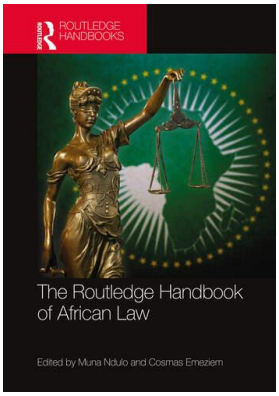

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Addressing serious crimes of global concern in AfricaDribbling around the problem

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ADDRESSING SERIOUS CRIMES OF GLOBAL CONCERN IN AFRICA

Dribbling around the problem

Chris Maina Peter

Introduction

The doctrine of human rights is one theme that troubles many an African ruler. This is not a new attitude; it goes back to 1960s, when the various countries on the continent began regaining their independence. Possessive and defensive of their new status, the new rulers were ready to do anything to protect themselves. The early disruption of many of them by the departing colonial powers and others, directly or through mercenaries and other forces, seemed to justify undertaking unprecedented measures, including suspending fundamental rights and freedoms or omitting them from their constitutions.[1,2]

The excesses of some of the dictators emerging in the continent brought a second thinking in 1970s, and thus, the half-hearted adoption of the African Charter on Human and Peoples' Rights in 1981.[3,4] The Charter was carefully prepared to ensure that no court was established to deal with the violators of human rights. A Commission without teeth was put in place and asked to report to the Summit of the Heads of State and Government, of the continental body the Organisation of African Unity (OAU), comprised of the potential violators of rights and their colleagues. A court was to come years later, but with serious limitations.[5]

The 1990s witnessed issues of warrants by courts in Europe against sitting rulers on the continent through the application of the principle of universal jurisdiction.[6] This did not augur well with the African political elite in power. They contested the legality and legitimacy of these warrants bitterly. The coming of the idea of the establishment of the International Criminal Court (ICC) was perceived as a possible way out of the embarrassment brought by the individual court warrants.[7] This explains the massive support of the Rome Statute, 1998, by African states. To date, Africa forms the strongest block in the state parties to the Rome Statute, with 34 out of 55 members of the African Union (AU) being parties. However, the honeymoon was not long. The operation of the court was soon to become a major disappointment to many African states. The main complaint was that the new court was unfairly targeting the continent and was turning a blind eye to violations of human rights and, particularly, commissions of serious crimes in other areas of the world by the powerful in Europe and the Americas. With these

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double standards, an alternative to the ICC was sought—Africa should be in a position to deal with its own problems of international nature at home, within the continent.

This thinking explains the adoption of the Malabo Protocol of 2014. The Protocol was intended to be a legal instrument of the AU, aimed at replacing the Rome Statute, 1998, in Africa. This chapter examines how Africa has been dealing with human rights and, particularly, serious crimes over the years; the effects of principles like universal jurisdiction; the Rome Statute; and eventually the road to the Malabo Protocol. The question is whether the alternative to the Rome Statute has been well conceived and whether it is up to the task from a legal viewpoint. The issue is whether a permanent solution has been found to address violation of human rights and, particularly, serious crimes. Generally, it is thought that, other than confronting the problems facing Africa, a dance is going on around the problems, without touching them.

African states and human rights

The African continent has been facing challenges of violations of human rights since colonial times. During the colonial period, the fundamental rights and freedoms of the so-called natives were completely ignored. The colonial subjects were brutally abused with impunity. Human rights, which were highly cherished in the metropole, were never exported to the colonies. To do so would have defeated the very aims and purposes of the colonial project.

The postcolonial state did not fare any better. Each began by first inheriting the brutal colonial laws and then adding arbitrary laws on detention without trial. These laws, which went by different names, were meant to deal with the opponents. It is therefore not surprising that in the OAU, entrenched in its Charter, is a provision on noninterference in internal affairs.[8] This was a warrant to African rulers to deal with their citizens the way they wished without the outside world raising a finger.

The African Charter on Human and Peoples' Rights, 1981

In 1981, the adoption of the African Charter on Human and Peoples' Rights in Nairobi, Kenya, was a reaction to the culture of impunity, which had emerged and was spreading like wildfire around the continent. However, the Charter had its limitations (Yusuf and Fatsah 2012). It only provided for a Commission to address human rights violations on the continent. The Commission, notwithstanding its best intentions and efforts, had its hands tied. Having investigated human rights violations as per its mandate, it was supposed to report to the Summit—the Assembly of Heads of State and Government. That was the end of the road. Therefore, violations of human rights by one of the rulers were being reported to his colleagues. That was the "wisdom" of the originators of the Charter.

A Court was to follow years later, after the realization of the deficiency of the Commission in addressing human rights on the continent.[9] This also came with limitations. It barred individuals and civil society from accessing the Court unless the state concerned has made specific undertakings recognizing and giving individuals and civil society *locus standi* in the Court in cases involving them.[10] With this set-up, human rights victims on the continent remained without any remedy and virtually at the mercy of their tormentors.

The principle of universal jurisdiction

The fact that African rulers were insulating themselves from the reach of the law made it difficult for the victims of human rights violations to access justice. Incidentally, this was not only

in Africa. It has been a global phenomenon whenever dictators are in power. It is this situation that led to an innovative move to reach the dictators in their "hideouts." This was through the principle of universal jurisdiction.[11]

The principle of universal jurisdiction, which gained popularity in 1990s, completely revolutionized international criminal law. This was done by eliminating interest or *locus standi* and the place where the crime took place in all cases involving serious crimes.[12] Therefore, a persons alleged to have committed any of the enumerated serious crimes could be prosecuted in any country irrespective of where the crime was committed and the nationality of the victim or suspect. In practical terms, warrants of arrest could be issued by a *first* state against a citizen of a *second* state, and the suspect could be arrested in a *third* state while the victim(s) could be from the *fourth* state. Such a complex scenario was simplified by this principle. The first high profile case involving the principle was that of the former Chilean strongman Lieutenant General Augusto José Ramón Pinochet Ugarte.[13] On arrival in the United Kingdom for medical treatment, General Pinochet was arrested on the basis of warrants issued in Spain for torture and other serious crimes committed in Chile when he was in power.[14]

British courts assumed jurisdiction and his case.[15] It went to the then highest court, the House of Lords, which refused to recognize the doctrine of sovereign immunity and underlined the importance of the principle of universal jurisdiction.[16]

In Africa, the principle of universal jurisdiction gained prominence following the issue of arrest warrants by courts of law in several European states against some prominent African politicians—some still in office. These included the former President of Gabon, the late Omar Bongo; the President of Congo, Denis Sassou Nguesso; and Rose Kabuye, the former chief of protocol of President Paul Kagame of Rwanda.[17] The AU was upset by these arrest warrants. Therefore, the AU Assembly at the 11th Ordinary Session held between June 30 and July1, 2008, in Sharm El-Sheikh, Egypt, received a study on the use of the Principle of Universal Jurisdiction by Some Non-African States, which had been commissioned the Conference of Ministers of Justice/Attorneys General (AU 2008). The Assembly then recommended to the European Union (EU) that a joint team of independent experts should study the application of this principle in relation to Africa. This team was made of three experts from the AU and three from the EU.[18] This team, whose report was presented to the African Union, made a variety of recommendations on how the principle's application could be improved and balanced in order to avoid possible bias and double standards in its application (AU and EU 2009).

There was no doubt that the continent was shocked by this principle. African rulers were being called upon to address issues they had no control over. Issues taken for granted for years, such as sovereign immunity as a shield for any top politician, were crumbling in relation to serious crimes. Destinations had to be chosen carefully across the globe in order to avoid a potential warrant of arrest. This was uncomfortable and being a ruler was soon becoming a liability. A lesson had been learned, so that it was easier when the international community came up with the Rome Statute in 1998.

The Rome Statute and the International Criminal Court

African states took a very active role in the discussion, negotiations, and eventually, adoption of the Rome Statute (Crawford 2003; Maqungo 2010; Schabas 2010). It was understandable, as it involved the creation of the first permanent international institution to address serious crimes at the global level. This was after decades of addressing serious crimes of concern to the international community on ad hoc bases.

Over the years, these makeshift institutions were addressing very serious matters and then being disbanded. They included the Leipzig War Crimes Trial of 1921 (see Mullins 1921; Yarnall 2011); the International Military Tribunal–Nuremberg Tribunal of 1945–46 (see Woetzel 1962; Ginsburg and Kudriavtsev 1990; Taylor 1993); the International Military Tribunal for the Far East 1946—Tokyo War Crimes Tribunal convened in 1946 (see Minear 1971; Rölling and Cassese 1993); the International Criminal Tribunal for the Former Yugoslavia (ICTY) established in 1993[19]; and the International Criminal Tribunal for Rwanda (ICTR), 1994 (see Peter 1997; van den Herk 2005; Wilson 2011).

Other institutions of lesser prominence were the Special Panels of the Dili District Court (also called the East Timor Tribunal), a hybrid international and East Timorese tribunal created by the United Nations Transitional Administration in East Timor (UNTAET) in 1999 (see, *inter alia*, Beauvais 2001; de Bertodano 2003; Katzenstein 2003); the Extraordinary Chambers in the Courts of Cambodia, also known as the "Khmer Rouge Tribunal," 1979 (see Ea and Sim 2001; Chon and Thet 2010; van Heughten and Verhoeven 2011); and the Special Court for Sierra Leone, 1996 (see Jalloh 2007; Tejan-Cole 2009; Waugh 2011; Wharton 2011).

Such a litany of courts and tribunals was not reflecting well on the international community. This explains the desire to establish a single, serious, and permanent institution to address serious crimes at the global level. The new initiative had overwhelming support from developing countries and Europe. Strangely, but understandably, China, Russia, and the United States did not support the new initiative through the Rome Statute. This was after their attempts to water down some of its provisions, and bids to secure exemptions to the application of some of the provisions, had failed.[20]

The International Criminal Court and concentration on Africa

Initial overwhelming support

Members to the Rome Statute stand at 123 out of the 123 members of the United Nations. Africa, with 34 state members, comprises 28 percent of the total state parties. For the African continent, this large showing meant even more. Sixty-three percent of all 54 African states members of the African Union are signatories of the Rome Statute. Many observers noted that, at last, African was waving goodbye to impunity and violations of human rights.[21] Notwithstanding opposition and negative campaigns by some powerful states, the Rome Statute came into force in July 2002, fairly quickly by United Nations standards.

Apart from the fact that the Rome Statute was not retrospective to cover crimes committed before it came into force, it created a court of a very special nature. The Statute underlined that the primary responsibility of prosecuting serious crimes was in the hands of the national judicial system (Yan 2009; Murunga and Biegon). The ICC was to step in when it was absolutely necessary. In other words, it was not a court of first instance. It was to admit a case only where the state involved was *unwilling* or *unable* to take up prosecution of the case.[22] It is therefore a complimentary mechanism to support the national legal system.[23] The national criminal justice system is given sufficient opportunity to address these serious crimes before the international legal regime enters (Nsereko 2005; Jallow and Bensouda 2008).

No to immunity to state officials

One of the provisions of the Rome Statute that later troubled many states was art. 27. This provision denied immunity to those in power by declaring that the official capacity of the accused

was irrelevant. The Statute was to apply equally to all persons without any distinction based on official capacity (Gaeta 2002; Akande 2004). It went on to underline that being a head of state or government, a member of a government or parliament, an elected representative, or government official shall in no case exempt that person from criminal responsibility. Such status was also not a good ground for the reduction of sentence in case of conviction.[24]

This position taken by the Rome Statute was a major departure from traditional international law that guaranteed political leaders and rulers immunity from both civil and criminal matters as a matter of right (Van Alebeek 2010, 2; Murungu 2011, 33). This was a worrying legal provision to those in power across the continent and was to prove a thorn in the side of the future relationship between the International Criminal Court and African states (see Baker 2004; Peter 2016). It can be said with certainty that it is this provision that triggered the process toward the Malabo Protocol.

Undue focus on Africa

From its inception, the ICC seemed to have a direct focus on the African continent. The continent looked like easy prey as a starting point for the new Court. This seemed to be the focus of the first prosecutor, Mr. Luis Gabriel Moreno Ocampo from Argentina, and the second prosecutor, Ms. Fatou Bom Bensouda from The Gambia in Africa (see Ocampo 2009). The fact that some cases were referred to the Court by African states and others by the United Nations Security Council could not remove this apparent bias against the continent (see Gaja 2008).[25] Other parts of the world seemed to be outside the radar of the ICC.[26]

The same trend is easy to observe in the cases that are at different stages in the Court. All of them are from Africa. The 41 cases, which are at different stages (pretrial, trial, sentencing, appeals, etc.), are from the Democratic Republic of Congo (DRC) – 6; Uganda – 5; Central Africa Republic – 5; Darfur, Sudan – 7; Kenya (including those acquitted) – 9; Libya – 5; Côte d'Ivoire – 3; and Mali – 1.

The data seems to support the allegation that the Court is targeting the continent and ignoring what is happening in other parts of the world.

African rulers on the dock

The straw that broke the camel's back in the relationship between ICC and Africa was the summoning and actual prosecuting of sitting African rulers before the Court (Peter 2015, 271). A warrant of arrest was issued against Omar Hassan Ahmad al-Bashir of the Sudan.[27] The sitting President of Kenya Uhuru Muigai Kenyatta and his Deputy William Samoei Ruto[28] were put on the dock in connection with post-election violence in Kenya in 2007–8 (see Kweka 2015, 84; Materu 2015). These incidents were followed by others that woke the African rulers (see Monageng 2014).

Under the auspices of the African Union, African states and, particularly, those affected by the work of the IC,C began a war of attrition against the Court (see Knottnerus 2016, 152). Ideologically, the Court was depicted as an instrument and a face of the declining imperialism, which was intent on undermining the continent and embarrassing its rulers. Kenya was in the lead, followed by Uganda, which had sought the intervention of the Court in its struggles with guerrilla Joseph Kony. In this group of frontrunners was also Rwanda, which is not even a party to the Rome Statute. African states began by requesting the UN Security Council for deferral of all cases involving rulers in office until such a time as they had finished their tenure of office (Cole 2013; Nichols 2013; Asaala 2017). This request was aimed at getting al-Bashir, Kenyatta,

and Ruto off the hook—temporarily (Oette 2010; Barnes 2011). This request was received with skepticism, as African rulers did not have one political system providing specific tenure of office. The cases of Kenyatta and Ruto could be understood, because the Constitution of Kenya (2010) clearly provided for tenure of office to those in power. However, the situation was not the same with al-Bashir who had no tenure of office. Also, in various jurisdictions, rulers were sponsoring amendments to their constitutions to abolish terms of office. Even when constitutions stipulated age limits to hold offices, there were efforts to change dates of birth required or to scrap the provisions addressing age limits altogether.[29] As a result, this request to the Security Council for the deferral was rejected.

Having failed to convince the UN Security Council to grant deferral of the cases already being held, Plan B was to withdraw from the Rome Statute (see Lubbe 2012). For the latter, it was not easy to obtain a consensus. While a considerable number of African states were unhappy with the performance of the ICC in its targeting of Africa states and ignoring of other geographical areas where there were equal or worse human rights violations, they were hesitant to leave the Rome Statute and the Court (see Cryer 2005; Hoile 2014).[30] Only three states announced that they would be leaving the Rome Statute and the Court. These were The Gambia under former dictator Yahya Abdul-Aziz Jammeh, South Africa under former President Jacob Gedleyihlekisa Zuma, and Burundi under its strongman Pierre Nkurunziza. Of the three, only Burundi seems to be determined to leave.[31] In The Gambia, following the loss by Jammeh at the ballot box and his departure due to pressure from the international community, the new president Adama Barrow halted the process of leaving the Rome Statute and reversed a number of arbitrary decisions made by Jammeh, including returning to the Commonwealth. South Africa was prevented from leaving the Rome Statute by the High Court.[32]

Given the current emphasis on protection of transparency in governance and respect of human rights at the global level, it would have looked awkward for Africa to abandon the ICC and remain silent, without providing an alternative mechanism to address the serious types of crimes being addressed by this Court. That is the genesis of the quick preparation and adoption of the Malabo Protocol, 2014.[33]

The Malabo Protocol, 2014

In 2014, the African Union concluded that Africans should not continue to be prosecuted abroad, using foreign law. Africa should have a mechanism that would provide for Africans who are alleged to have committed serious crimes to be dealt with on the continent. With this thinking in mind, the idea was floated to establish a criminal jurisdiction at the continental level, which would effectively replace and make the International Criminal Court irrelevant to the continent. Actualization of this idea is what brought about a legal document, popularly known as the Malabo Protocol, and which was adopted in Malabo, Equatorial Guinea, in June 2014—hence, the name.[34]

Contents of the Malabo Protocol

The Malabo Protocol, 2014, is comprised of 12 Articles and an Annex, which amends various parts of the Statute of the African Court of Justice and Human and Peoples' Rights. However, there are three points about the Malabo Protocol that actually form the basis of the adoption of the Protocol. These relate to granting of international criminal jurisdiction to the African Court of Justice and Human Rights, providing immunity of rulers in power on the continent,

and increasing the number of the offenses to be handled by the African Court of Justice and Human Rights. These three points deserve elaboration.

International criminal jurisdiction for the African Court of Justice and Human Rights

The African Court of Justice and Human Rights was established through the Protocol on the Statute, adopted in Sham El-Sheikh, Egypt, on July 1, 2008 (Ventura and Bleeker 2016). That Protocol *merged* two courts, that is, the African Court of Justice established under art. 18 of the Constitutive Act of the African Union of 2000, and the African Court on Human and Peoples' Rights, established by a Protocol to the African Charter on Human and Peoples' Rights of 1998.[35]

It is this court, coming out of the two other courts, that is now given criminal international jurisdiction through the Malabo Protocol, 2014. Therefore, strictly speaking, the Malabo Protocol, as its full name indicates, is a Protocol on Amendments to the Protocol on the Statute of the African Court of Justice and Human Rights—a Protocol to amend another Protocol.

The question is what is the legal status of the Protocol that merges the two courts and on which the Malabo Protocol is based? As of November 2018, the Protocol establishing the African Court of Justice and Human Rights, 2008, was signed by 31 out of 55 members of the African Union. At the same time, it has been ratified by six out of the 55 members of the African Union, and a total of 15 ratifications are required to bring it into force. Therefore, it is *not in force* and requires nine more ratifications to bring it into force, and *it is now 10 years after adoption*. This raises a serious legal question. That is, can a Protocol be based on another Protocol, which is not yet in force? In other words, can a Protocol that is not yet in force be acted upon? Whatever the answer, the Malabo Protocol is put on very shaky ground, being built on a "legal document" that is not yet in force and thus of questionable legal value.

Immunity of rulers in power on the continent

Unlike art. 27 of the Rome Statute, 1998, which denies immunities to all irrespective of their positions, the Malabo Protocol, 2014, in art. 46A, provides that: "No charges shall be commenced or continued before the Court against any serving AU [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 the tenure of office."

With this very wide immunity, any state could provide a list of persons who could not be touched by the law, notwithstanding the seriousness of the crimes committed. In practice, given the behavior of African rulers, this provision provides permanent immunity to all African rulers in office. It does not give any of them incentive to leave office, knowing that there was possibility of facing prosecution for what one has done before or during the tenure of office.

Again, experience has indicated that very few African rulers will respect tenure of office—even where their constitutions clearly provide for it. The continent has witnessed rulers manipulating the system to force changes to the constitutions of their countries to remove tenure terms and also to remove age limits where they are stipulated in the constitution.[36] Very few states in the continent have remained faithful to their mother law—their constitutions.[37] Therefore, with this provision, the Malabo Protocol has nowhere to begin, as all potentially accused persons will insulate themselves against prosecution.

Increasing the number of offenses to be handled by the new Court

The Rome Statute, 1998, restricted itself to three serious crimes of concern to the international community as a whole. These were genocide, crimes against humanity, and war crimes. Later on, one extra crime was added—aggression. The Malabo Protocol, 2014, developed a very long catalog of offenses to be dealt with by the African Court of Justice and Human Rights. There are a total of 14 and are listed in art. 28A of the Protocol. These offenses are: genocide; crimes against humanity; war crimes; the crime of unconstitutional change of government; piracy; terrorism; mercenarism; corruption; money laundering; trafficking in persons; trafficking in drugs; trafficking in hazardous wastes; illicit exploitation of natural resources; and the crime of aggression.[38]

This list has two problems. One, it waters down the very seriousness of crimes that are to be handled.[39] Such a long list has not given serious consideration to crimes that can be handled by normal national courts, in contrast to those requiring the attention of a continental institution. Second, some of these offenses already have legal instruments and institutions dealing with them.[40] Therefore, it is a duplication of efforts that does not assist those involved, over and above collision in the process.

The legal status of the Malabo Protocol, 2014

One disturbing fact is the very legal status of the Malabo Protocol, which is intended to replace the Rome Statute and establish a mechanism to address serious crimes, thus removing the ICC from the continent once and for all. As indicated earlier, the Protocol was adopted on June 27, 2014. However, to date, it has been signed by 11 states out of 55 members of the African Union. Forty-four African states have withheld their signatures. As to ratifications, *there are zero ratifications*, with no single state out of the 55 members of the Africa Union depositing instruments of ratification with the Office of the Legal Counsel of the AU in Addis Ababa, Ethiopia. As 15 states are required to bring it into force, there is a long way to go. Thus, Malabo is far from coming into force, and its future is in serious doubt.

That is the legal status of the African legal document, which is intended to replace the Rome Statute, 1998, and its International Criminal Court on the continent.[41]

Conclusion

The question is whether African states are willing to back up their rhetoric with action. Are they serious in addressing and dealing with serious crimes on the continent? Facts on the ground indicate a major difference between the rhetoric and practice. One may ask whether there is genuineness in attacking the International Criminal Court for being biased against the continent but then not seriously addressing the way to deal with such a situation. The Malabo Protocol, 2014, is a non-starter, as it fails from the outset.[42]

That said, this failure does not mean that everything is well with the International Criminal Court. Experience indicates a clear bias against Africa and an overconcentration of cases on the continent. This is happening while crimes of a very serious nature are being committed elsewhere in the world, and the Prosecutor of the International Criminal Court is ignoring them, turning a blind eye.[43] This is neither good nor fair behavior on the part of the Office of the Prosecutor. It paints a very bad and biased picture of the Court and it should change. It does not mean that serious crimes are not being committed in Africa, or those with warrants or facing trial at different stages should be freed. No! They should face the law. However,

others throughout the world who are alleged to have committed similar crimes should be investigated thoroughly, arrested, and brought before justice. That is what fairness demands, and the International Criminal Court should be able to demonstrate that it is an independent, free, unbiased, and fair global institution.

Notes

1 Laws on preventive detention in almost all countries. On various versions of detention without trial, see Frankowski and Shelton (1992); Harding and Hatchard (1993); Greer (1995, 45).
2 For an example of omission, Tanzania, then Tanganyika, refused to include a bill of rights in its independence constitution of 1961. It was seen as a luxury that invites conflicts. See Read (1973, 21); Martin (1974).
3 Notable among them were Idi Amin Dada of Uganda; Emperor Jean Badel Bokassa of the then Central African Empire; and Macias Nguema of Equatorial Guinea. See Orizio (2004); Nwankwo (1998); Peter (1990).
4 On the African Charter on Human and Peoples' Rights, 1981, and its adoption and analysis, see OAU (1982); Umozurike (1983).
5 The Protocol on the Court was adopted by the OAU in 1998, and it came into force in 2004, thus clearing the way for the establishment of the Court, 23 years after the adoption of the African Charter on Human and Peoples' Rights, 1981.
6 The principle of universal jurisdiction will be discussed at length later in the chapter. See Abbi-Saab (2003, 596); Macedo (2004).
7 On the International Criminal Court see, *inter alia*, Schabas (2011).
8 See Chapter III of the Charter of the Organisation of African Unity. This Charter is reproduced in Toure (1963, 413). Generally, on the OAU, see Woronoff (1970); Naldi (1999); Yusuf and Ouguergouz (2012).
9 See Protocol to the African Charter on Human and Peoples' Rights on the Establishment of an African Court on Human and Peoples' Rights, 1998, which came into force in 2004. On this Court, see Mohammed (2010); Muigai (2011, 265); Fennell and Andoni (2014).
10 Article 5(3) of the Protocol on access to the Court provides that the Court may entitle relevant non-governmental organizations (NGOs) with observer status before the Commission, and individuals to institute cases directly before it, in accordance with art. 34(6) of the Protocol. Article 34(6) provides that at the time of the ratification of the Protocol, or any time thereafter, the State shall make a declaration accepting the competence of the Court to receive cases under art. 5(3) of this Protocol. The Court shall not receive any petition under art. 5(3) involving a state party that has not made such a declaration.
11 On how the principle works in practice, see *The Princeton Principles on Universal Jurisdiction* (Macedo 2001); "Universal Jurisdiction for International Crimes" (Chatham House 2008); *African Perspectives on Universal Jurisdiction for International Crimes* (Africa Legal Aid 2001); and the "Technical Ad hoc Expert Group on the Principle of Universal Jurisdiction Report" (AU and EU 2009).
12 Serious crimes under the principle of universal jurisdiction were listed as genocide, torture, war crimes, and crimes against humanity. See Summers (2003, 63).
13 General Pinochet and his case have been extensively analyzed. As a sample, see Wilson (1999, 930); Roht-Arriaza (2005); Kaleck (2009, 927); Perez (2000, 175).
14 See *Regina v. Bow Street Magistrate, Ex parte Pinochet Ugarte* [1999] 2 All E.R. 97. See, also, Hawthorn (1999); Muñoz (2008).
15 See, *inter alia*, *Regina v. Bow Street Metropolitan Stipendiary Magistrate & Others, Ex parte Pinochet Ugarte* (1) [1998] 4 All E.R. 897; and *Regina v. Bow Street Metropolitan Stipendiary Magistrate & Others, Ex parte Pinochet Ugarte* (3) [1999] 2 W.L.R. 827. See, also, Roht-Arrianza (2009, 77).
16 On sovereign immunity and how it functions, see, *inter alia*, Fox (2008); Fox (2003, 297).
17 Kabuye was arrested on arrival at the airport in Frankfurt, Germany, on the basis of a warrant issued in France under the principle of universal jurisdiction. See McGreal (2008); *Sunday Times* (2009); Y'Gihanga (2009).
18 The team of independent experts included: from the EU were Professor Antonio Cassese (Italy); Professor Pierre Klein (Belgium); and Dr. Roger O'Keefe (Australia). From the African Union were Dr. Mohammed Bedjaoui (Algeria); Dr. Chaloka Beyani (Zambia); and Professor Chris Maina Peter

(Tanzania). The Secretariat was composed of Mr. Ben Kioko, Legal Counsel, AU Commission; Mr. Fafré Camara, Legal Officer, AU Commission; Dr. Sonja Boelaert, Legal Adviser, European Commission; and Mr. Rafael de Bustamante Tello, UN and ICC Desk, General Secretariat of the Council of the EU.

19 This Tribunal was established by United Nations Security Council Resolution 827 of May 25, 1993. On this Tribunal, see, *inter alia*, Morris and Scharf (1995); Cassese (1996); Lescure and Trintignac (1996); Kerr (2004). For one of its well-known detainees, see Dawson (2010).

20 The United States has had a highly vacillating relationship with the ICC, depending on who occupies the White House. The Clinton Administration (1993–2001) signed the Rome Statute in 2000, but did not submit it for Senate ratification. The George W. Bush Administration (2001–2009), the US administration at the time of the ICC's founding, stated that it would not join the ICC and actually withdrew the US signature from the Rome Statute. The Obama Administration (2009–2017) subsequently reestablished a working relationship with the Court as an observer.

21 This was due to the gravity of the offenses that the International Criminal Court was set up to address, namely, genocide, crimes against humanity, and war crimes. The crime of aggression was added later during the meeting of the State Parties held in Kampala, Uganda, in 2010. See Reale (2011); Kreß (2018).

22 See the Preamble to the Rome Statute and arts. 1 and 17 of the Rome Statute (ICC 2011). The two terms (unwilling or unable) are elaborated on in art. 17(2): unwillingness is indicated by factors such as the prosecution taking a direction aimed at shielding a person from criminal responsibility; an unjustified delay in the proceedings; and proceedings not being conducted independently or impartially and in a manner consistent with intent to bring the person concerned to justice. Inability on the other hand, as described in art. 17(3), takes into account factors such as a total or substantial collapse or unavailability of a national judicial system, or the failure to obtain the accessed or necessary evidence and testimony.

23 On the nature of the jurisdiction of the International Criminal Court, see du Plessis (2000); Kleffner (2003); Yang (2005); Kleffner (2008); Stigen (2008); Greenawalt (2009); Jurdi (2009); Olugbuo (2011).

24 Generally, on prosecution of political leaders, see Lutz (2009).

25 The data available confirm this picture of bias against Africa. Situations under investigation were from Uganda, the Democratic Republic of the Congo (DRC), Darfur, Sudan, Central African Republic, Kenya, Libya, Côte d'Ivoire, Mali, Central African Republic (II), and Burundi. Only one state was from outside Africa—Georgia. There are also cases under preliminary examination from the continent, including Gabon, Guinea, and Nigeria.

26 Following a heavy criticism from Africa, the ICC has begun some preliminary examinations in other countries, including Afghanistan, Colombia, Iraq/United Kingdom, Palestine, the Philippines, Ukraine, and Venezuela. However, even in these new cases, keen observers of the Court have noted that not much energy is being expended in these new areas.

27 In the warrant, the Court listed five counts of crimes against humanity (murder, extermination, forcible transfer, torture, and rape) and two counts of war crimes (intentionally directing attacks against a civilian population as such or against individual civilians not taking part in hostilities, and pillaging). See *The Prosecutor v. Omar Hassan Ahmad Al Bashir*, Decision on the Prosecution's Application for a Warrant of Arrest against Omar Hassan Ahmad Al Bashir, Public Redacted Version, No. ICC-02/05-01/09 (March 4, 2009). Also relevant is McCausland and Rojo (2010).

28 See the cases of *The Prosecutor v. Francis Kirimi Muthaura and Uhuru Muigai Kenyatta*, ICC-01/09-02/11 and *The Prosecutor v. William Samoei Ruto and Joshua Arap Sang*, ICC-01/09-01/11.

29 Kweka (2017) captures it graphically: this clinging to power is a common problem of most African leaders. In the past, it was worse because of lack of limited presidential terms under the constitutions. Now it is even worse because leaders are willing to change constitutions to be eligible for reelection no matter what the repercussion. What is even more striking is the scenario in Burundi where President Nkuruzinza spiked violence as he desired to serve for a third term. See Kweka (2017, 312).

30 Generally, on the relationship between the continent and the ICC, see Kemp (2014).

31 On the relationship between South Africa and the ICC before the al-Bashir fracas see Stone (2011).

32 *Democratic Alliance v. Minister of International Relations and Cooperation and Others* (*Council for the Advancement of the South African Constitution Intervening)* (83145/2016) [2017] ZAGPPHC 53; 2017 (3) SA 212 (GP); [2017] 2 All SA 123 (GP); 2017 (1) SACR 623 (GP) (22 February 2017). For analysis of the case, see Fowkes (2017).

33 See "Protocol on Amendments to the Protocol on the Statute of the African Court of Justice and Human Rights 2014," adopted by the Twenty-Third Ordinary Session of the Assembly, held in Malabo, Equatorial Guinea, on June 27, 2014. https://au.int/sites/default/files/treaties/36398-treaty-0045_-_protocol_on_amendments_to_the_protocol_on_the_statute_of_the_african_court_of_justice_and_human_rights_e.pdf.

34 For the first comprehensive and in-depth analysis of the provisions of the "Malabo Protocol," which amends the Protocol to the Statute of the African Court of Justice and Human and Peoples' Rights. See Werle and Vormbaum (2017).

35 While the African Court of Justice was formally declared in the Constitutive Act of the African Union, 2000, it was never established. The African Court on Human and Peoples' Rights is operational and is based in Arusha, Tanzania. See Juma (2007); Viljoen (2018).

36 East Africa is leading in this tendency with rulers in Uganda, Rwanda, and Burundi manipulating their constitutions in order to prolong their stays in power. See *inter alia*, *Economist* 2017; Ingelaere 2017; Moore 2017; BBC News 2018.

37 Botswana, Zambia, Tanzania, and Kenya have remained faithful to their constitutional mandates.

38 It has been noted that creating the crime of unconstitutional change of government is part of self-preservation on part of African rulers, who themselves do not respect the constitutions through which some of them come into power. See Omorogbe (2011).

39 The African Union did not bother to analyze what international crimes are. For analysis, see Abi-Saab (1988).

40 Thus, it would seem that the African Union was compiling potential offenses to be handled by the new court, without much thought on what the Organisation of African Unity has already done. For instance, the Organisation had already adopted legal instruments on half of those 14 crimes listed. These include: *terrorism*—OAU Convention on the Prevention and Combating of Terrorism, 1999, and Protocol to the OAU Convention on the Prevention and Combating of Terrorism, 2004; *mercenarism*—Convention for the Elimination of Mercenarism in Africa, 1977; *corruption*—African Union Convention on Preventing and Combating Corruption, 2003; *trafficking in hazardous wastes*—Bamako Convention on the Ban of the Import into Africa and the Control of Transboundary Movement and Management of Hazardous Wastes within Africa, 1991; *illicit exploitation of natural resources*—African Convention on the Conservation of Nature and Natural Resources, 1968; Revised African Convention on the Conservation of Nature and Natural Resources, 2017; and *the crime of aggression*—The African Union Non-Aggression and Common Defence Pact, 2005.

41 Notwithstanding this very dubious situation, Kweka still thinks that Malabo may be the only way out for the African continent. In her opinion, it addresses offenses that are relevant to the continent and also answers some of the issues against ICC being European in nature, as well as the targeting of the continent under the principle of universal jurisdiction. She thus drums for support of the Protocol and a show of good will on the part of the African states. See Kweka (2017, 366).

42 Interestingly, this lax attitude of the African States is taking place while state parties to the Rome Statute are expanding the reach of the ICC by elaborating the statute on the crime of aggression, which has been pending since 1998. See Bertram-Northnagel (2016, 347).

43 Yet, this office has a lot of discretion in deciding which situations to investigate or which cases to prosecute. See Brubacher (2004).

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