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Immunities in International Criminal Law

The Challenges from Africa

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About this study

The position taken by the African Union pertaining to immunities of Heads of State and other sitting officials under international criminal law, as evidenced in its adoption of a 2014 Protocol on Amendments to the Protocol on the Statute of the African Court of Justice and Human Rights, puts the continent directly in conflict with the scope of the International Criminal Court. Given the complexity of the laws relating to immunities, both under customary international law and treaty law, it is paramount to crystallise the prevailing legal position, before evaluating strategies to affirm a commitment to closing the impunity gap in Africa.

1. Background

Over the last decade and more intensely since 2011, the International Criminal Court (ICC) has faced a backlash over its focus on Africa. The core of this challenge started with the warrant of arrest issued in 2009 against Omar Al Bashir, President of Sudan, while the diplomatic and legal battle took another turn with the election of Uhuru Kenyatta and William Ruto as President and Vice-President of Kenya in 2013. The most important issue at hand was, and continues to be, whether heads of states and senior government officials are entitled to immunities for the serious crimes within the jurisdiction of the Court. This debate has been accompanied by lobbying for the amendment of Article 27 of the Rome Statute establishing the ICC, to expressly provide for immunities for heads of States, with African State parties to the Rome Statute at the forefront of this movement. While the proposed amendments were discussed in various meetings held by the Assembly of State Parties Working Group on Amendments in 2014, substantive support was not garnered to push the proposals forward for deliberation during the 12th ASP Session in December 2014. It is expected that the Working Group will resume its discussions on the proposed amendments in the course of this year.

In parallel to thediplomatic and legal ballet in the international arena, within the African Union the proposal for granting criminal jurisdiction to the merged African Court has made headway, and in June 2014, the Assembly adopted a Protocol to that effect. That 2014 Protocol not only added criminal jurisdiction to the mandate of the African Court of Justice and Human and Peoples' Rights, but it also introduced a provision on immunities which reads as follows:

> Article 46A bis Immunities
> 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 provision offers a development that has not been possible before the ICC. This brief seeks to analyse the legality and functionality of such a framework. However, before embarking on such analysis, one needs to clarify the two critical concepts of the study: immunity and international crimes.

2. Definition of the Scope of our analysis

Two concepts are at the centre of this study. The first is international crimes, while the second, immunity, applies to the prosecution of international crimes.

The most important issue at hand was, and continues to be, whether heads of states and government officials are entitled to immunities for the serious crimes within the jurisdiction of the Court

Our definition of international crimes is simply any crime established in international law. In practice, such crimes are established in customary international law but more frequently in treaties. In our context, one needs to consider both sources of international law at the universal level and in the exclusively African context. The 2014 African Court Protocol offers a comprehensive list of international crimes envisaged for the new Court. However the African instrument does not provide for a set of elements for each crime asthe Rome Statute does, while the degree of precision necessary for finding commission of each crime varies.

Immunity is more complex to understand. In general, it is a procedural rule that excludes responsibility for a crime under certain conditions, usually the status of the individual beneficiary of the rule. Immunity is functional when it protects the agent of the State in his/her official capacity. Immunity is personal (or full) when it protects the agent even in his/her private capacity. Usually personal immunity only extends to Head of State because (s)he represents the State at all times. The complexity with this rule of immunity resides in three aspects of its functioning: first the rule derives fromcustomary international law and as such some of its parameters remain debated, especially vis-à-vis crimes of jus cogens nature; secondly, the scope of the beneficiaries of the rule remains contested; and lastly, the rule emerged at a time when there was no international criminal court, and should therefore be limited to domestic jurisdiction unless solid grounds are established for the contrary. Immunity protects officials of a State from being subject to judicial proceedings by any jurisdiction. Our study, however, is exclusively concerned with the legality of immunityfor international crimes before international courts.

1 The challenge against the Court is however based on mistakes of fact: the situations before the ICC have either been brought to the Court by African States themselves (self-referral) or with their support through the United Nations Security Council, where three of them are members. See Report of the African Union Commission, Dec. 2013.

2 As of 22 May 2015, on the website of the Assembly of States Parties, there is no update on the progress of those discussions. In a recent report, the proposed amendments submitted by Kenya still appear the same as in 2014. See: Secretariat of the Assembly of States Parties, Informal Compilation of Proposals to Amend the Rome Statute, 23 January 2015 (http://www.icc-cpi.int/iccdocs/asp_docs/Publications/WGA-Inf-Comp-RS-amendments-ENG.pdf).

3 See: Protocol on Amendments to the Protocol on the Statute of the African Court of Justice and Human Rights, 2014 (http://au.int/en/sites/default/files/PROTOCOL%20ON%20AMENDMENTS%20TO%20THE%20PROTOCOL%20ON%20THE%20AFRICAN%20COURT%20-%20EN_0.pdf). No State has so far ratified this protocol.

4 Article 28A of the Statute of the African Court lists the following: crime of genocide, crimes against humanity, war crimes, crime of unconstitutional

3. Legality of the immunities provision in the 2014 Protocol

The preliminary questionone faces when considering Article 46 bis of the 2014 African Court Protocol is the legality of such a provision, heeding the overwhelming international practice against such immunity. The current state of affairs is that the law on immunities for certain officials of a State applies solely to domestic jurisdiction as a protective measure guaranteeing sovereigntyand equality between-States, while here we are looking at the jurisdiction of an international court.

In State-to-State relations,immunities are well established in customary international law and confirmed through jurisprudence,particularly the 2002 Judgment of the International Court of Justice. It is, however, difficult to extend such rule to the circumstance of interest to us here, namely the relation between a State and an International Court or Tribunal. Such practice here is exclusively based in convention and consistently goes against the recognition of any immunity for officials of a State, including a Head of State. Additionally, one could also find a ground for such non-recognition in the draft articles of the International Law Commission on international crimes and various resolutions of the Institute of International Lawstating the same. This is further confirmed in the joint expert report on universal jurisdiction commissioned by the African Union and the European Union where it is stated that the general immunity regime is denied in three African States for international crimes.

This consistent practice for international courts/tribunals culminated in the provision of Article 27 of the Rome Statute, which reads as follows:

Article 27 Irrelevance of official capacity

1. This Statute shall apply equally to all persons without any distinction based on official capacity. In particular, official capacity as a Head of State or Government, a member of a Government or parliament, an elected representative or a government official shall in no case exempt a person from criminal responsibility under this Statute, nor shall it, in and of itself, constitute a ground for reduction of sentence.

2. Immunities or special procedural rules which may attach to the official capacity of a person, whether under national or international law, shall not bar the Court from exercising its jurisdiction over such a person.

This provision must however be read in conjunction with Article 98:

Article 98 Cooperation with respect to waiver of immunity and consent to surrender

1. The Court may not proceed with a request for surrender or assistance which would require the requested State to act inconsistently with its obligations under international law with respect to the State or diplomatic immunity of a person or property of a third State, unless the Court can first obtain the cooperation of that third State for the waiver of the immunity.

2. The Court may not proceed with a request for surrender which would require the requested State to act inconsistently with its obligations under international agreements pursuant to which the consent of a sending State is required to surrender a person of that State to the Court, unless the

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 aggression.

5 For instance, one could question the particulars of the crime of unconstitutional change of government especially when looking at the practice of the African Union. In the recent case of Burkina Faso, the institution supported actively the selection of a civilian to lead the transition while the Constitution provides for the Prime Minister or the President of the Senate to replace the President until new elections are held. See Article 43 of the 1991 Constitution as Amended in 2012 and available in Constitute (http://www.constituteproject.org), a Google Initiative.

6 On the distinction between functional and personal immunities, see: Advisory Committee on Issues of Public International Law (CAVV, The Netherlands), Advisory Report on the Immunity of Foreign State Officials (Translation, Original: Dutch), Advisory Report No. 20, The Hague, May 2011, pp. 11-12.

7 ICJ, Arrest Warrant of 11 April 2000 (Democratic Republic of the Congo v. Belgium), Judgment, I.C.J. Reports 2002, p. 3, Judgment of 14 February 2002 (http://www.icj-cij.org/docket/files/121/8126.pdf).

Court can first obtain the cooperation of the sending State for the giving of consent for the surrender.

The joint reading of these two provisions of the Rome Statute leads to a confirmation of the samerule against immunity, but precludes any request that requires a State to violate its obligations vis-à-vis other States in cooperating with the Court. In practice, thismeans that States can choose to respect the immunity of an official of a State despite a warrant or summons from the ICC.

These provisions have been subject to scrutiny by ICC Judges first in the Al Bashir case and later in the Gaddafi et al.case, reaffirming the irrelevance of official status before the Court and reaffirming the no-immunity regime.

The total rejection by the Assembly of States Parties of this amendment must be viewed as reinforcement the critical nature of Art. 27 to the regime of the ICC

It is against this well established legal framework that the Government of Kenya has submitted its proposal for an amendment of Article 27, suggesting a third paragraph which would read as follows:

Notwithstanding paragraph 1 and 2 above, serving Heads of State, their deputies and anybody acting or is entitled to act as such may be exempt from prosecution during their current term of office. Such an exemption may be renewed by the Court under the same conditions.
However, the total rejection by the Assembly of States Parties of this amendment must be viewed as a reinforcementof the critical nature of Art. 27to the regime of the ICC.

Many authors use the foregoing provisions to buttress their claim that there is an international law norm prohibiting immunity for State officials when such individuals are facing international criminal justice. This assertion can be challenged given that sucha prohibition is only found in treaties and is therefore limited to the conventional relations established under those instruments. In order to prove the existence of a customary norm, one needs to consider both the practice and the opinio juris of all contemporary States, a monumentally difficult task to conduct nowadays. As a result, we must proceed with caution whendebating whether there is a customary source to support the prohibition of immunities before international courts. African States were therefore arguably at liberty to establish an immunity regime in their instrument and it does not violate any international customary norm.

However, there are further complexities in the norm established by the African States pertaining to the beneficiary of the rule. Article 46 bis states that "heads of state or government" and "senior state officials" are the beneficiaries. The first category is well known in international practice to benefit from personal immunity and can be identified in the States constitutions. The

8 See in that sense: Versailles Treaty (1919), Art. 227 (http://www.loc.gov/law/help/us-treaties/bevans/m-ust000002-0043.pdf); Charter of the International Military Tribunal (1945), Art. 7 (http://www.loc.gov/rr/frd/Military_Law/pdf/NT_Vol-I.pdf); Convention on the Prevention and Punishment of the Crime of Genocide (1948), Art. IV (http://www.ohchr.org/EN/ProfessionalInterest/Pages/CrimeOfGenocide.aspx); and Statute of the Special Court for Sierra Leone (2000), Art. 6(2) (http://www.rscsl.org/Documents/scsl-statute.pdf).

Other valuable legal instruments including similar provisions are: Principle III of the Principles of International Law Recognized in the Charter of the Nürnberg Tribunal and in the Judgment of the Tribunal (1950) (http://legal.un.org/ilc/texts/instruments/english/draft%20articles/7_1_1950.pdf); Statute of the International Criminal Tribunal for the Former Yugoslavia (S/RES/827 (1993)), Art. 7(2) (http://www.undocs.org/S/25704/); and Statute of the international Criminal Tribunal for Rwanda (1994), Art. 6(2) (http://www.undocs.org/S/RES/955 (1994)/). However the work of the International Law Commission and the Resolutions of the United Nations Security Council are all based on United Nations Charter which is also a conventional instrument. Finally the jurisprudence of the later three tribunals (ICTY, ICTR and SCSL) has offered interpretation of this irrelevance of official status

second category is less clearly identifiable: in some States, the practice is for the Government to draw a list of senior state officials for the purposes of immunity. The list is not only about the function that one exercises, and there is a margin of discretion in the determination of the Government. Such vagueness and the consequential divergent practice from one State to another highlights the difficulty in the enforcement of sucha provision.

If we look to the law on immunities before domestic jurisdictions, not all senior state officials are exempted. In general, the law on immunities only protects certain positions within a government, such as the Minister of Foreign Affairs, or any other minister within the scope of his/her portfolio. Judges are also usually immune from prosecution for acts within their judicial mandate, regardless of their seniority in the profession. It therefore appears that the rule in the 2014 African Court Protocol is not sufficiently precise and gives States a wide margin of discretion, which could affect the well-documented commitment of African States to fight against impunity.

In conclusion, it appears to us that international law has provided for immunities vis-à-vis domestic courts and it is only by rational extension that those immunities could apply to international courts especially when there is no explicit prohibition. This means that there is no general exclusion based on immunities for prosecution of international crimes before international courts and Art. 46 bis of the 2014 African Court Protocol is not a violation of any international law norm.

4. Functionality

The fact that Article 46 bis of the 2014 African Court Protocol is not in violation of international law does not prevent conflicts with other norms/instruments, especially the Rome Statute.

Indeed, African State parties to the 1998 Rome Statutewill be in a conflicting situation when a State official will be accused of international crimes, and they would not be able to hide behind the 2014 African Court Protocol against a cooperation request from the ICC. Moreover, the 2014 Protocol would fail African States in their aim of holding African prosecutionsinstead of international prosecutions: State officials could still be subject to the jurisdiction of the ICC. This directly contradicts the intentions of some African States in designingthe Protocol.

The 2014 African Court Protocol could also be in contradiction with the United Nations Charter in the case of a referral to the ICC by the United Nations Security Council. In such an event, the Protocol would again be rendered irrelevant and African States would continue to be bound by the Charter, particularly Art. 25, which makes resolutions of the Security Council adopted under Chapter VII of the UN Charter binding for all Member States.

In addition, it is unclear whether the complementarity principle established in the Rome Statute extends to a regional criminal court. Its application has been envisaged for relations between the ICC and domestic courts, and it remains to be seen whether prosecutions under this new regional court would satisfy the principle of complementarity.

Finally there exists a major challenge within the African legal system itself, with the sequence of instruments/amendments. First, two separate treaties led to the creation of two courts: 1998 Protocol for the African Court on Human and Peoples' Rights,

(and the related immunities) before international courts and tribunals. See: ICTY, Milosevic case, Decision on Preliminary Motions, 8 November 2001 (http://icty.org/x/cases/slobodan_milosevic/tdec/en/1110873516829.htm); and SCSL, Taylor case, Decision on Immunity from Jurisdiction, 31 May 2004 (http://www.rscsl.org/Documents/Decisions/Taylor/Appeal/059/SCSL-03-01-I-059.pdf).

9 See: Art. 3 of the Draft Code of Offences against the Peace and Security of Mankind (1954) (http://legal.un.org/ilc/texts/instruments/english/draft%20articles/7_3_1954.pdf); and Art. 7 of the Draft Code of Crimes against the Peace and Security of Mankind (1996) (http://legal.un.org/ilc/texts/instruments/english/draft%20articles/7_4_1996.pdf).

10 See: Resolutions of 2009, 2005, 2001, 1991 and 1954 (http://www.idi-iil.org/).

11 Those 3 African States are: Democratic Republic of the Congo, Niger and South Africa. See: The AU-EU Expert Report on the Principle of Universal Jurisdiction, 2009, para. 17 (http://www.africa-eu-partnership.org/sites/default/files/documents/rapport_expert_ua_ue_competence_universelle_en_0.pdf).

African State parties to the 1998 Rome Statute will be in a conflicting situation when a State official will be accused of international crimes, and they would not be able to hide before the 2014 African Court Protocol against a cooperation request from the ICC

and 2000 Constitutive Act for the African Court of Justice. Thereafter, a Protocol in 2003 provided for the Statute of the African Court of Justice. Secondly, in 2008, a Protocol amending all three previous conventions merged the two courts into a single one with two branches. As of 22 May 2015, only 5 States have ratified this instrument while 15 ratifications are needed for it to enter into force. The 2014 African Court Protocol was then introduced to modify the 2008 Protocol, which is not yet in force. This sequence of instrument creation and parallelamendment and ratification entangles conventional relations in a way that confuses the regional judicial systemand potentially renders it ineffective for human rights protection.

5. Advocacy Agenda

The development of international criminal law over the last two decades is focuses on the fight against impunity, an agenda that African States have played a role in. The provision on immunity in the 2014 African Court Protocol is a step backwardsin the continental-wide fight against impunity. Civil society must step in to help continue the fight where African leaders have failed both their societies and the continent. With this is mind, the following suggestions are made for action:

(i) It is important to assist African States and the legal profession on the continent to develop a common and clear understanding of the immunities in international law;
(ii) It is necessary to assist the legal profession in Africa to develop a strong understanding of the relation between universal and regional norms related to prosecution of international crimes;
(iii) It is essential that further research is conducted on the immunity rule in the 2014 African Court Protocol for clarity, especially on how the concept related to senior state officials; and
(iv) It is urgent that civil society and the legal profession work together to develop tools and strategies to effectively assist victims in the identification of alternatives to the immunity regime before the African Court of Justice and Human and Peoples' Rights.

12 See: Decision on the Prosecution's Application for a Warrant of Arrest against Omar Hassan Ahmad Al Bashir, 4 March 2009 (http://www.icc-cpi.int/iccdocs/doc/doc639096.pdf).

13 See: Decision on the "Prosecutor's Application Pursuant to Article 58 as to Muammar Mohammed Abu Minyar Gaddafi, Saif Al-Islam Gaddafi and Abdullah Al-Senussi", 27 June 2011 (http://www.icc-cpi.int/iccdocs/doc/doc1099314.pdf). In this decision, the issue of possible immunity for head of state is not directly discussed but one could deduct from the reasoning that the Chamber has adopted a similar approach to the decision in Al Bashir case, based on Art. 27.

14 Against this consistent interpretation, one could read Wardle Phillip, The Survival of Head of State Immunity at the International Criminal Court, Australian International Law Journal 18 (2011), 181-205.

See: C.N.1026.2013.TREATIES-XVIII.10 (Depositary Notification) Kenya: Proposal of Amendments, 14 March 2014.

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