



The African Court for Justice and Human Rights: Protecting Africans, or Just Africa's Leaders?

Hide nothing from the masses of our people. Tell no lies. Expose lies whenever they are told. Mask no difficulties, mistakes, failures. Claim no easy victories...¹

1. Introduction

The African Union's (AU) new judicial organ, the African Court for Justice and Human Rights (ACJHR), is envisaged to be a tool to address pressing issues on the continent, such as genocide, crimes against humanity, and terrorism. Initially, the African Court for People's and Human Rights and the African Court for Justice were two separate bodies. However, the AU sought to join them in order to deal with human rights abuses and political disputes before a single court. After several amendments, the Protocol on the Statute of the African Court of Justice and Human Rights, which outlines the mandate of the combined body, has now reached a point of consensus among AU members.

Critics of the new body argue, however, that some recent amendments to the Protocol have turned the ACJHR into a mechanism that will prevent African heads of state, politicians, and state officials from being targeted by the International Criminal Court (ICC). On this view, the main purpose of this body is certainly not the protection of the continent's people. For one thing, a clause has been inserted that purports to protect political office-bearers from prosecution; for another, clauses that protected the right of legitimate public protest against incumbent governments have been removed, rendering those who agitate for regime change liable to prosecution. The strong impression is that these amendments are intended to create a court that will protect African governments and their political elites, rather than the continent's people.

What follows is an in-depth look at the ACJHR and the implications of the contested clauses.

2. A Joint Court

The ICC has been accused numerous times of being 'unfair' for having tried only African leaders. It comes as no surprise, therefore, that the African Union urged its members to stand together against the ICC. It has been suggested that "the decision to broaden the courts' authority was linked to complaints from several African leaders that the International Criminal Court...was singling out Africans as targets for prosecution"¹. As for the architecture of the new court, Andrew Friedman notes that the AU "has for eight years had the African Court for People's and Human Rights," while the African Court of Justice was still seen as the primary tool for legal action among African states. Accordingly, "member states voted to fold the two together, creating a two-chambered court that would be the 'principal legal organ of the AU'"². Joining the two thus served the AU's stated goals of protecting human rights, and maintaining inter-state justice, in one fell swoop. As the debate for joining the two bodies and establishing the ACJHR continued, a critical issue came to the surface. At a summit on July 26th 2014, the AU, "which claims the ICC is pro-western and has been 'hunting' African leaders",³ agreed on the draft protocol on amendments to the protocol on the ACJHR. Allison Simon notes "Africa's leaders seemed isolated from the continent's real problems, focusing instead on saving their own skin and keeping themselves in power"⁴. What

Simon refers to here are issues such as corruption, terrorism, genocide, the exploitation of natural resources, trafficking in persons and drugs, as well as other offences falling under the court's jurisdiction.

3. A Court to Protect Elites?

The ACJHR's mandate includes to "try serious human rights violations, war crimes and major breaches of international law"⁵. As much as the ICC has had a significant role in trying African leaders who have committed abuses, the creation of a specifically African court ought to signal a step towards self-sufficiency; and could be seen as a progressive step for the continent. As already mentioned, though, what is worrying is that some of the clauses in the protocol constitute what Jemima Kariri calls "a protective veil that denies justice for victims and is detrimental to accountability"⁶.

Article 46A bis, under a section entitled 'Immunities', provides that "[n]o 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"⁷. What this means is that none of these people can be prosecuted for any crime they commit while still in office. More than that, "granting immunity offers free reign to senior officials and heads of state to perpetrate crimes and is likely to motivate them to cling to their official positions to avoid prosecution"⁸. What is considered to be a senior state official is also not clearly outlined and would thus only be decided on a case-by-case basis; this opens up the possibility of an extensive range of officials being included in this category.

In 2013 African leaders raised the issue of immunity: "African state parties to the ICC tabled a proposal on behalf of the AU for the Rome Statute to be amended to exclude sitting heads of state from prosecution for crimes."⁹ That so many heads of state demanded to be immune from prosecution strongly suggests that their priority was to protect themselves; and all this does is to promote a culture of non-accountability and to undermine the rule of law. As observers have asked, what would make a corrupt leader step down when he/she has a shield of protection regardless of his/her actions? With the kind of immunity the AU is instituting, the answer is that in fact nothing can. Being a member of the ACJHR

means that a state pledges to submit to the court's jurisdiction those of its citizens who commit crimes against humanity. While this might be seen as a show of commitment by such states, it is entirely undermined by the leeway that leaders have given themselves to commit crimes without being tried. In the end, regardless of how many states become involved in the ACJHR, as long as it cannot hold senior political figures accountable, it will only disadvantage the many Africans who suffer because of corruption and other abuses of state power.

4. The Implications of Immunity

Firstly, it is important to note that the immunity provision goes against international law. The AU appears to be committed to resisting 'Western influence' in matters that concern Africa, but it needs to grasp that solving African problems is not a matter of protecting leaders – it is about looking after the African people. All human rights violations should have consequences and, if African political elites ignore these, the idea will be perpetuated that holding onto power is their sole aim.

Secondly, the immunity provision is inconsistent with the national laws of African states such as Kenya and South Africa (neither of which have objected to it). South Africa's Constitution provides for the removal of the President if he or she commits "(a) a serious violation of the Constitution or the law; (b) serious misconduct or the (c) inability to perform the functions of office."¹⁰ This shows that South Africa does not give its President, let alone any other senior political figure, immunity from criminal prosecution. Similarly, the Kenyan Constitution lays down that "[t]he immunity of the President...shall not extend to a crime for which the President may be prosecuted under any treaty to which Kenya is party and which prohibits such immunity."¹¹

Thirdly, the establishment of a court that nominally seeks to promote peace and the orderly resolution of conflict, but which allows unlawful, even violent, behaviour by heads of state to go unpunished "goes against the very essence of promoting human rights, peace and stability, and presents a major setback to advancing democracy and the rule of law."¹²

5. Current African Heads of State on Trial

Many African leaders have been implicated in grave human rights violations. At present, Kenya's President, Uhuru Kenyatta, and its Deputy President, William Ruto, are accused of orchestrating post-election violence in 2008, during which over a thousand people lost their lives. The ICC has launched proceedings against them, but their reluctance to co-operate has led to accusations that they are deliberately obstructing the trial. The Ivory Coast's former President, Laurent Gbagbo, has been on trial at the ICC since 2011 for violence committed during the civil war; the charges include offences such as crimes against humanity, murder, rape, and other forms of sexual violence.

The leaders that are currently on trial would most likely welcome their cases being deferred to the ACJHR from the ICC as that would allow the ACJHR to grant them immunity from the consequences of their alleged crimes. Widening the jurisdiction of the AU (in the form of the ACJHR) means that the AU may demand that cases involving African leaders be deferred to the African court, allowing the AU to shield them with the immunity provision. This is what the AU is currently trying to do with Sudanese President Omar al-Bashir who, in 2009, became the first sitting president to be indicted for crimes against humanity by the ICC,¹³ but who has never appeared in The Hague. It is startling that, instead of persuading Bashir to appear before the ICC, the AU is "demanding the deferral of charges against the Sudanese president"¹⁴. And it is no surprise that Bashir has pushed for the African court to be established, or that he has tried to persuade AU member states that the ICC "is a neo-colonial weapon to punish Africans"¹⁵.

The statute of the ACJHR states in Article 3 that "...it will have an original and appellate jurisdiction, including international criminal jurisdiction..."¹⁶ However, despite this, states that have signed the Rome Statute that set up the ICC remain subject to the latter's jurisdiction and have a legal obligation to honour the regulations prescribed in that Statute; hence, the ICC will still have the mandate to try African leaders, regardless of whether or not they prefer to be tried by the ACJHR. Nevertheless, such cases will take even longer to reach the ICC, and this will prolong the period for which the leader can hold onto power (or escape justice) before appearing at the ICC. In some cases, justice may never actually be realised.

6. No Right to Protest

The AU considers a "putsch or coup d'état against a democratically elected government"¹⁷ as unconstitutional. A putsch, like a coup d'état, is a violent or forceful overthrow of a government. In the 2012 version of the Protocol, article 28 E(3) was inserted to provide that "any act of a sovereign people peacefully exercising their inherent right [to protest] which results in a change of government shall not constitute an offence under this Article." In other words, peaceful protest or mobilisation against a government was allowed. However, in the 2014 version of the protocol, this article was removed and now renders any attempt to peacefully remove the state, as a criminal offence.

Allison Simon argues that the 2014 version of the protocol's provision "excluded peaceful protests – the Arab spring kind... it was designed to make sure that people were not punished for rising up against oppressive regimes"¹⁸. The fact that it has been removed is another tell-tale sign that many heads of state want to hold onto their power and feel threatened by the possibility of being overthrown. Unsurprisingly, Zimbabwe was one of the states that came out strongly against this clause before its removal, and which asked for the court to be able to act harshly against those who try to 'overthrow' a government.

7. The Response of Civil Society

Numerous groups internationally have come out against the protocol and the establishment of a court that will effectively shield human rights violations and trample on the will of a nation's people. Amnesty International's Africa director, Netsanet Belay termed it "a backward step in the fight against impunity and a betrayal of victims of serious human rights violations"¹⁹ For many, agreeing on these terms goes against the principle of accountability and calls into question the integrity of the council that heads the AU. The protocol has been rejected by 42 African and international civil society and rights organizations; Elise Keppler from Human Rights Watch, for example, has noted that "putting immunity in the protocol is completely at odds with the ideas of delivering justice for the most serious crimes"²⁰. Some organizations are calling it an 'own goal' for African leaders, while the director of Kenyans for Peace with Truth and Justice has stated that "the African court has been cited as an African solution to African problems,

but by granting themselves immunity they put themselves out of reach of the institution”²¹

The South African government has been silent on the issue. South Africa is seen as a progressive state that has for a long time “advocate[ed] for international accountability.”²² Now, however, things seem to have shifted and instead “... SA is keeping quiet, unwilling to risk offending other African states.”²³ Botswana, thus far, is the only government that has objected to the protocol.

8. Conclusion

The recent amendment to the protocol of the ACJHR suggests that the key problems that African governments intend on solving are those that face

corrupt or criminal leaders, rather than those issues that most affect the continent’s people. By establishing clauses within the protocol that safeguard them from prosecution, Africa’s presidents have shown what their real concerns are. The newly established ACJHR needs to live up to its name: justice and human rights require an active role on the part of those meant to uphold these principles. While African leaders claim that establishing a court to deal with African issues is a step in the right direction, by using the court to cement their immunity they are in fact dragging Africa backwards.

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³ Cluskey, P. (2014). African Union agrees protocol for court of justice ahead of ICC Kenyatta trial.

<http://www.irishtimes.com/news/world/africa/african-union-agrees-protocol-for-court-of-justice-ahead-of-icc-kenyatta-trial-1.1859538>

⁴ Simon, A. (2014a). AU summit conclusions: Number Ones look out for number one, again.

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⁵ Simon, A. (2014a). op.cit.

⁶ Kariri, J. (2014). ISS: Can the new African Court truly deliver justice for serious crimes?

http://www.defenceweb.co.za/index.php?option=com_content&view=article&id=35408:iss-can-the-new-african-court-truly-deliver-justice-for-serious-crimes&catid=56:diplomacy-a-peace&Itemid=111

⁷ African Union. (May 2014). Draft Protocol On Amendments To The Protocol On The Statute Of The African Court Of Justice And Human Rights.

⁸ Kariri, J. (2014) op.cit.

⁹ Kariri, J. (2014) op.cit.

¹⁰ The Constitution of the Republic of South Africa. No. 108 of 1996

¹¹ The Constitution of Kenya. Revised Edition 2010.

<https://www.kenyaembassy.com/pdfs/The%20Constitution%20of%20Kenya.pdf>

¹² Kariri, J. (2014) op.cit.

¹³ For complicity in mass killings and rape in Darfur.

¹⁴ Simon, A. (2014a). op.cit.

¹⁵ Nossiter, A; Simons, M. (2014) op.cit.

¹⁶ African Union. (May 2014). Op.cit.

¹⁷ African Union. (2012). Draft Protocol On Amendments To The Protocol On The Statute Of The African Court Of Justice And Human Rights

¹⁸ Simon, A. (2014a). op.cit.

¹⁹ Cluskey, P. (2014) op.cit.

²⁰ Nossiter, A; Simons, M. (2014) op.cit

²¹ Mark, M (2014). African leaders vote themselves immunity from new human rights court. The Guardian.

<http://www.theguardian.com/global-development/2014/jul/03/african-leaders-vote-immunity-human-rights-court>

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<http://www.dailymaverick.co.za/article/2014-06-26-at-the-new-african-court-will-power-mean-impunity/#.U6vq4PmSxqU>

²³ Simon, A. (2014b) op.cit.

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