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The AU's journey to an African Criminal Court: a regional perspective

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ABSTRACT

The discourse on international criminal law enforcement took an interesting turn when, in 2016, three African states announced their withdrawal from the ICC, punctuated by rhetoric, both from within the AU and a selection of African Heads of States, on the need for an alternative African-wide criminal court. Researchers, over the years, have examined the strained relationship between the ICC and AU. However, very little, if any, research has examined the discourse from the perspective of regionalism, and whether a regional criminal court, which would be the first of its kind, is in line with recent regional strides within Africa. This article seeks to make an important contribution to the literature by examining past developments between the AU and ICC. It argues that, its feasibility notwithstanding, there is a strong case for viewing Africa's move for a regional court from an alternative lens of regional governance and control.

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1. Introduction

In 2016, three African states, Burundi, the Gambia, and South Africa announced their intentions to withdraw from the International Criminal Court (ICC) in what was described as a "continental domino effect" (Miyandazi, 2016). This was followed, in 2017, by an AU resolution and "withdrawal strategy document" encouraging member states to withdraw from the court. In its 2017 strategy document, the AU advocated the creation of a regional criminal justice system and urged member states to ratify the Protocol on Amendments to the Protocol on the Statute of the African Court of Justice and Human Rights ("the Malabo Protocol") which was aimed at expanding the jurisdiction of the African Court of Justice and Human and Peoples' Rights to include international criminal law.

As was to be expected, the AU's directive drew reactions from academic and political commentators (see Chadwick & Thieme, 2016; Diaz, 2017; Helfer & Showalter, 2017; Kerr, 2020; Magliveras, 2019; Miyandazi, 2016; Mutua, 2016). One view was that African Heads of States were seeking to withdraw from the ICC in order to evade trial and accountability (Mutua, 2016). Critics further pointed out that a mass

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or even partial withdrawal of African states from the ICC would reverse already achieved progress and constitute a retrogressive step towards authoritarianism and non-accountability. Granted that there may be some merit in these criticisms, such works appear to ignore the rapid growth of regional economic and justice institutions within Africa in the past couple of decades. This article seeks to fill this gap by examining the push for a regional criminal court (RCC) in the context of the AU's drive towards regional sovereignty – a regional political system that leaves no room for external influence, intervention, or hegemony. It begins by introducing the continent's sustained regional drive in the past decades, and then examines the AU's recent grouse with the ICC. Thereafter, it explores and critiques the arguments of bias and political convenience that have been put forward by advocates of both sides. It argues that, notwithstanding alternative alleged motives for the creation an RCC, such a court very much be within the purviews of regionalism and the "African solution for African problems" strategy that have characterized regional discussions in recent decades (see Møller, 2009).

2. Meaning and justification of the regionalism perspective

Like many similar concepts, the meaning of regionalism is not always clear-cut. One approach has been to study regionalism from a statist perspective – in this sense regions are subsets of nation states (Uwazuruike & Salter, 2017). Another view of regionalism or regional studies is of supranational institutions exercising sovereign power across national borders (Uwazuruike & Salter, 2017; Agnew 2013). In this latter sense, regionalism transcends the traditional state-centric model and entails a pooling of sovereignty by nation states for economic, political, and security objectives. Accordingly, one study (Uwazuruike & Salter, 2017) has argued that developments within the AU fit within the Schmittian regional model of Großraum which literally translates into "large spaces". Under this model, member states within a political space, and motivated by a core "political idea" or identity, develop a system of regional cooperation that generally seeks to jettison external influence from states outside of that spatial region (Salter & Yin, 2014; Schmitt, 2011). In the African "political space", the concept of Pan-Africanism, hinged on a shared history of colonialism and independence movements, would form the fulcrum of a shared "political idea", resulting in a "regional cooperation", such as the AU, that seeks to exclude "external influence" or perceived neo-colonialism from states outside of that region. This model of regionalism necessarily entails a degree of "regional sovereignty" which envisages regional political autonomy and an exclusion of foreign interference in the affairs of the region.

Indeed, the concept of regionalism has been applied, in varying degrees, to areas of international law and relations. One example is the area of human rights where the case has long been made for protective mechanisms functioning at the intermediate (or regional) level, exercising authority which is broader than the sovereign state, yet closer to the affected communities than a global supranational organization (Uwazuruike, 2020). Accordingly, despite the existence of a widely analysed and accepted concept of "universal" human rights, there is no global "human rights court" or tribunal. The most effective non-state institutions – at least in the context of an

adversarial system of adjudication and enforcement – are seen at the regional levels in the form of bodies like the European Court of Human Rights, the InterAmerican Court of Human Rights, the ECOWAS Community Court of Justice, and the African Commission on Human and Peoples' Rights (see Shelton & Carozza, 2013; Mugwanya, 1999)

As will be demonstrated in more detail in later sections, the concept of regional autonomy, fuelled in parts by Pan-African sentiments, has deep roots in African geopolitics and international relations from the period of independence. To this end, the OAU Charter of 1963, in its preamble, emphasized the "brotherhood and solidarity" of member states, the need to safeguard states' "hard-fought independence", and "fight against neo-colonialism in all its forms". It, therefore, follows that, for a more nuanced understanding of the motives of the AU in its interaction with the ICC, its actions and decisions should not be viewed in isolation, but within this context of regionalism. Interestingly, several of the works that have analysed the AU's call for withdrawal from the ICC do not appear to have paid due attention to this element, leading to an arguably incomplete analysis and understanding of the AU response. The aim, therefore, is to show that the AU response to the ICC is not solely attributable, if at all, to vindictive and protectionist motives, but also to regional Pan-African developments and sentiments spanning several decades. This will be done by tracing Africa's steps towards regional sovereignty, a history of antipathy against perceived posturings of Western superiority, and clamours for "sovereign equality" within the international community.

Scholars have examined and analysed the grouse between the AU and the ICC over the indictment of sitting Heads of State including the AU's allegations of bias and witch hunting (Bosco, 2014; Chadwick & Thieme, 2016; Diaz, 2017; Helfer & Showalter, 2017; Miyandazi, 2016; Murungu, 2011; Mutua, 2016; Peskin & Boduszynksi, 2016; Vinjamuri, 2016). As is to be expected of such a politically tense topic, opinions have been divergent. While some argue that there may be justifiable grounds for alleging bias against the ICC, others argue that such claims are unfounded. However, on the whole, it would appear that there are only a few commentators that either support the withdrawal of African states from the ICC or believe that such withdrawal is motivated solely by the perceived bias of the ICC. Rather, there is the belief, or at least concern, that such withdrawal could be fuelled by protectionist motives (see Mark, 2016; Mutua, 2016). This alleged motive becomes hard to refute when one considers the provision of Article 46A of the Malabo Protocol, discussed below, which grants sitting Heads of States and other government officials immunity from prosecution in the proposed RCC. Viewed from this perspective, the creation of an RCC is an entirely unwelcome one that can only have negative implications for justice and human rights on the continent. In this sense, it must necessarily be vehemently resisted.

As stated above, the regionalism perspective is important in not only offering a more balanced explanation for these developments, but also demonstrating how, ulterior intentions notwithstanding, an RCC could fit into a wider goal of regional integration and sovereignty within the African continent. The next section examines this regional trend within the context of international criminal law as well as related areas of regional security and human rights.

3. Africa's consistent journey towards regional sovereignty

Africa's postcolonial history has been characterized by efforts to create a united region of states sharing identical colonial histories. This Pan-African idea was based on the belief that Africans, having "suffered together" in the colonial years, must march in unison towards a new and brighter future (Emerson, 1962). Among the early champions of this Pan-African dream were Ghana's Kwame Nkrumah and Tanzania's Julius Nyerere. Nkrumah proposed the creation of an African High command through which a continental army would be established to prevent external intervention and undertake wars of liberation (Vine, 2013). Even though this view was spurred by the strong anti-colonialist feelings at the time, it goes to show very early sentiments of Pan-Africanism and, even more crucially, antipathy towards perceived foreign interventions.

On his part, Nyerere pushed for closer political unification arguing that the boundaries dividing African states were "nonsensical" as they had been arbitrarily drawn by Europeans in the 1885 "scramble for Africa" (Murithi, 2008, p. 73). However, these sentiments failed to generate the necessary consensus amongst other African Heads-of-State who preferred to hold on to national sovereignty in the immediate aftermath of decolonization and independence. Even though African leaders still maintained a stance against foreign domination, the Pan-African dream failed to disrupt the formation of a pluralist society of sovereign African states (Williams, 2007). The resultant effect was the establishment, in 1963, of the Organisation of African Unity (OAU), whose core principles were centred on a strict adherence to state-centric principles of territorial sovereignty and non-intervention in domestic affairs of member states. Such was the sanctity of this non-interventionist principle that several conflicts and government-orchestrated atrocities against citizens were largely ignored by the OAU.

Pressed by local and international condemnations, African leaders opted for a regional approach by adopting an African Charter on Human and Peoples' Rights ("the African Charter"). This Charter created a regional body – the African Commission on Human and Peoples' Rights ("the African Commission") to oversee the Charter's implementation. However, the overarching OAU principles of non-interference meant that the African Commission had little powers of enforcement and could do little to deter or sanction erring states. The flaw in the OAU's setup was demonstrated by the constant interstate and humanitarian crises that enveloped the continent in the late twentieth century. After the Rwandan genocide of 1994, which resulted in the death of half a million Rwandans (Lemarchand, 2004), it became apparent to African leaders that the continent's approach to regional integration needed to be revisited. Its strict principles of state sovereignty and non-interference meant that the OAU, at the time, found it difficult to initiate any meaningful steps to either prevent or manage the ensuing carnage. There was therefore the need to create a stronger and more unified regional front equipped to address such situations and negate the need for Western intervention. Thus, towards the late 90s, African states started reacting to the need to modify the existing principles of domestic non-interference by ceding more control to the regional body. This culminated in the creation and launching, in 2002, of the African Union (AU) which, unlike its predecessor, created an African Peace and Security Architecture

(APSA) that not only challenged the non-interference principle but aimed to forge a stronger regional authority – one that could address the region's affairs and challenges.

Chief among the component units of APSA were the Peace and Security Council (PSC) and African Standby Force. While the PSC was the standing decision-making organ for the prevention, management and resolution of conflicts, the African Standby Force was to be a multidisciplinary contingent "ready for rapid deployment at appropriate notice". The 2003AU Mission in Burundi (AMIB), a peace-building initiative, was the first operation wholly initiated, planned, and executed by AU members. The AU deployed over 3000 troops to monitor the peace process and provide security in Burundi. By the end of its mission, AMIB had succeeded in establishing relative peace to most provinces in Burundi (Murithi, 2008). While the AU has struggled to attain similar levels of success in its subsequent missions, it has nevertheless taken active steps in stemming conflicts in Sudan, Somalia, and the Central African Republic (Carayannis & Fowlis, 2017; Williams, 2018).

3.1. Regional sovereignty: Justice and human rights

Africa's quest for regional integration is further demonstrated in the creation and further reforms of its nascent human rights system. One of the first significant steps in the area of human rights was the adoption, in 1981, of the African Charter and the creation of a regional Commission to oversee its implementation. However, as previously highlighted, the African Commission, much in the spirit of the pervading OAU mantra of non-interference, was a weak body with little binding powers. After years of relative inactivity, it became clear that the system had to be reformed for any meaningful protection of human rights at the regional level. The reaction of African states here is instructive and lends credence to the continent's growing commitment towards regional solutions. In 2006, member states adopted a Protocol providing for an African Court on Human and Peoples' Rights. According to Article 2 of the Protocol, the court was to "complement" the work of the African Commission in the field of human rights. Prior to this, the AU had, in its Constitutive Act of 2001, created the African Court of Justice for the adjudication of intra-African disputes. Few years later, and even before the two courts had started full operations, it was decided to merge the Court of Justice and human rights court into an African Court of Justice and Human Rights (ACJHR). The ACJHR was to have two independent sections: the Human Rights Section and the General Affairs Sections. It was whilst awaiting the necessary ratifications for the ACJHR to come into force that the AU formed a committee to look into the possibility of creating a criminal chamber in the proposed ACJHR.

It is important to note that, prior to the AU, African leaders had generally shunned the idea of courts with adjudicatory powers over member states. The view was that the African concept of dispute resolution was based on negotiations and conciliations rather than adversarial or court systems (Naldi, 2002). The subsequent creation of courts, therefore, signals a shift from this perception in favour of a more important goal of regional integration and sovereignty.

The AU's commitment to regional solutions also extended to the realm of international criminal law as was evidenced in the case of the former President of Chad, Hissène Habré. Belgium had indicted Hissène Habré for international crimes and the

European Parliament had called for his extradition to Belgium for trial. However, in a thinly-veiled bid to avoid Habré's trial in Belgium, the AU mandated Senegal to try him before its own domestic courts "on behalf of Africa" (Williams, 2007, p. 269). The AU went to great lengths to not only ascertain the legality of trying Habré within the African continent but also to ensure that necessary measures were put in place to make such trial possible. Accordingly, the AU set up a Committee of Eminent African Jurists to study the case and give necessary feedback and recommendations. The Committee held that the regional courts in Africa did not have jurisdiction to try crimes of genocide, crimes against humanity and war crimes. It, however, maintained that an "African solution" be opted for, and that Habré be tried by an African state, preferably Senegal or Chad (Murungu, 2011). It is important to note here, that the Committee's emphasis was not necessarily on the particular country that would try Habré but on the need for the trial to be held within Africa and under the authority of an AU member state. As a matter of fact, the Committee went on to recommend, for the future, that the African Court of Justice be conferred with criminal jurisdiction to try international crimes in Africa (Murungu, 2011).

The AU's adoption of the Committee's recommendations, and Senegal's willingness to conduct the trial, did not come without challenges. In order to comply with its new mandate, Senegal had to go through the onerous process of amending its constitution to allow retrospective prosecution of crimes against humanity committed outside its territory – a lengthier process compared to the alternative of having Habré tried in Belgium. It was not until some five years later, in July 2013, that Habré was charged in an International Tribunal in Senegal.

From the Habré case, one cannot fail but notice a firm resolve by the AU to avoid a foreign trial. The motivation was not so much to have Habré tried as it was to prevent the trial of an African leader by a Western court. Interestingly, available literature on the subject do not appear to give due consideration to the Habré case before reaching the conclusion that the AU's grouse with the ICC is mainly motivated by the need to protect longstanding dictatorial regimes in Africa. This is not surprising given that the Habré example would not fit into the necessary indices for reaching such a conclusion, such as the requirement for the concerned state to have a longstanding leader who has had runs-in with the ICC. Quite to the contrary, Senegal was a democratic state which did not have any direct conflict with the ICC and has even been critical of a mass withdrawal from the court (Mahdi, 2018). Even more importantly, the aim of the AU, in that case, was to bring Habré to justice, albeit through an African regional process, and not to shield him.

3.2. Regional sovereignty: concluding remarks

The above sections have detailed decades of regional initiatives by the AU in the areas of international criminal law, human rights, and economic integration. Granted that some of these initiatives may very well be in their infancy, they go to show some commitment towards regional integration and sovereignty – one within which an RCC may not be far-fetched.

It is indeed very easy, as has been the case with some previous studies, to view arguments for the creation of an RCC as arising solely out of the AU's confrontations with the

ICC. Granted that those confrontations may have hastened the calls for the creation of an RCC, the latter is consistent with the AU's philosophy of regional governance or African solutions for African problems.

The issue, however, cannot end here. The evidence of a consistent regional trend notwithstanding, it is clear that proposals for the creation of an RCC, even though fitting within this narrative, were rather hasty. This is seen in the far from cohesive withdrawal – and, even later, membership renewals – of only a handful of states, an AU call for withdrawal which lacked the support of a significant number of African states, and the rather slow pace of the Malabo Protocol in attracting the required number of signatures to come into the force. The aim here is to demonstrate, through contextual analysis, the processes and operation of the ICC and UNSC which may have had the impact of stirring "regional-centric" sentiments within Africa prompting the creation of a court. This is more so the case given the continent's colonial history, a general aversion towards perceived neo-colonialism, and the dynamics of international powerplay. The following sections will therefore identify and discuss some of the key themes in the AU grouse with the ICC, such as sovereign equality and immunity. Such discussion will highlight actions or inactions that appear to fuel regional and neo-colonial sentiments, and pave way for conclusions on the justification for an RCC.

4. The ICC and Africa – the early beginnings and perceptions of neo-colonialism

The ICC example demonstrates that, the early Pan-African rhetoric notwithstanding, African states are generally not averse to ceding sovereign rights to international bodies. Pan-African regional drives will only be triggered, not necessarily when disagreements arise, but when practices of inequality and neo-colonialism are alleged.

The AU's relationship with the ICC did not start on a sore note. In fact, the majority of African countries celebrated the ICC's emergence as a positive development in global governance (Schneider,, 2020; Murithi 2017). Of the 60 initial signatures required for the commencement of operations by the ICC, 34 were from African states. Thus, unlike the vast majority of other "international treaties", the African continent was a central player in the birth of the ICC (Mutua, 2016). However, events took a different turn in 2008 when the ICC prosecutor applied for an arrest warrant for Sudanese President, Omar Al-Bashir, following a referral by the UN Security Council (UNSC). Shortly after, the AU PSC issued a communique requesting the Security Council to defer the case under Article 16 of the Rome Statute. The PSC's request was based on the belief that Al-Bashir's indictment and arrest would hamper the then-ongoing peace process in Sudan. Following the Security Council's silence on the PSC's application, the ICC went on to issue an arrest warrant for al-Bashir for war crimes and crimes against humanity prompting the PSC to issue another communique requesting deferral. Interestingly, the UNSC failed to respond to either of the two requests, an inaction that "aroused a feeling of disrespect" among African leaders (Helfer & Showalter, 2017). Following the UNSC's disregard of both requests, the AU, at the 13th Annual Summit of its Heads of State, decided not to comply with the arrest warrant and directed member states, under the threat of sanctions, not to cooperate with the ICC (Sadat, 2020; Murithi, 2017; Thieme 2016).

4.1. Imperialism and the drive for regionalism

As has been demonstrated above, the drive for regionalism within Africa – at least from the perspective of rhetoric – has in parts been driven by the continent's colonial history and quest against Western domination. Indeed, the OAU Charter pointed out the need for newly independent African states to "fight neo-colonialism in all its forms". In the context of the ICC, the perception of imperialism may have been unwittingly compounded by the failure of the ICC and UNSC to respond, one way or the other, to deferral notices from the AU. Consequently, the AU in 2013, adopted a decision which framed ICC prosecutions as an insult to African sovereignty (Helfer & Showalter, 2017; Schneider,, 2020). This position was no doubt influenced by the ICC's indictment of African Heads-of-States which, were it to become commonplace, the AU feared would greatly undermine the sovereignty of African nations particularly given that such indictments were almost exclusively against African leaders.

Brett and Gissel (2020) explain this backlash against the ICC by pointing out inconsistencies with the principle of sovereign equality which invariably legitimated hostilities against the court. According to this view, African states are less concerned about sovereignty per se as with issues of "global separation of powers" (Reinold 2012) and the question of "who makes the rules" (Mills 2012). In other words, there is an "unequal distribution of privileges" which means that only weak, mostly African leaders, can be prosecuted by the court, often following referrals of the UNSC whose permanent members and allies are practically out of the court's reach. It is this seeming singling out of Africans that has been one of the major bones of contention in the fall out with the ICC. Former Ethiopian Prime Minister, Hailemariam Desalegn, describing it as "race hunting" (BBC News, 2013) while his counterpart South African president, Thabo Mbeki, described it as "a global system of apartheid" (Brett & Gissel, 2020). It is not the aim of this article to examine the substance of these allegations. Rather, it is to show how this perception of inequality has further fast-tracked the continent's quest for regional sovereignty – one in which member states will be equal.

It is important to point out that any allegation of "witch hunting" or inequality is, in substance, not necessarily against the ICC per se but against the "world order" most especially the organization of the UNSC. By virtue of Article 13 of the Rome Statute, the UNSC may refer a matter to the ICC where it believes that crime has been committed contrary to Article 5. The UNSC has exercised this power against both Sudan and Libya. Ironically, some permanent members of the UNSC, aside being practically out of the court's reach, have also gone ahead to disparage the court's existence. For instance, the United States of America refused to ratify the Rome Treaty and even went as far as signing bilateral treaties with other states to avoid the trial of US citizens at The Hague (Vinjamuri, 2016). In September 2020, the US government imposed sanctions on officials of the ICC including its chief prosecutor, Fatou Bensouda, for "targeting Americans" (Guardian, 2020). Russia "withdrew" from the ICC in 2016 (despite never ratifying the Treaty) and, together with China, has consistently questioned the Court's operations (Vinjamuri, 2016).

It is indeed curious that countries that openly disavow the ICC have a guaranteed say on who the court prosecutes. It is also worth noting that the country which is the subject of such referral by the UNSC, for example Sudan, need not have ratified the Rome

Statute. This invariably means that countries which, given their permanent status within the UNSC, cannot be referred to the ICC, and some of whom have even disparaged the ICC's existence, are in a position to refer third-party states that have not accepted the ICC's jurisdiction. It is this sense of inequality that sits at the heart of the AU's recent regional drive. Indeed the AU (2017) has expressed its reservations on this "systemic imbalance", pointing out that it questions the fairness of the international justice system. For instance, Paragraph 4 of the AU's Withdrawal Declaration states: "the effect of being legally bound by a decision of the UNSC to a statute that a country has not even ratified is not acceptable".

Still on the point of the UNSC, it must further be noted that, by virtue of their permanent membership of the UNSC, some states could perpetually veto resolutions and referrals against them or their allies. It has therefore been interestingly noted that the Security Council is most likely to refer a case to the ICC "when the state in question does not have a clear patron among the P-5" (Bosco, 2014 cited Hillebrecht & Straus 2017). For instance, it has been pointed out that the UNSC's inaction in Syria owed largely to political interests of both Russia and China who would veto any resolution referring the situation in that country to the ICC (Schneider,, 2020; Murithi 2017). Accordingly, it has been argued that "the politicization of the ICC by the world's most powerful nations in the UNSC poses a continuous threat to the legitimacy of the court" (Schneider,, 2020).

Aside the influence of the UNSC, it has been further argued that the ICC may, itself, be reluctant and unwilling to prosecute high-level government officials from these powerful states owing to the political inexpedience of such a move. In the words of Slye (2016, p. 9), "the political cost of such a prosecution … would likely be high, and thus perhaps not worth risking". Slye goes on to state:

> African states, however, do not have the power to distort the international justice system in such a way. The political risk to the ICC of indicting a sitting African government official is much less than the risk of indicting officials from more powerful states, making it more likely that such indictments will be focused on African officials, and thus giving rise to credible accusations of hypocrisy and double standards. (p. 10)

Africa's renewed regional quest for an RCC must necessarily be seen in the context of this power imbalance, as a continuation of the quest for "equality" within the international legal order. It is this perceived inequality that is the basis and justification for the AU's institutionalization of regional sovereignty. Being unable, as it were, to wield equal influence on the international justice system, the AU seeks to create a regional court free of the current unequal powerplay.

5. How the proposed African Court fits within the regional narrative

Thus far, the aim of this article has been to demonstrate how the creation of an RCC for Africa is in keeping with decades of Pan-African developments that has only been quickened by perceived bias and imbalanced power dynamics within the realm of international politics and relations. Regardless of possible protectionist motives from some quarters, the RCC is not inconceivable, within this narrative, after such regional developments as an African human rights court and regional Peace and Security Council. It is therefore interesting that this development – which would, if successful, be the first RCC in the world – has not been greeted with a corresponding degree of interest. Part of the

reason for this is the presence of an immunity clause in the Malabo Protocol. The following sections briefly outline the essential characteristics of the proposed RCC and how the immunity clause, controversial as it may be, arguably fits within the AU's system of political resolution.

5.1. The proposed Criminal Chamber

By Article 3 of the Malabo Protocol, the proposed African Court of Justice and Human Rights is to be vested with "international criminal jurisdiction". Such jurisdiction is to be exercised by the International Criminal Law Section of the Court which shall have three chambers namely a pre-trial chamber, a trial chamber, and an appellate chamber. Article 28A provides for the court's competence to try persons for the international crimes of genocide, crimes against humanity, war crimes and the crime of aggression. Interestingly, the Article goes further to grant the court the competence to try crimes of unconstitutional change of government, piracy, terrorism, mercenarism, corruption, trafficking, and money laundering amongst others. It is worth noting the inclusion of crimes not contained in the Rome Statute or ordinarily seen as falling under International Criminal Law. Upon closer examination, it may be noticed that the added offences are some that have particularly plagued the African continent in the past decades. This appears, therefore, to be one of many cases of the AU adopting region-specific solutions to the challenges facing the continent. The inclusion of financial crimes of corruption and money laundering further highlight the unique placement of regional machineries in identifying and addressing region-specific challenges.

Another interesting observation is the AU's clear political resolve against unconstitutional changes of government, an area in which the Peace and Security Council has been active in recent years (Uwazuruike, 2020). It has already been highlighted above how, with the creation of the AU, African states moved from an ideology of non-intervention to the creation of a regional framework to respond to conflicts and unconstitutional changes of government within member states. Several instances of the implementation of this "new" regional ideology have been observed over the years (See Nte, Eke, & Mac-Ogonor, 2009; Oguonu & Ezeibe, 2014; Wilén & Williams, 2018). For instance, in 2005, the PSC suspended Togo from participation in the AU following an unconstitutional change of government in the country. In another example, the AU imposed travel bans on Guinean officials and even froze the assets of some of the state's officials. The AU also threatened similar measures after successful coup d'etats in Burkinafaso and Sudan (Ani, 2021).

The proposed Criminal Chamber will oversee the trial of African officials that would have ordinarily come within the purview of the ICC. Given its position as a regional court, it will avoid the general jurisdictional challenges encountered in the run up to the Habré trial. It will also be outside the purview of the UNSC and its accompanying sovereign inequality.

5.2. The "own-goal": immunity for sitting government officials

One of the main arguments in favour of the protectionist intentions of an African Criminal Chamber is the provision for immunity for serving Heads of State and other senior state officials. Article 46A provides:

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

This move, aptly described as an "own goal" (Mark, 2016), has been roundly criticized by local and international NGOs as going against the axiomatic standards of other international criminal tribunals (See Abass, 2013). It has also been linked to the AU's battles with the ICC following the indictment of two serving Heads of State in Kenya and Sudan (Uwazuruike & Salter, 2017). It has been argued that the AU's strained relationship with the ICC has induced the former to adopt "retaliatory" measures viz conferring international criminal jurisdiction on the African Court (Abass, 2013 cited Etieno, 2014). It seems clear that its grouse with the ICC concerning the trial of sitting Heads of State at least facilitated or sped up the AU's creation of an RCC. This had led some commentators to argue that the AU's sole goal is not one of regional justice but the protection of heads of state (Austin & Thieme 2016; Hillebrecht & Straus 2017; Mutua, 2016; Vinjamuri, 2016). Arguing along these lines, Mutua (2016) asserts:

> The AU's concern is only for heads of state … The AU viciously attacks the ICC as an evil imperialist instrumentality when it targets ruling elites … but becomes a legitimate court to which the AU hands over rebels … for trial. There is no principle at stake here except a protection racket among African rulers within the AU. (p. 56)

This position is arguably backed by evidence of cooperation of African leaders, such as Yoweri Museveni of Uganda, with the ICC against local political opponents and rebel groups. Hillebrecht and Straus (2017 p. 48) term this the "international legal lasso" whereby state opponents neutralize domestic opposition and advance their international reputation by handing them over to the ICC. This commitment, however, ceases at the point where it threatens the domestic political interest of the incumbent (Mutua, 2016, Hillebrecht & Straus 2017, Austin & Thieme 2016).

There is no denying that the AU's strongest oppositions to the ICC have come after indictments against the sitting presidents of Sudan and Kenya, and even, that particular African leaders have reviled against the ICC when the latter have pointed accusing fingers at them. However, rather than be irrefutable evidence of a protectionist agenda as propounded by some, it has been demonstrated in this article, tracing the regional developments within the continent, that the indictments have only fast-tracked efforts towards having an RCC.

Furthermore, it may be argued that the immunity clause fits within the AU's preference for peaceful resolution over individual accountability – however debatable that approach may be. Accordingly, in many cases of conflicts, African regional interventions have generally fallen short of apprehending top military fighters suspected of genocide, war crimes, or crimes against humanity. For example, despite spearheading ECOWAS peace missions in Liberia, the Nigerian government, in 2003, offered abode to former Liberian leader, Charles Taylor, as a prelude to ending 14 years of civil war in Nigeria (Ojione, 2008). A more recent example was the handling and resolution of the political stalemate in Gambia in January 2017. Rather than adopt a punitive approach in Gambia, ECOWAS states, through negotiations, facilitated an agreement that saw the former Gambian leader, Yahya Jammeh, peacefully hand over power and leave the country

(Ateku, 2020). The goal, for ECOWAS and other regional actors, was having the former Gambian leader leave office peacefully, rather than having him tried for offences – the former leader having, apparently, been lured with promises of non-prosecution (Welle, 2016). Similarly, the AU was generally disinterested in – and even positively opposed – the indictment of Heads of States such as Omar al-Bashir of Sudan and Uhuru Kenyatta of Kenya, instead prioritizing the restoration of peace in those countries (Murithi, 2017; Peskin & Boduszynksi, 2016; Vinjamuri, 2016).

In keeping with the AU's position regarding the indictments of the Sudanese and Kenyan leaders, trying and potentially convicting a sitting Head of State at the regional level would likely exacerbate rather than abate regional tension. Following this logic, and as demonstrated in the Jammeh case above, the more practical course would be to ensure, through political and other means, the exit from office of an accused leader before subsequent criminal trials.

It is, of course, understandable that some critics have questioned the sincerity of the AU in holding individuals to account especially with the existence of the immunity clause in the Malabo Protocol and the AU's historical lack of emphasis on individual accountability. It is however important not to overlook the few instances, such as the already highlighted case of Hissène Habré, where the AU has demonstrated commitment in holding individuals accountable for war crimes and crimes against humanity. Slye (2017) points out that the AU has usually supported holding individuals to account for international crimes once those individuals leave office. It has even gone on to do so in resolutions issued contemporaneously with those criticizing the ICC's involvement in Sudan and Kenya. Rather than an inclination to protect serving heads of states, Slye argues that the AU is more concerned with "challenges to the existing power structures of African states". Indeed, this concern was expressly stated in the joint AU-EU Expert Report on the Principle of Universal Jurisdiction 2009, wherein the AU expressed dissatisfaction over the indictment of sitting African Heads of States in European states. This, it argued, was contrary to the principle of sovereign equality and "evoked memories of colonialism". The creation of an African Criminal Court is therefore a means of tackling that perceived inequality. Also, within this context, the provision of an immunity clause could be interpreted as the AU's attempt to be consistent as it would be contradictory to rile against the ICC and other European states for trying sitting Heads of State only to set up a system that does the same thing.

5.3. Malabo Protocol: operation and ratification

It must be noted, however, that the Malabo Protocol is nowhere near garnering the required fifteen ratifications to come into force. The implication of this is that Africa's regional drive in the area of International Criminal Law remains largely aspirational. Given the poor ratification of the Malabo Protocol, it may indeed be argued that the majority of African states do not consider the region to be ready for an RCC. An African criminal court or chamber may, therefore, be years or even decades away from becoming a reality, if at all. Should it eventually materialize, it would not be out of a vacuum but will be in keeping with decades of regional building and integration.

6. Conclusion

This article set out to examine the clamours for withdrawal of African states from the ICC and calls for the creation of a regional criminal court. While the majority of commentators focused on the conflict between the AU and ICC as being the driver behind the creation of an RCC, the article sought to demonstrate that an RCC was a foreseeable outcome of decades of regional institution building within the African continent. It argued that, even though steps towards an RCC could have been accelerated by the AU's grouse with the ICC, they nevertheless fit within the continent's drive towards regional sovereignty. The creation of the AU in 2001 ushered in a new era in Africa's quest for regional integration and development. Apart from showing the world that it could handle its own problems, African leaders saw the need to resist external intervention and, instead, become the prime agents for humanitarian intervention and civilian protection on the continent. The AU, therefore, became the resuscitation of the Pan-African dream, its main aim being to address Africa's insecurity and underdevelopment and create a more assertive continent. The announced withdrawal of some member states from the ICC and increased calls for the creation of a regional criminal court were direct reactions to a perceived sovereign inequality and dominance by the West in matters relating to international criminal law. It is these political agreements and even possible perceptions of imperialistic posturing that act as an additional spur to the creation of a regional court.

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