes against humanity attended an African Union summit meeting in Johannesburg (Mills, 2012). Upon the arrival of al-Bashir in South Africa, the South African Litigation Centre instituted proceedings in the High Court Gauteng Division seeking an order preventing Bashir's exit and effecting of his warrant of arrest (*Southern Africa Litigation Centre v. Minister of Justice*, 2015). The High Court ordered that President al-Bashir was prohibited from exiting South Africa pending its final decision. The High Court's final order was that South Africa should arrest al-Bashir

without a warrant according to Section 40(1)(k) of the Criminal Procedure Act of South Africa and surrender him to the ICC. Immediately after pronouncing its order, the High Court was informed by Government counsel that al-Bashir had left the country earlier that day through the Waterkloof Air Base (*The Minister of Justice v. Southern African Litigation Centre*, 2016).

President Jacob Zuma justified his government's actions stating that the arrest of al-Bashir would tantamount to illegitimate regime change in Sudan (Tladi, 2015). This argument is premised on the principle of sovereign equality of states, which is the foundation for immunity of states from being subjected to the jurisdiction of another (*par in parem non habet imperium*) (Nicaragua v. United States, 1986). Akande and Shah (2010) argue that a move to arrest a sitting head of state invariably leads to a change in the governance of the country concerned. Arresting a sitting president may constitute extreme meddling in the sovereignty and independence of another state. Notwithstanding of this consideration, the ICC ruled that South Africa had failed in its duty to arrest al-Bashir and extradite him to The Hague for prosecution (Decision under article 87(7), 2017). Regardless of this ruling, South Africa did not face any sanction for failing to arrest the Sudanese President.

Following the controversy surrounding al-Bashir's failed arrest, South Africa expressed its intention to withdraw from the ICC (Fabricius, 2017). The Government followed up on its intention by tabling a Bill in Parliament seeking to repeal the Rome Statute of the ICC, which would effectively withdraw from the ICC (Gous, 2017). On 5 December 2016, the Democratic Alliance (DA) political party instituted proceedings in the High Court seeking to prevent the Bill repealing the Rome Statute (*Democratic Alliance v. Minister of International Relations*, 2016). The High Court ruled that the government's decision to withdraw from the ICC without prior parliamentary approval was unconstitutional. Following this ruling, South Africa's Minister of Justice and Correctional Services withdrew the Bill in accordance with Rule 334. The Democratic Alliance was pleased with the withdrawal of the Bill although it acknowledged that the Court may very well have some weaknesses which should be addressed. Rather than completely withdrawing from the ICC, the Democratic Alliance recommended that South Africa should initiate debate on possible areas of reform in order to improve the efficiency of the court (Gqirana, 2017).

The South African situation discussed above is an account of a failed attempt aimed at liberating herself from the authority of the ICC. While the African National Congress (ANC) government had a real appetite to pass the Bill repealing the Rome Statute, they faced an uphill battle getting it past the members of opposition particularly the DA at which point the proposal failed. While government's proposal was driven by majority consensus among African leaders that the ICC is becoming less relevant, opposition highlighted the role

that the Court plays in ensuring accountability regardless of its shortcomings. The position taken by the opposition in this case is indeed a commendable one. While one cannot help but sympathize with the vulnerable position of African leaders, there is still a need to ensure that victims of crimes against humanity and rights violations can still access justice.

Gambia's withdrawal and rejoining ICC

Just like in the case of South Africa, Gambia accused the ICC of bias against people of color and in particular, Africans. This inspired the state's decision to quit the ICC in October 2016. Gambia's Information Minister, Sheriff Bojang, raised some concerns with the Court's scrutiny on Africans while ignoring the atrocities committed by Western states (Aljazeera, 2016). The Minister highlighted the case of Britain's former Prime Minister, Tony Blair, whom the ICC declined to prosecute over his role in atrocities committed during the Iraqi War (Mendick, 2016). The Prosecutor's decision not to try Blair for war crimes was met with widespread outcry as many felt that he was responsible engineering the Iraqi war. The Gambian Minister went ahead to note that since the establishment of the ICC, more than thirty Western states had been responsible for war crimes and crimes against humanity and yet none of them had been charged. He went as far as referring to the court as the 'International Caucasian Court' designed to target and persecute Africans of color (Mendick, 2016).

There were major developments regarding Gambia's membership to the ICC in 2017. The country elected a new president, Adama Barrow in December 2016 who replaced Yahya Jammeh in a heavily contested election (Associate Press, 2017). In January 2017, Jammeh went into exile in Equatorial Guinea, a country which is not a member of the Rome Statute. Following the ousting of Jammeh, President Barrow notified the UN General Secretary in February 2017 of his country's resolution to restore its ICC membership (Associate Press, 2017).

Gambia's withdrawal and subsequent rejoining of the ICC is revealing of the concerns that the previous administration had in the first place. There were strong criticisms raised about the ICC's lack of action towards Western states while channeling all their efforts to investigating African states. This point appears to carry weight in light with the concept of sovereign equality of states in international law (Anand, 1966). This principle requires states to be treated as equals under in international relations. The ICC's practice of focusing on African states while ignoring the crimes committed by Western states may very well constitute an undermining of this principle. Be it as it may, the former president Jammeh was himself implicated in several serious crimes including torture committed during his tenure as president (Sprouse, 2016). Opposing the authority of the ICC would therefore be a logical option for a man who thought

he was close to being indicted by the court. In addition, his choice of country of exile also supports this argument because Equatorial Guinea is not a party to the Rome Statute. It can be argued that by withdrawing from the ICC and subsequently fleeing to a non-signatory of the Rome Statute, Jammeh was insulating himself from prosecution for his crimes. However, the new President, Adama Barrow restored the country's ICC membership prompting a call for Burundi to reconsider its withdrawal. However, Burundi has not taken any steps to restore ICC membership as discussed subsequently.

Burundi's withdrawal from ICC

In September 2017, a UN Commission of Inquiry released a report on Burundi implicating President Pierre Nkurunziza in possible crimes against humanity including torture, enforced disappearances, sexual violence, extrajudicial killings and arbitrary arrests which occurred during his bid for a third term of presidency in April 2015 (OHCHR, 2017). The release of this report coincided with the period when there was growing resentment over the court's over indulgence in African affairs. President Nkurunziza immediately jumped on the bandwagon of the African leaders calling for an end to what they described as an assault on African state sovereignty. On 15 April 2016, the ICC Prosecutor instituted investigations into these allegations (Moore, 2017). However, Burundi preempted the ICC's investigations by withdrawing from the Rome Statute in October 2016. This effectively paralyzed the court's investigations into the crimes committed by Nkurunziza's administration since its jurisdiction is limited to state parties to the Rome Statute (Article 17 and 20, Rome Statute). All efforts to establish accountability for the election related violence have since stalled.

In response, the ICC urged Burundi to reconsider its decision to withdraw from the court in order to prevent impunity for crimes against humanity (Aljazeera, 2016). However, Burundi has not shown any sign of retracting its notice of withdrawal from the Court to date. The effect of retracting the withdrawal would be to open up channels through which President Nkurunziza could be criminally charged under the ICC, something that his administration is definitely not keen on. One cannot help but notice similarities between President Nkurunziza of Burundi and former President Jammeh of the Gambia. Just like in the case of Jammeh, President Nkurunziza foresaw the noose of the ICC tightening around his neck and his only option was to withdraw his country's ratification. This supposes a pattern by which certain leaders exclude the authority of the ICC in order to protect themselves from investigation and prosecution.

IMMUNITY OF HEADS OF STATE IN INTERNATIONAL LAW

A discussion on the indictment of African heads of state

by the ICC is somewhat incomplete without reference to the principle of immunity of heads of state from prosecution. Akande and Shah (2010) rightfully point out that the principle of immunity from prosecution is a heritage of old practice in which majestic dignity was accorded to members of royal families especially kings and princes. International law has retained the principle of immunity from prosecution in relation to modern day heads of state (presidents) and representatives of states (foreign representatives) (Elshtain, 1990). A head of state therefore entitled to immunity because he or she is a personification of the state which he/she represents. Such immunity also attaches due to the nature of the duties he/she performs as well as the respect for the sanctity of the office he/she occupies.

Immunity of heads of state under international law

The international law doctrine of immunity from prosecution effectively exempts certain individuals from prosecution for crimes committed while they are serving as heads of state or foreign state representatives (Akande and Shah, 2010). There are two types of immunity from prosecution these being functional immunity and personal immunity. Functional immunity also known as immunity *ratione materiae* is an exemption from prosecution that is accorded to individuals who carry out certain functions of state (Akande and Shah, 2010). The basis for functional immunity is rooted in both treaty law and customary international law and these protections usually apply to foreign officials or diplomats representing a sending country (Mazzeschi, 2015). On the other hand, personal immunity also known as *ratione personae* is a type of exemption that is conferred upon certain persons by virtue of the office which they occupy. It is a settled principle of law that sitting heads of state, leaders of governments and foreign representatives of state automatically enjoy *ratione personae* (*Democratic Republic of the Congo v. Belgium*, 2002). It must be emphasized at this point that the operation of *ratione personae* is limited to the individual's term in office. Immediately after vacating office, individuals who were previously entitled to *ratione personae* may be subsequently tried for crimes committed in their personal capacities during their terms of office. The principle of non-intervention or non-interference in the domestic matters of another state presents a rationale for absolute immunity of presidents from criminal prosecution (Jamnejad and Wood, 2009). The principle of non-intervention places an obligation upon states not to interfere with domestic affairs and the territorial or political integrity of another state using force (Article 2(4), UN Charter). This principle operates within the framework of equality of states at international law which prevents a sovereign state being subjected to the jurisdiction of another (Kelsen, 1944). Akande rightfully concludes

that if a state is to arrest another sitting head of state, such action would amount to an illegitimate/unconstitutional regime change (Akande and Shah, 2010). An example of the operation of this principle was the case in which an English court declined to issue a warrant of arrest against Robert Mugabe on grounds that he was a sitting head of state who enjoyed the protections of *ratione personae* (Branigan, 2004).

While this is the case with criminal matters, there is an exception to immunity of heads of state that has been developed in relation to accountability for international crimes under international tribunals. As has been discussed in this manuscript, there are some sitting African heads of state have been investigated and charged with serious international crimes in the ICC for example, President Uhuru Kenyatta and President Omar al-Bashir. This exception to the operation of immunity from prosecution is examined following.

Exception to immunity in international crimes

International crimes are most of the times perpetrated by powerful and seemingly untouchable state officials who are not normally prosecuted for their roles in such atrocities (Akande and Shah, 2010). This invariably results in a thriving culture of impunity in which human rights violations continue to occur over and over again. One avenue that has proved effective in ensuring accountability for rights violations is prosecution of such perpetrators in international tribunals such as the ICC. However, such prosecution raises the issue of the operation of the principle of immunity from prosecution of heads of state. In order to address this issue, reference can be made to the ruling of the Appeals Chamber of the Special Court for Sierra Leone in the case of *Prosecutor v. Charles Ghankay Taylor*. The Appeals Chamber ruled that the defense of immunity from prosecution was not available to President Charles Taylor although he was a sitting head of state when he was indicted.

The justifications that are often raised for the deprivation of the protection of immunity are first that international crimes including crimes against humanity, genocide and war crimes cannot be categorized as sovereign acts (*Regina v. Bartle and Commissioner of Police*, 1999). This stems from the consideration that a state in itself is not capable of committing crime although it may be held responsible for such acts (Nollkaemper, 2009). Secondly, the prohibition against crimes against humanity, genocide, and war crime have attained *jus cogens* status and states have an *obligatio erga omnes* to ensure that such perpetrators do not enjoy impunity (Bassiouni, 1996 a,b). As such, the *jus cogens* status of international crimes should not be derogated under any circumstances including the operation of immunities. It was stated in *Siderman de Blake v. Republic of Argentina* (1992) that *jus cogens* rank supreme in the hierarchy of

international law and must be placed above any other conflicting rules of international law such as sovereign immunity (*Prefecture of Voiotia v. Germany*, 2000).

It is therefore accurate to conclude that the investigations and prosecution of African leaders by the ICC is in fact legally sound and are properly founded within international law. The indictment of sitting heads of states which African leaders have been critical about is not necessarily targeting them, but ensuring that *jus cogens* are upheld. This guarantees that the culture of impunity does not carry on within an African continent that is already riddled with all sorts of past and on-going atrocities. It is therefore important to examine the role of accountability for international crimes in Africa and how such accountability can be guaranteed.

Accountability for international crimes in Africa

One does not have to look hard and long before coming across numerous accounts of crimes against humanity, genocide and war crimes committed on the African continent. Several conflicts such as the Rwandan genocide (Akresh, 2008), the post-election violence in Kenya (Kanyinga, 2009) and the armed conflict in the Democratic Republic of Congo (Gleditsch et al., 2002) to mention but a few, have made headlines all over the world for their senseless brutality and loss of lives. For all these atrocities committed, there is always a perpetrator behind them who must be held accountable for those crimes. Failure to ensure accountability for such violations leads to a detestable cycle of impunity.

There is a strong relationship between peace and justice which requires accountability for the commission of a crime (Williams and Scharf, 2002). Accountability for atrocities not only serves as a deterrent to other would-be perpetrators, but also plays a key role in any attempt towards reconciliation in post-conflict societies (Lambourne, 2009). The continued impunity of perpetrators simply destroys social cohesion which cannot be achieved without a reasonable degree of trust between community members themselves, and the government in some cases. When perpetrators are held accountable for their actions, it helps the community to heal from hate, animosity and the desire to revenge (UN Office on Genocide, 2018).

States have an obligation under international law to prevent international crimes and to ensure that the perpetrators are held accountable for such acts (Spinedi, 2002). But what happens where the person who is responsible for such atrocities is a leader of state? Can that person still be held accountable for his/her role? Brown and Sriram argue that the African continent has suffered some of the worst atrocities at the hands of their very own leaders who in many cases seek to protect each other from accountability (Brown and Sriram, 2012). In addition, it is inconceivable that they can be charged in

the courts of their own countries since they wield power therein. Such impunity coupled with corruption, dictatorship, and autocratic conduct has robbed African people of the justice that they rightfully deserve. The African Union has also not helped Africa's pursuit of justice and accountability for international crimes committed by heads of state. The African Union to this end has abdicated from intervening against errant presidents since this supposedly violates the principle of non-interference in domestic matters, and would tantamount to an unconstitutional regime change (Gumede, 2018). If 'the big fish won't fry themselves' as Brown and Sriram (2012) argue, somebody has to step up to ensure that the victims of international crime access justice. The next option to turn to in an attempt to attain justice and accountability for African leaders who commit international crimes would be African regional tribunals. However, these forums have not been effective as discussed briefly following.

THE WEAKNESS OF AFRICAN REGIONAL TRIBUNALS

When African regional tribunals such as the African Court of Justice and other sub-regional tribunals were established, they brought renewed hope that impunity for international crimes would henceforth be a thing of the past. However, the reality that awaited the victims of such crimes was that these tribunals would be undermined, overlooked and often mocked by the same leaders who championed their establishment in the first place (Gumede, 2018). This has impacted the overall effectiveness of African regional and sub-regional tribunals.

Gumede (2018) cites the example of Zimbabwe's former President Robert Mugabe who in 2010 sought to suspend the Southern African Development Community Tribunal. This was for the reason that the tribunal had ruled that the government's compulsory acquisition of land without compensation from white farmers was unlawful. Later in 2012, the leaders of the SADC sub-regional bloc voted to prevent their citizens from instituting human rights complaints against their governments in the SADC Tribunal (Gumede, 2018). This move is nothing short of African leaders insulating themselves from being held accountable for possible wrongdoing. This ultimately facilitates the preservation of impunity leaving victims of human rights violations helpless and without the ability to seek justice.

Even more interestingly in July 2014, African leaders attending a summit meeting in Equatorial Guinea voted that all sitting heads of state and representatives were granted immunity from prosecution in the African Court of Justice and Human rights (Mark, 2014). This move was heavily criticized by several human rights advocates who noted that the African Court of justice had been an

African solution engineered to solve African problems. The implication of this decision was that Africans would have to turn to the ICC in order to attain some sort of justice since African tribunals had effectively been paralyzed by their own leaders. The weakness of African tribunals is the reason why the ICC has risen up despite all of the criticism against it to ensure that the supposed untouchable African leaders who have committed international crimes do not get away with impunity.

CONCLUSION

It must be emphasized from the onset that when a country ratifies the Rome Statute of the ICC, it is bound by the obligations therein which include cooperation with the court among others. It is a breach of international law and good state practice for member states to willfully disobey requests of compliance from the ICC. This is indeed acting in bad faith which only sets a bad precedent for other states. The ICC flawed as it may seem offers Africans an opportunity to hold their leaders accountable for some of the heinous crimes committed under their watch. One cannot help but sympathize with African leaders feeling helplessly close to prosecution in the ICC. Most of them perceive these prosecutions as Western motivated interests aimed at getting rid of unpopular leaders and governments. African leaders justifiably or not, feel that the ICC is in fact, nothing but a repulsive tool Western of oppression and neo-colonialism. They share the sentiment that the ICC is a total insult to their dignity and sovereignty which should therefore be totally abandoned (Abdulai, 2010).

The reason why the ICC was established in the first place was to end impunity for international crimes which some states had proved unable to prosecute. It so happens that the individuals whom states were mostly unable to prosecute were their own powerful and influential heads of state and highly placed politicians who enjoyed immunity within the national legal systems. The ICC which is an international tribunal therefore lifts the lid under which African leaders sought to evade accountability for crimes committed. This is basically possible because the prohibition against international crimes including crimes against humanity, genocide and war crimes have attained *jus cogens* status and prevail over protections accorded under immunity. The consideration for this is that both *jus cogens* and immunity of heads of state are both principles of international law (Martin, 2015). It would not be logical for an individual to violate *jus cogens* which is one principle of international law, and yet claim protections under another principle of the same body of international law. As the legal maxim goes, he who seeks equity must come with clean hands.

As has been noted in this article, the ICC has repeatedly been criticized for lacking membership of

major world powers. The United States which first signed the Rome Statute and then later withdrew its signature sighting fears that their servicemen might be exposed to prosecution (Bradley, 2002). China and other superpowers are also not members of the ICC meaning that they cannot be subjected to the jurisdiction of the court. This supposes a state of inequality between states at international but the fact is that African countries do not rank the same as other states due to economic, social and political factors (Gumede, 2018). As has been noted, an innocent man has nothing to hide. If African leaders are so afraid of the jurisdiction of the ICC, it only means that they may be responsible for international crimes which they are so desperate to get away with. This does not mean that some of the Western countries with an appetite for economically motivated wars have not committed atrocities around the world. Although the ICC has certain weakness which should be addressed, it has offered a channel through which Africans can achieve justice for international crimes and prevent impunity of their leaders.

Bottom-line - justice should prevail

The bottom-line is that the world's tolerance for totalitarian regimes is wearing thin. Any leader who attempts to govern his nation on autocratic terms automatically becomes unpopular within his own country and the international community at large. The world today is conscious of human rights and embraces the principles of democracy, rule of law, constitutionalism, and separation of power which all seek to eliminate the likelihood of abuse of power. In addition, states today operate within the international law framework, which lays the foundation for a collective responsibility to ensure the respect *jus cogens*.

Africa has and continues to be a grieving continent plagued by significant accounts of crimes against humanity, war crimes and genocide sometimes perpetrated by their own governments. African leaders therefore have an obligation to ensure that any person who perpetrates international crimes, head of state or not, must be held accountable for those atrocities. Africans deserve justice and in cases where a state fails to prosecute a perpetrator of international crimes, the ICC offers a forum under which such proceedings may be conducted. The ICC has been a forum that has dispensed justice for victims of international crimes regardless of its deficiencies such as lack of universal jurisdiction and over reliance on state cooperation. It offers a way out for Africans to proceed against their heads of state and leaders of government who are usually untouchable in the national courts.

If African leaders harbor grievances with the court's methods of operation or are unsatisfied by the ICC's inadequacies, it is incumbent upon them to champion

reform on the areas of concern through the appropriate channels. Quitting the court altogether does nothing for victims but promotes impunity of perpetrators for international crimes which is highly undesirable. It amounts to errant political leaders protecting each other from being accountable for atrocities, which they have committed. Ultimately, victims of international crime still need justice, which to this end has been provided by international tribunals such as the ICC regardless of its shortcomings.

CONFLICT OF INTERESTS

The authors have not declared any conflict of interests.

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